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Euro 2000 win for part-time workers

Preston & Ors v Wolverhampton Healthcare NHS Trust & Ors Fletcher & Ors v Midland Bank & Ors

IN A momentous decision given on 16 May, the European Court of Justice has confirmed in the part-timer pension cases that:

- **part timers can claim retrospective membership of an occupational pension scheme at least as far back as 8 April 1976;**
- **the time limit for bringing claims is still open to question. It might be longer than six months from the end of employment; and**
- **where a worker is employed on a succession of separate contracts in a stable employment relationship, such as in the case of supply teachers, the time limit only runs from the date of termination of the last contract.**

This judgment amounts to a huge victory. It must, however, be remembered that the decision only relates to preliminary points. The test cases will have to be referred back to the House of Lords and then the Employment Tribunal in Birmingham will move on to the next stage of the nationally directed process for dealing with these cases. The preliminary points determined by the ECJ represent only the first stage: determination of points applicable to all pension schemes. The second and third stages are: determination of points applying to particular pension schemes; and determination of individual complaints.

The decision of the ECJ relates to whether or not the procedural requirements of the Equal Pay Act 1970 comply with EU law. Individual member states must set the procedural rules for implementing EU law rights, that neither:

(i) make it impossible in practice for Applicants to exercise their EU law rights (the 'principle of effectiveness'); nor

(ii) are less favourable then the procedural rules governing similar actions of a domestic nature (the 'principle of equivalence').

Throughout these cases, the test case Applicants, backed by UNISON, NASUWT, NUT, NATFHE, ATL and UNIFI, have argued that the two year limit on back pay from the date the claim was lodged and the six month time limit from the end of a contract to lodge a claim fail to comply with both principles. Teachers and lecturers, in the test cases, also argue that, by requiring them to bring a fresh claim within six months of the end of each of a succession of contracts, the principle of effectiveness is breached.

The ECJ have ruled in the Preston and Fletcher judgment, as they did in Magorrian v Eastern Health and Social Services Board [1998] IRLR 86 that the two year limit on back pay breaches the 'principle of effectiveness'.

The ECJ goes on to find that the six month time limit does not itself fail to comply with the principle of effectiveness. It is up to the House of Lords to decide whether it breaches the principle of equivalence. The ECJ have helpfully ruled that the time limits for bringing a claim in the Equal Pay Act, ☛

Don't fly the flag, keep the pay

British Airways Ltd v Moore and Botterill [2000] IRLR 296

THE DECISION of the Employment Appeal Tribunal in this case finds that suitable alternative employment for pregnant women suspended on health and safety grounds requires a remuneration package no less favourable than that applying to her normal work.

Ms Moore and Ms Botterill both became pregnant during the course of their employment as pursers with British Airways. Under their terms and conditions of employment they could no longer be employed on flying duties after their 16th week of pregnancy. They therefore accepted alternative work in ground posts. Although their basic pay remained the same, they lost out on flying allowances.

They argued, successfully, that when suspended by reason of pregnancy, section 67(2) of the Employment Rights Act 1996 requires an employer to offer suitable alternative employment with terms and conditions no less favourable than those they would be entitled to under their normal work. The fact that some of the flying allowances represented expenses was not relevant. "We are quite satisfied that it was not necessary, for the purpose of determining liability, for the Tribunal to embark on a breakdown of the various allowances… It is enough…that taken as a whole a considerable part of those allowances represented profit".

So far so good. However, Ms Moore and Ms Botterill also sought to pursue equal pay claims by comparing their situation with male comparators who could be seconded to ground posts to pursue career development, and who would retain these flying allowances.

It might be thought that this would be a classic case where the Article 141 and the Equal Pay Act might apply. Although the decision of the European Court of Justice in Gillespie (1996 IRLR 214) held that equal pay comparisons cannot be made to improve on maternity benefits during maternity leave, nonetheless in later cases the European Court have held that the Gillespie provisions did not preclude a woman from pursuing a case under Article 141 during her pregnancy when she was still working and before she took maternity leave. (Pedersen (1999 IRLR 55) and Thibault (1998 IRLR 399).

Despite this, the Employment Appeal Tribunal decided that Ms Moore and Ms Botterill could not pursue equal pay claims, and that their rights were limited to the "self-contained" maternity codes. They conclude that no distinction could be drawn between a worker absent from work on maternity leave and one who is suspended on health and safety grounds when pregnant and moved to a suitable alternative job.

