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THOMPSONS SOLICITORS

The relations are coming

Employment Relations Act 1999: Commencement Orders No 1 and No2 (SIs 1999/2509 and 1999/2830)

The Employment Relations Act became law in July 1999. The new rights are being brought into force. Most publicity surrounded the increase in the compensation limit for unfair dismissal to £50,000, but that was by no means the only right which is now effective.

PROVISIONS IN FORCE FROM SEPTEMBER 1999

Protection against dismissal of fixed term contract workers for pregnancy or asserting a statutory right (section 18(6)).

The power to make regulations under the Act (s 42) and the specific power to make regulations which extend the TUPE regulations beyond the provisions of the Acquired Rights Directive and allow orders to treat particular public sector transfers as though they were covered by TUPE (s 38). One such "TUPE order" has already been made covering the Rent Officer service.

SUBSTANTIVE PROVISIONS IN FORCE FROM 25 OCTOBER 1999

- Protecting trade union members and activists from being subjected to any detriment by an act or omission of the employer: an improvement of the previous law on "action short of dismissal" (s 2 and schedule 2)
- Ending the use of waiver clauses which exclude fixed term contract workers from unfair dismissal rights. Only existing contracts with waivers signed before 25 October will validly exclude rights (s 18).
- Removing the right for residential members of religious communities to receive the minimum wage and allowing tax and national insurance information gathered by the Inland Revenue to be used in minimum wage enforcement (s 22 and 39)
- Amending the duties of ACAS and the Central Arbitration Committee in line with the new legislation (s 26 and 27).
- Abolishing the Commissioner for the Rights of Trade Union Members and Commissioner for Protection against Unlawful Industrial Action (s 28)
- Extending the powers of the Certification Officer and preventing duplication of complaints by stopping complaints being pursued before both the CO and the courts (s 29 and sched 6).
- Authorising the government to make funding available for partnerships at work (s 30).
- Removing the provisions limiting employment rights to those ordinarily working in Britain (s 32).
- Increasing the limit for the compensatory award on unfair dismissal to £50,000, providing for automatic uprating of limits in line with inflation, removing the limit on compensation for health and safety and whistleblowing cases and simplifying the system of trade union or representatives dismissals so that it is replaced with a single "additional award" (s 33 - 37).
- Bringing the qualifying period for unfair dismissal rights for school staff in line with the reduced one year period (s 40)

REGULATION MAKING POWERS IN FORCE FROM 25 OCTOBER 1999

The government now has powers to make regulations on the issues listed in this section. For many of them, there will be further consultation before draft regulations are presented.

- Prohibiting the compilation of lists of trade union members and activists for use by employers to refuse them employment or discriminate against them (which the legislation refers to as "blacklisting") (s 3 and sched 3).
- Prohibiting discrimination against part-time workers (s 19 - 21). This implements the Part-Time Workers Directive and must be in force by April 2000.
- Extending employment rights to wider categories of workers, where those rights are presently confined to employees (s 23).
- Upgrading the regulation of employment agencies (s 31 and sched 7).

Getting in on the act

PROVISIONS COMING INTO FORCE ON 15 DECEMBER 1999

The new "family friendly" provisions on maternity leave, parental leave and time off for emergencies affecting dependants (s 7 - 9 and sched 4).

WHAT IS STILL TO DO?

This still leaves some very significant provisions for which no definite date has yet been set.

These include the changes to the law on industrial action ballots and notices and the new unfair dismissal rights for strikers. These are expected to be in force in the Spring as are the improved rights for national security workers.

It looks like we shall have to wait until the middle of next year for the new right to be accompanied in disciplinary and grievance hearings and the statutory procedure for trade union recognition.

Defining a worker

Bain v Post Office Counters [1999] ET 27 August 1999 unreported; Edmunds v Lawson [1999] Times Law Reports 11 October 1999

There have been two recent cases looking at the definition of 'worker' as defined in the National Minimum Wage Act 1998 (the Act). Both decisions are encouraging for potential applicants and perhaps an indication that tribunals are going to interpret the legislation widely.

