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The working times they are a changin'

On 7 July, the Government published proposals to amend regulations 4 (48 hour week), 5 (opt-out agreements) and 20 (record-keeping) of the Working Time Regulations 1998. The Government carried out only very limited consultation, with a deadline for response of 21 July.

The regulations have now been laid before Parliment. The amendments seriously undermine the protection given to workers. Their effect is even more damaging than the description given in Stephen Byers' accompanying memorandum to the proposals.

48 HOUR LIMIT: OPTING-OUT

Working time must not exceed an average of 48 hours per week, except for workers who have opted out. Currently, the "opt-out" is subject to a number of requirements, including that it must be in writing and that the employer must keep records of the hours worked and of the terms of the "opt-out" agreement.

The Government says that the proposed amendment is to remove a perceived burden on businesses to keep records of hours worked for opted-out workers. On its own, this is serious in that there is likely to be more dispute as the hours actually worked.

The Government has withdrawn its proposal that the opt-out need not be in writing. However, there would only have to be an agreement that the worker shall "perform such work".

It seems that the 48 hour maximum would not apply to a worker who had agreed to perform particular work, even though the worker had not specifically agreed to opt-out, or even have known about the 48 hour limit.

48 HOUR LIMIT: RECORDS

Under the amendments, employers will only have to keep records of who had signed an opt-out. The current requirements to keep records of hours actually worked and of the terms of any opt-out agreement would be removed.

This weakens the effective enforcement of the 48 hour maximum. It is difficult to see how the Government will be able to comply with its own obligations to respect the general principles of the protection of health and safety of workers when employers' record keeping duties are only partial.

UNMEASURED WORKING TIME

The proposed amendment to regulation 20 (the "unmeasured working time" derogation) will exclude from the limits on weekly working time and night workers that part of working time which the worker carries out "without being required to do so by the employer". The Government explains that the derogation is to be extended so as to apply to workers who "choose to work longer because of their own volition".

Once again, there will be considerable scope for confusion and uncertainty. If an employer requires a worker to carry out a particular task, at what point can it be said that the worker is working of "[her] own volition"? The imbalance of power between worker and employer is ignored.

The Age of Retirement

Taylor v Secretary Of State For Scotland [1999] Court of Session IRLR 362

Whilst legislation prohibiting age discrimination is yet to be introduced in the UK, the recent decision of the Court of Session (Scotland's Court of Appeal) in Taylor v Secretary of State for Scotland has created a window of opportunity for combating age discrimination using collective agreements and employer policies, which may then be enforced through the Courts.

Mr Taylor was employed as a Prison Officer by the Scottish Prison Service. When he joined the Service, retirement arrangements permitted him to retire at age fifty-five. By agreement, he could continue to work until age sixty, subject to a right to terminate by giving three months' notice by either side.

In 1991, Mr Taylor reached age fifty-five. His employers agreed that he could continue in his job beyond the age of fifty-five but that retention beyond the minimum retirement age "is at the Department's discretion and subject to regular review. Retirement may therefore be effected at any time and is subject to three months' notice on either side".

In 1992, the employers issued a circular setting out an equal opportunities policy, undertaking "to offer opportunities on an equal basis to all staff regardless of gender, race, religion, sexual preference, disability or age".

In 1994, the Scottish Prison Service introduced changes to its retirement policy. All employees over age fifty-five, including Mr Taylor, were given six months' notice of dismissal. The purpose was to save money and get a younger and differently skilled workforce.

Employers may be accountable for equal opps policies

Mr Taylor claimed that this amounted to discrimination on grounds of age, in breach of the equal opportunities provision which he claimed formed part of his contract of employment.

TWO ISSUES AROSE:

(a) whether the management circular of 1992 provided a legally enforceable contractual right not to be discriminated against on grounds of age; and

(b) if so, was a change in the employer's retirement age policy, which led to his dismissal, age discrimination and therefore in breach of contract?

The Employment Tribunal supported Mr Taylor's claim. The equal opportunities policy was "incorporated into the Applicant's contract of employment". The Tribunal went on to find the policy specifically contained a provision that employees would not be discriminated against because of their age, that the reason for the change in the retirement policy was principally a question of age and therefore contrary to the equal opportunities policy. There had been a breach of contract.

The Employment Appeal Tribunal (Scotland) upheld the employment Tribunal's finding that the terms of the equal opportunities policy were incorporated into the employee's contract of employment. However, the EAT allowed the employer's appeal on the grounds that the dismissal of Mr Taylor after he reached the normal retirement age of fifty-five was not discrimination on grounds of his age.