This aspect of the decision sits uneasily with European law. As it happened, the result did not matter for Ms Moore and Ms Botterill who were successful under the section 67 suitable alternative employment point. However, in another case where a pregnant woman might wish to make an equal pay comparison, we suggest that European law should be preferred so as to allow them to do so, notwithstanding the terms of this curious decision.

☛cannot be used as a yardstick to justify the six month time limit.

The decision is particularly important for workers employed on a succession of short term contracts. It means that, for many teachers and lecturers, their claims will now be regarded as in time if their cases were brought within six months of the last contract.

The cases are not expected to return to the House of Lords until early next year. In the meantime, the remainder of the 100,000 cases lodged nationally will continue to be stayed.

It is also important for members to be aware, in contributory pension schemes, that they will almost certainly have to fund their own employee's contributions.

A more detailed briefing document on the judgment is available on request from the Thompsons Employment Rights Unit at Congress House.

Race claim survives death

Harris as personal representative of Andrews (deceased) v Lewisham and Guys Mental Health Trust [2000] IDS 660

IN A welcome decision, the Court of Appeal has overturned the Employment Appeal Tribunal's ruling that a race discrimination claim does not survive the death of the Applicant.

In Harris as personal representative of Andrews (deceased) -v- Lewisham & Guys Mental Health Trust, the Court of Appeal held that a Tribunal claim for compensation for race discrimination is a cause of action under the Law Reform (Miscellaneous) Act 1994 and, as such, it was capable of surviving the applicant's death. It was irrelevant whether or not the claim for discrimination could be described as being of a purely personal nature. It was also irrelevant that the discrimination statutes, unlike the Employment Rights Act 1996, make no provision for the continuation of a claim after the death of the Applicant.

Whatever the deficiencies of the discrimination statutes, it must be right that a discrimination claim should survive the death of an applicant in exactly the same way as other employment related claims survive the death of an applicant under the Employment Rights Act.

In practice however winning a case for a deceased Applicant may be harder. Corroborating evidence, usually rare in discrimination claims, may be crucial as will a signed statement taken from the applicant before death.

A fair decision

R V Broxtowe Borough Council ex Parte Bradford [2000] IRLR 296

IN THIS case, Colin Bradford applied to Broxtowe Council for an employed position as a tennis coach. Before confirming his appointment the Council made inquiries about his employment history. His former employers, Derbyshire County Council, replied detailing three allegations made against him that he had interfered with female pupils whilst coaching at a school in the county.

Derbyshire confirmed that he had been prosecuted in respect of one of the incidents but later acquitted.

Upon receipt of this information Broxtowe arranged a meeting with Mr Bradford. At the meeting he was given a letter which stated that the Council had received information raising concerns as to his suitability to coach and as a consequence of the result of the inquiry he was instructed not to undertake further coaching.

Mr Bradford brought judicial review proceedings in respect of the Council's decision.

Although the High Court found that the Council had acted unfairly in that Mr Bradford should have been given the opportunity to explain, they nevertheless dismissed the application on the basis that the Council's failure to give Mr Bradford an opportunity to explain had not resulted in any injustice. The decision would have been the same in any event.

Mr Bradford went to the Court of Appeal which found that the High Court should have exercised considerable caution before finding that the absence of a hearing had not resulted in any injustice. The High Court had not exercised such caution and so not complied with its responsibility not to interfere with an individual's right to earn a living without proper cause and without exercising the principle of fairness.

In order to have been fair, the Council should have allowed Mr. Bradford the opportunity to respond to the unseen material and correct errors in the account of the matters.

This procedure should have been followed before arriving at a decision. Not to do so was unjust. Mr Bradford's appeal was allowed and the Council ordered to reconsider its decision.

This case reiterates the crucial importance of a fair hearing where a person's livelihood is at stake. These rights may be strengthened still more when the Human Rights Act comes into force in October 2000.

Access all areas. What method to choose?

Code of Practice: Access to Workers during Recognition Ballots.

Trade Union Recognition (Method of Collective Bargaining) Order

THE DEPARTMENT of Trade and Industry has now completed public consultation on two key aspects of the recognition legislation. These will now come into force with the new statutory right to trade union recognition on 6 June 2000.