Mrs Bains, a sub-postmistress, claimed she was a worker under the Act and entitled to the minimum wage. She accepted that her contract was a contract for services and therefore she was not an employee, but argued that her contract did fall within the definition of 'worker' as defined by the Act. The Respondents argued that she was not a worker as her services were not 'personal' (see section 54(3)(b)) but the tribunal disagreed stating that many of her duties and responsibilities would be virtually impossible to fulfil without a fair degree of personal input. Her contract stipulated that she had a duty to ensure that transactions were carried out accurately, with reasonable steps to prevent fraud, that documentation was properly completed and timeously dispatched, and any losses incurred by her assistants were to be discharged by the applicant. She was also expected to undertake training sessions in putting the customer first. Her claim was found to have fitted into the definition of worker in accordance with section 54(3)(b).

Ms Edmunds, a pupil barrister, was also successful in her claim. A pupillage was held to be an apprenticeship. She was not there as a volunteer neither was her twelve months as a pupil purely educational both suggested by the respondents. It was held that the claimant (Ms Edmonds had sought a declaration from the Queens Bench Division of the High Court) was a worker under section 54(3)(a) under a contact of apprenticeship. It should be noted, however, that permission to appeal was granted.

Until now there has been little case law on what is a worker. Most of the case law is on who is an employee. With the extension of some employment rights to workers as well as employees, these cases will have implications beyond the minimum wage legislation.

- The Post Office have now lodged an appeal.

Protecting collective agreements

Guest author Professor Brian Bercusson of Manchester University looks at the latest trade union case from Europe

On 21 September 1999, the European Court of Justice handed down what may be one of its most important labour law decisions. Cases C-67/96, C-115-117/97 and C-219/97 (referred to as Albany) concerned a challenge to a collective agreement in the Netherlands which established a pension fund system for workers in the textile sector. Affiliation by employers to this sectoral pension fund was made mandatory by an order of the Dutch Minister of Social Affairs. Albany, a textile business, sought exemption from affiliation and was refused. It complained that mandatory affiliation to a collective agreement violated EC competition rules in Article 81(1) (formerly 85(1)) of the EC Treaty.

What made Albany significant was the Opinion of Advocate General Jacobs, handed down on 28 January 1999. The Opinion shaped analysis of the employers' complaint in two ways. First, the Opinion shifted the focus of the complaint from mandatory affiliation to the collective agreement itself. Secondly, it posed the question whether collective agreements were "immune" from competition law; the cases: (para. 79)

"raise the fundamental issue of the relationship between the prohibition [from restricting competition] contained in Article 85(1) (Article 81(1)) of the Treaty and collective agreements concluded between representatives of employers and employees, an issue which the Court has not yet had occasion to consider".

Advocate General Jacobs (who is British) perceived the issue in terms of an "immunity" of collective agreements from competition law ("an antitrust immunity"), an approach derived from the history of trade union law in Britain (the Trade Union Act 1871) and the USA (the Clayton Antitrust Act 1914). In contrast, the continental European approach of fundame tal and positive trade union leg rights would have formulated tl issue in terms of a "right" of tra unions to enter into collecti agreements.

The Advocate General's Opinic denied the existence of a fund mental trade union right to colle tive bargaining in EU law. reach this conclusion meant th Jacobs had to dismiss IL Conventions 87 and 98, whicl have been ratified by all tl Member States of the EC, th Community Charter of Fundamental Social Rights of 1989, approved by all Member States, the Council of Europ Social Charter of 1961 and tl European Convention on Huma Rights. In his view, none of the international instruments supported a fundamental right to collective bargaining in EU law.

Following from this denial of any right to collective bargaining, Jacobs asserted that collective agreements were merely "contracts", and as such had only limited immunity from EC competition rules, which impose justified limitations on collective agreements. Collective agreements are protected from EC competition law (enjoy "anti-trust" immunity) only in the case of:

"collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as

agreements, painfully acquired by trade unions in the Member States (in the UK, by granting immunity from judicial doctrines on restraint of trade, beginning with the Trade Union Act 1871) was now potentially threatened by the supremacy of EC competition law. The Opinion seemed to offer employers a weapon to challenge collective agreements, and competition lawyers began to raise questions in the professional legal literature about what trade unions could and could not demand in collective agreements.

It was a relief, therefore, when, in a decision on 21 September 1999, the European Court of Justice rejected the Advocate General's contention that collective agreements were in conflict with the competition provisions of the EC Treaty. The Court did not even mention the Advocate General's Opinion, either on this

n the issue of funda-
l trade union rights.
nstead, the Court
emphasised the social
policy objectives of
the EC found in
Articles 2 and 3 of
the EC Treaty, along-
ide competition policy
jectives. Social policy
be given at least equal
t to competition policy
es. Even more signifi-
he long-term was the
decisive pronounce-
at its conclusion was
by provisions in the
apter (the Agreement
Policy; after the
Treaty, now Articles
the EC Treaty) which
citly support social
and collective bar-
ween employers and
luding at EU level.
e are still questions as to the precise scope of the rights to collective agreements protected by the Court, the decision in Albany has a number of potentially fundamental implications for the future of labour law, both in the EC and in the UK.

First, EC labour law is not following the much criticised path of UK labour law, which has traditionally regarded trade unions and their collective agreements as merely enjoying special "immunities" or "privileges". Instead, EC social policy acknowledges that there are trade union rights, in this case, with equal or greater status than competition law.

Second, these trade union rights derive support from the EC Treaty Articles 2 and 3. However, the future significance of the Court citing these provisions may be affected because, although they applied in the Albany case, they were later re-drafted and re-structured by the Treaty of Amsterdam.

Particularly important, therefore, is the Court's reliance in the Albany judgement on the provisions of the Social Chapter, now reinforced by their insertion into the EC Treaty by the Treaty of Amsterdam. The EC Treaty itself now not only encourages and recognises social dialogue and collective agreements at EU level, but authorises their mandatory extension in the form of Council directives. The Court cited these provisions: (now in Article 139 EC)

"the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission'.

Thus, the success of the European Trade Union Confederation (ETUC) in achieving the agreement of 31 October 1991, now the Social Chapter in the EC Treaty, is even more important than previously realised. It enabled the Court in Albany to assert that the EC Treaty protected collective agreements.

Third, the Albany decision has implications for labour laws in the Member States, including in the UK, which attempt to restrict trade union rights guaranteed by the EC Treaty. For example, if Member States try to constrain collective agreements by invoking competition law, these may be blocked by EC law's right to collective agreements.

Finally, Albany highlights how the struggle by the European trade union movement, through the ETUC, to obtain trade union rights at EU level is of vital importance for the protection of trade union rights in the Member States. Trade union rights at EU level become essential in the face of unforeseeable challenges from the EC law emerging from the economic and monetary union of the EU (another example is the "Monti" regulation; see LELR 20, "The full Monti: stripping away strikers' rights", pp. 4-5).

There are currently initiatives to enshrine fundamental rights in the EC Treaty, aimed at the Intergovernmental Conference scheduled for the end of 2000. These require careful scrutiny, not only to ensure that trade union rights are safeguarded, but that the existing rights recognised by the Court in Albany are not diminished by any new formulation.

Still waiting for pensions for transsexuals

Bavin v the NHS Pensions Agency and Secretary of State for Health
IDS Brief 646
(October 1999)

The EAT has revisited the question of survivors' pension rights for unmarried partners — this time in the context of an unmarried couple where one of the partners was a transsexual who had undergone gender reassignment surgery.

The reason why there is a problem is that whilst occupational pension schemes invariably provide a spouse's pension in the event that a member or pensioner dies (and must do so if it contracts out of SERPS on the usual "reference scheme" test), a spouse, for these purposes, means the person the deceased was legally married to at the time of death. Some schemes provide a pension for an unmarried partner (of the same sex or of the opposite sex) if there is no spouse – but there is no legal obligation to do so.

Same-sex couples cannot marry in the law of this country. Nor can transsexuals. In the eyes of the law, a transsexual keeps the same gender that he or she was born with until he or she dies.