CODE OF PRACTICE

The first is the Code of Practice on Access to Workers during Recognition and Derecognition ballots. The second is the Method which the Central Arbitration Committee (CAC) may prescribe when recognition is granted or agreed but the parties cannot agree on a method of collective bargaining.

Access arrangements

The right of access only arises once the CAC has given notification that a ballot will take place. This is at an advanced stage of the procedure after the union has been required to show 10 per cent membership in the bargaining unit and that it is likely to secure majority support for recognition. It has no right of access to assist with that part of the process.

The access period should begin as soon as notification of the ballot is given, not when the ballot has commenced and preparations for access should begin as soon as possible. The employer should agree to a request from the union for a meeting at an early date to discuss proposed access arrangements.

The Code recommends establishing a written agreement including the union's programme for access and a mechanism for resolving disputes. It suggests that the union should put its proposals to management who should respond within two working days and, if the proposals are rejected, propose alternative arrangements.

The employer should provide information about methods of communicating with the workforce. The employer's own plans to communicate with the workforce are relevant. There appears to be an acceptance that where the employer engages in a concerted campaign, the union's rights to access should be increased to counter-balance this. The Code expressly states that the names of the individuals to be balloted should not be disclosed to the union without the individual's consent: a striking contrast to the former provisions on unions providing lists of names to employers on industrial action ballots.

There is a danger that employers will prevaricate in an attempt to delay access or even delay the ballot.

Access in operation

The Code suggests that contact with workers while the actual ballot takes place should be confined to encouraging workers to vote. This overlooks that the employer has the advantage of full access to the workers at all times, from well before the ballot, whereas the union has only the limited access afforded by the legislation.

The document acknowledges that access should generally be at the workplace, but it is a cause of concern that it envisages circumstances where employers may use health and safety or security reasons to require that access take place away from the workplace, without preventing the employer from holding similar events at the workplace.

Paid officials as well as lay officials of the union should be granted access. The number of officials granted access should be proportionate to the scale and nature of the activities or events organised within the agreed access programme.

If the employer traditionally communicates through mass meetings on site, the union should be afforded similar facilities. The access should generally be during working time and workers should be permitted time off.

The access agreement should establish limits on the duration and frequency of the union's activities. The Code suggests as a min-

imum the union should be allowed:-

- one meeting of 30 minutes duration for each 10 days of the ballot; and
- individual surgeries of up to 15 minutes each "where … appropriate".

Workers should be permitted paid time off to attend. If the employer organises mass meetings, the union should be entitled to hold the same number.

The Code lacks safeguards to ensure that the meetings are private and the employer does not keep records of those who attend, nor discourage attendance. Nor does it prevent employers from holding individual meetings with members.

The legislation gives the union the right to send written information to the independent person conducting the ballot who must then distribute it to the workers being balloted. The Code suggests that, in addition, the union be given a notice board, somewhere to leave leaflets and access to internal communications systems, including e-mail, with workers being permitted to access the union's web-site.

There must also be arrangements for communicating with "non-typical workers" such as shift workers, part-time workers, homeworkers, those on maternity, parental or sick leave and those at other work locations.

The employer is to provide the union with appropriate accommodation for meetings.

Enforcing access

The Code stresses the need for co-operation and to avoid acrimonious situations. However, there is a need for diligent enforcement to ensure the employer does not use delay as a means of frustrating access. There should be strict deadlines and prompt enforcement. The Code appears to allow employers to deny access where the union has "acted unreasonably". If the Code has been breached by the employer, the CAC has the power to grant recognition to the Union without a ballot.

The document could do more to redress the imbalance which arises from the employer's unfettered access to the workers and more to protect workers against interference with their right to participate in the process and vote freely without pressure from the employer.

METHOD OF COLLECTIVE BARGAINING

The statutory Method concerns the situation where the CAC has awarded recognition to the union under the statutory procedure, but where the employer and the union fail to agree a method of bargaining between themselves or have failed to follow an agreed method. It may also apply where there has been agreed recognition following an application under the statutory procedure, but there has been no agreement on a method of bargaining or a failure to follow the agreed method.

The most significant aspect of this part of the legislation is that the method is to be legally binding unless both parties agree otherwise. It is a contract between the union and the employer which can be enforced by applying to the court for an order for specific performance. This means an order requiring a party to carry out its obligations under the contract. If it fails to do so, it will be in contempt of court.