Ms. Bavin was a member of the NHS Pension scheme, who lived with a transsexual (male) partner. The law regarded her partner as a woman, and they could not marry. Ms. Bavin complained to an Employment Tribunal that the NHS Pension Scheme discriminated against her, by not providing a survivor's pension to her partner, on the ground of her partner's sex.

The EAT disagreed. It found that the discrimination was on the ground of Ms. Bavin's marital sta tus: and whilst it is unlawful to discriminate against married people on the ground of their marital status, it is lawful to discriminate against single people. In doing so, the EAT followed the reasoning of the European Court of Justice in the case of Lisa Grant v South West Trains (see LELR 20). There, the ECJ found that it was lawful to deny free travel facilities to a lesbian partner, where they were available to a spouse.

The ECJ also found, however, in the case of P v S LELR 1, that it was unlawful to dismiss a person because he was about to undergo gender reassignment surgery. He was treated less favourably than members of the same sex which he was born with, and that contravened the Equal Treatment Directive. Wasn't Ms. Bavin treated less favourably on the grounds of her partner's reassignment?

But, said the EAT in this case, Ms. Bavin was discriminated against because she was unmarried. The reason why she was unmarried was beside the point the EAT held. But this is to miss the point and is reminiscent of the fatuous argument around pregnancy dismissals when employers argued that absence on pregnancy leave was not inextricably linked with pregnancy. The House of Lords and the ECJ nailed this myth.

The root cause for this state of affairs is law's refusal to recognise gender re-assignment or same sex marriage. Sadly, the European Convention of Human Rights does not help: the European Court of Human Rights (which is responsible for policing the Convention) has held that states are not obliged to give legal recognition to gender reassignment.

We will have to wait for specific legislation, and the UK is trailing the field. A number of European countries have legislation in place which allows couples to register a same-sex relationship giving it the same force, in law, as a marriage. The Republic of Ireland has just enacted wide-ranging legislation preventing discrimination on seven different grounds, including sexual orientation.

The Law Commission in England and Wales is examining the issue and the Law Commission in Scotland has just done so, recommending that the law be changed to give some legal recognition to unmarried partnerships (of the same or opposite sex). Perhaps the wait will not be too long.

Social policy is no defence for employers

Kruger v Kreis Krankenhaus Ebersberg [1999] IRLR 808

In a welcome decision, the ECJ refuses to allow an employer to justify gender-based discrimination in pay on the basis of broad social policy objectives. The case is important because it clearly distinguishes between discriminatory measures which relate to a particular aspect of social policy adopted by a member state (or some essential concept of national security) which may be used as the foundation for justifying discrimination in the social security context, and pay discrimination of workers by their employer, where a more stringent test of objective justification may be applied.

Ms Kruger worked as a nurse in Bavaria. She originally worked full-time, but, when she transferred to part-time work, her employers refused to pay the normal Christmas bonus. The employer set out to justify the refusal to pay her a bonus by reference to the collective agreement covering public sector employment in Germany.

The European Court of Justice had no difficulty in identifying the bonus payment as an element of 'pay', for the purpose of Article 141 of the EU Treaty (formerly Article 119). It left it to the national court to determine whether the difference in treatment, through non-payment of the bonus to part-timers, affected a considerably higher proportion of women than men. The issue before the European Court of Justice therefore turned on the question of objective justification.

In previous decisions relating to the former Article 118 of the EU Treaty, and matters of social security, the ECJ has been prepared to allow member States to rely upon policy considerations by way of objective justification. For example, the German Government had previously been able to justify its decision to exclude individuals in 'minor employment' (the majority of whom have been women) from entitlement to a particular social security benefit by reference to social policy. In Ms Kruger's case, the ECJ confirmed that, in matters of social policy, member States should indeed be allowed a wide area of discretion.

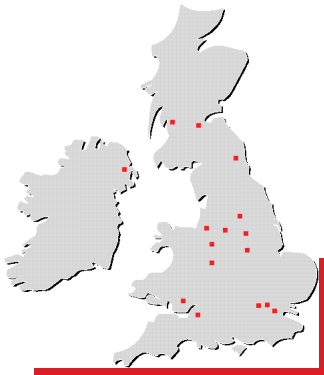
However, the ECJ found that different considerations applied to Ms Kruger and matters of social policy were not relevant. The discrimination which she had suffered was nothing to do with a measure of social policy adopted by a Member State or some social security concept. Instead, she was objecting to a provision contained in a collective agreement. Therefore, Ms Kruger's case did not involve an issue of social policy and her employer was unable to justify objectively the decision not to pay her a bonus on the broad social policy grounds it put forward.