The proposed method

The Method will cover only bargaining on pay, hours and holidays. It will give exclusive bargaining rights to the recognised unions.

The procedure is the establishment of a Joint Negotiating Body with equal numbers of union and employer representatives. Each of the recognised unions must have at least one member on the Body and may include paid officials of the union. The employer's representatives should have authority to take final decisions for the employer on the issues discussed.

The proposal envisages an annual bargaining round with a claim put forward by the union, followed by counter proposals and meetings of the JNB in a fairly rigid framework. If no agreement is reached at the end of the process the parties may voluntarily refer the matter to ACAS.

There is no formal "status quo" clause, but the Method does suggest that the employer shall not vary pay, hours or holidays unless it has first discussed its proposals with the union. An employer is not prevented from entering into personal contracts with individual employees.

The members of the JNB are to be given paid time off to attend the JNB and prepare the union's claim and the employer must provide facilities for meetings of the union side of the JNB and also a room, secure cabinet and typing facilities for the union.

It remains to be seen how frequently the CAC is required formally to exercise its powers to impose the Method, but it will also be interesting to see the extent to which the Method becomes a benchmark for voluntary agreements between unions and employers.

What unions really need to know about data protection

WITH LEGISLATION such as the National Minimum Wage Act 1998 and the Working Time Regulations 1998 requiring that employers keep more and more information on their employees, the Data Protection Act 1998 (DPA) came into force not a moment too soon. This article looks in particular at what trade unions need to know as 'data controllers' but also looks at what protection and rights are afforded to employees (union members). This article is intended as an introductory guide to what is a complex piece of legislation.

The DPA has been designed with openness and access to information in mind. It has been drawn up in line with the EC Data Protection Directive 1995. Article 1 of the Directive stipulates its purpose as being to protect the rights and freedoms of people, in particular their privacy. Unlike the 1984 Act of the same name, the Act covers manual records, where they are held in 'a relevant filing system', as well as computer records and will therefore have a huge impact in the workplace as most personnel files are paper based. The Act came into force on 1 March 2000 but will not become fully effective until 23 October 2007. The Act comes into force in stages repealing not only the 1984 Act but also the Access to Health Records Act 1990 for all employment related purposes.

Trade Unions as Data Controllers

The Data Protection Act applies to almost anyone who stores personal data. The Act refers to such a person or body such as a trade union, as the 'data controller'. This means that trade union members have the same rights as employees when it comes to data storage.

To make sure that all information is handled properly, employers and trade unions are required to comply with eight data protection principles and ensure that before any personal data (meaning any data where a living individual can be identified) is processed, they are included in the register of notifications maintained by the Data Protection Commissioner. Unions, as data controllers, are likely to be exempt from notification. Non-profit making organisations are exempted where the data is held for 'the purposes of establishing or maintaining membership of or support for the body or association or providing or administering activities for individuals who are either members of the body or have regular contact with'. Unions are still subject, however, to the eight principles.

The Eight Principles, embodying the fundamental purpose of the Act, require that information is:

1. fairly and lawfully processed
2. processed for limited purposes
3. adequate, relevant and not excessive
4. accurate
5. not kept for longer than is necessary
6. processed in line with employees and members rights
7. secure
8. not transferred to countries without adequate protection

Contravention of the principles may result in the Commissioner issuing an enforcement notice.

To process personal data, consent of the member will need to be obtained. Consent is not defined in the Act, for this we need to turn to the Directive where it is defined as 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.' Completion of a membership form should therefore be suffi-

cient depending on the wording on the application form.

The Act singles out certain information as sensitive personal data and this specifically affects trade unions. This data is defined as racial or ethnic origin, political opinions, union membership, religious belief, physical or mental health, sexual life, the commission or alleged commission of an offence and any proceedings for any offence. The processing of this data not only has to comply with the eight principles, but also further strict criteria set out in schedule 3 to the act. Unions will need the explicit consent of members if faced with any requests as to whether or not a person is a union member. Without this, requests should be refused.

There is a requirement for data controllers, including those exempt from notification, to make processing details public on request. If faced with such a request, it may be possible to comply by voluntary notification.

Members Rights As Employees

Part II of the Act gives employees their all important rights including rights of access and to amend. Although under the 1984 Act employees did have access to certain information stored on them, the DPA 1998 gives employees much wider access and will have a larger impact as they will be able to access certain paper-based files, including from 23 October 2001, their personnel files. The request for information must be in writing and employers are able to charge up to £10 for supplying this information. A request must be complied with promptly, and in any event within 40 days from the date the request is received. There are exceptions to the information employees may have access to and this includes references.