In other words, even though it was not unlawful for the German government to discriminate against workers in "minor employment" on grounds of social policy, the same argument will not necessarily hold good for employers.

Ms Kruger's case draws an important line between cases relating to social security and state benefits, where social policy objectives may be applicable so as to justify potential discrimination, and those relating to the relationship between workers and employers where such considerations will not apply so as to justify discriminatory pay practices. The case may well be of assistance further down the line in the part-time worker pension claims. Certainly in private sector schemes, it will not be possible for employers to justify the exclusion of part-timers by reference to broad policy objectives.

It could also be highly relevant in any challenge to the Lower Earnings Limit and access to Statutory Sick Pay which indirectly discriminates against women, following the EAT decision in Banks v Tesco (LELR 40) that Statutory Maternity Pay is covered by Article 141, and not Article 118

Full time pay for full time courses



Mrs P Davies v Neath Port Talbot County Borough Council [1999] IRLR 769

In a useful decision affecting part time workers who are involved in trade union activities, the Employment Appeal Tribunal in the case of Davies v Neath Port Talbot County Borough Council (15 December 1999 unreported) decide that a part timer who attended a full time union organised health and safety training course, was entitled to be paid on a full time basis by her employer. The EAT has rewritten the Trade Union and Labour Relations (Consolidation) Act to redefine the payments part time workers should receive using the supremacy of European law.

Mrs Davies worked part time as part of the Council's meals on wheels service. She was elected as a GMB health and safety representative. She attended two training courses organised by the GMB, one a health and safety course and the other an induction course. She was paid only in accordance with her usual part time hours, despite the fact that the courses were run on a full time basis.

Backed by the GMB, she pursued a claim to the Tribunal under Article141 (formerly 119) arguing that she should have received full time pay from her employers, in line with her full time colleagues who also attended the training courses.

The Tribunal found for the Council, and rejected her application, following a previous

Employment Appeal Tribunal decision, Manor Bakeries Ltd v Nazir [1996] IRLR 604. The Nazir case decided that time spent at a union's annual conference was not "work" in respect of which Article 119 pay would require to be paid.

In Mrs Davies' case, the Employment Appeal Tribunal reject the Nazir decision, following instead the key European Court of Justice decision, Arbeiterwohlfahrt Der Stadt Berlin v Botel [1992] IRLR 423. In the Botel case, a part time worker was elected president of the staff committee. When she attended a full time trade union training course necessary for her work on the Staff Council, the European Court of Justice held that she was entitled to full time pay:

"although compensation such as that at issue in the main proceedings does not, as such, arise from the contract of employment, it is nevertheless paid by the employer by virtue of legislative provisions and by reason of the existence of an employment relationship with an employee".

In Mrs Davies' case, the Employment Appeal Tribunal decide that the Botel decision should be followed. Nazir was incorrect, and it was inappropriate to distinguish "work" from "pay" for determining issues under Article 141 (formerly 119).

Further, there was no significant difference between attendance at a training course as a Staff Council member, and attendance at a GMB organised health and safety training course. Importantly, the Employment Appeal Tribunal also scotch the suggestion made by the Employment Tribunal that union organised health and safety courses are only of benefit to the employees involved and the trade union, and not the employer.

Quite properly, they recognise that attending a health and safety course safeguards staff interests which ultimately are of direct benefit to the employer. In any event, the training stemmed wholly from the employment relationship, and accordingly arose "by reason of the existence of an employment relationship" as set out in Botel.

This case has obvious significance for the part time workers attending union organised training courses, who will now be entitled to claim full time pay for the hours spent on the training course, in line with their full time colleagues. The principle may also be taken further. If the Nazir case is no longer good law, then part time workers who attend their annual union's conference may also be entitled to full time wages from their employer.

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