To amend inaccurate data, an employee (data subject) can ask the data controller (employer), or ask the Data Protection Commissioner for an assessment or seek an order from the court. There are also rights in relation to health and criminal records, automated decisions, to see 'relevant particulars' and to prevent processing likely to cause damage or distress.

Enforcement

The Data Protection Commissioner and the courts have powers to deal with breaches.

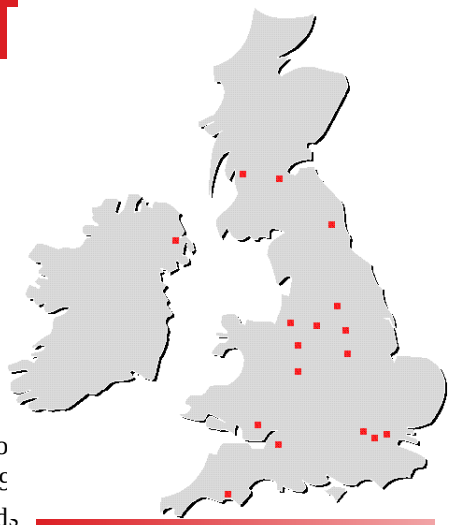
The Commissioner has powers to serve information notices and enforcement notices. An enforcement notice can require a data controller to take or refrain from taking certain action. There is a right of appeal. The Commissioner also has powers of entry and inspection.

A person can bring a claim in the County Court or High Court for any breach of the Act where damage has occurred.

In Force

Although the Act came into force on 1 March 2000, there are two transitional stages bringing in the legislation up to 23 October 2001 and then the second period up to 23 October 2007.

TUC challenge on parental leave



IN A historic challenge brought by the TUC against the Government, the High Court on 23 May 2000 agreed with the TUC, represented by Cherie Booth QC and Thompsons, that the 15 December 1999 cut-off date for parental leave was likely to be unlawful. Nonetheless, the Court decided that for the sake of clarity the question of the legality of the cut-off date should be referred to the European Court of Justice for a final decision, not least so that other Member States could benefit from the guidance of the Court on this important issue.

The case concerns Regulation 13(3) of the Maternity and Parental Leave etc Regulations 1999. The Regulations provide that, subject to satisfying certain criteria, employees should be able to benefit from 13 weeks parental leave away from work to spend time with their children aged under five. Regulation 13(3) then restricts this right to those parents whose children were born on or after the cut off date of 15 December 1999. Therefore parents with children born before that date have no rights under the Regulations, even though their children may be aged under 5. The effect of this is to exclude some 2.7 million parents who would otherwise have been able to benefit from parental leave.

The European Directive which underpins the Regulations and to which the Regulations are meant to give effect includes no such cut-off date. Instead, the Directive simply states that the right to parental leave must be introduced by the UK by 15 December 1999, and that the right "is on the grounds of the birth or adoption of a child". In a tenuous argument, the Government's position in defending the challenge was that these words "on the grounds of the birth or adoption" made the right to parental leave dependant on the child being born o adopted on or after 15 December 199 The TUC's argument was that the words simply introduced the right to parental leave in relation to children under five, and that right had to be implemented in the UK by 15 December 1999 regardless of whether the child was born on or after that date. In support of their position, the TUC referred to the Reasoned Opinion of the European Commission in similar proceedings being brought directly by the Commission against the Irish Government, who had also implemented the Directive with a cut-off date. In their Reasoned Opinion in the Irish case, the Commission simply conclude that the cut-off date represented a condition not authorised by the Directive. It is therefore unlikely that the European Court of Justice in the TUC case will reach a different conclusion.

The reference to Europe in this case may well take 18 months to 2 years to be concluded. In the meantime, the TUC are pursuing an appeal to the Court of Appeal to argue that pending the reference interim relief should be granted. If successful this would mean that until the European Court of Justice reach a decision Regulation 13(3) would have no effect and parents with children born before 15 December 1999 would nonetheless be entitled to parental leave.

For the time being, employees with children born before 15 December 1999 who wish to take parental leave and who are refused by their employers, should consider lodging Tribunal claims. The claims can then be stayed pending the outcome of the TUC's challenge.

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