On appeal to the Court of Session, it was not disputed that the equal opportunities policy was part of the contract of employment. However, the Court of Session also held that the decision to retire Mr Taylor was not age discrimination in breach of his contract of employment. The Court noted that any

retirement policy, if put into operation, would almost inevitably result in the retiring persons being replaced by younger persons.

Mr Taylor had a contractual right not to be discriminated against on grounds of age, before the minimum retirement age of 55. But, the contract gave management a wide discretion to decide on retirement ages between 55 and 60 and could include age considerations.

Whilst it is difficult to accept that the use by an employer of a retirement policy to remove a section of employees for the purpose of introducing a newer and younger workforce does not amount to age discrimination, the case does represent a significant advancement in creating a remedy for those who are discriminated against on the basis of their age. The finding that equal opportunities policies may be incorporated as part of a contract of employment, allows an employee to sue for breach of contract.

This case sends an important message to employers implementing equal opportunities policies that they may be held accountable for the assurances made in those policies, in the event that those assurances are not fulfilled.

EMPLOYEE SHARE OPTIONS

Share and share alike

Levett v Biotrace IRLR [1999] 375 CA

The Court of Appeal has confirmed the old legal principle that an employer cannot deprive an employee of rights by relying on its own breach of contract. The case related to valuable benefits under a share option scheme, but could have wider implications, for example in relation to pensions and other employee benefits.

Mr Levett was entitled to twelve months notice of termination of employment. His contract of employment contained a payment in lieu of notice clause.

He was also entitled, subject to the rules of Biotrace's share option scheme, to an option to purchase 1.7 million shares in the company at any time over a period of seven years.

The rules of the scheme dealt with a number of situations when the option holder ceased to be an "eligible employee". Rule 5.7.1 provided that the option would lapse immediately if Mr Levett became subject to disciplinary proceedings and his contract was consequently terminated.

A side letter to Mr Levett's contract of employment also stated that if he was given notice of termination by the company, then, provided that he did not go to work for a competitor, he would still be able to exercise his option within the seven year period.

The company became dissatisfied with Mr Levett's work. He was called to a disciplinary hearing, which he did not attend, and was dismissed.

The Company argued that Mr Levett's option lapsed on the termination of his employment because of rule 5.7.1 - i.e. because he had been subject to disciplinary proceedings and his contract had been subsequently terminated.

But the Court of Appeal rejected that argument, finding that rule 5.7.1 only applied where the contract of employment was lawfully terminated. Mr Levett had been summarily dismissed with no payment in lieu of notice in breach of contract. He had been dismissed in breach of contract. Rule 5.7.1 did not therefore apply and Mr Levett was entitled to rely on the terms of his side letter and exercise his option. It was a simple contract point - quite separate from any unfair dismissal claim that Mr Levett might have had.

If the company had made a payment in lieu of notice, then there would probably have been no breach of contract in the dismissal, and, from its own reasoning, the Court of Appeal may well have held that he was not entitled to the company shares.

Insolvent or bust?

1. Regeling v Bestuur van de Bedrijfsvereniging Voor de Metaalnijverheid (1999) IRLR 379

2. Mann & Others v Secretary of State for Employment House of Lords 15th July 1999

Under a 1980 European Directive Member States are required to provide protection for workers where their employers go insolvent primarily by guaranteeing wages and other sums that the workers would have been entitled to from their employers if they had not gone insolvent. Although this provision is now nearly 20 years old there have been very few cases dealing with that Directive but there have been two recent cases with some good news and some bad news.

REGELING

The first case, Regeling, went to the European Court of Justice from the Dutch Courts. Under Dutch Law workers are entitled to protection for the three month period preceding the insolvency but in this case the employers had not been properly paying the workers for nearly eight months but had been making sporadic payments during that period.

The Dutch Courts aggregated the payments actually made by the employers and set them off against the wages due during the three month protected period. They then claimed that there was no further money outstanding, leaving the employees unprotected for the wages that were due during the first five months of the year.

The European Court of Justice held this was wrong. What should happen, across all Member States, is to set off any payments made by the employers against the oldest debt first so that the amounts due would fall within the protected period.

WHICH WEEKS?

In the UK the period of debts that are protected preceding an insolvency is 18 months but the protection is only for eight weeks. The normal practice of the redundancy fund was to use the last eight weeks of employment or the last eight weeks in which there were wages owing.

In the second case of Mann and Others the House of Lords said that this practice was also incorrect. The individual workers are entitled to select which weeks they wished to use to claim protection in respect of unpaid wages.

SWAN HUNTER

The Mann and Others cases arose from the closure of the Swan Hunter Shipyard on Tyneside during 1993 and 1994. The shipyard was closed piecemeal over 18 months with groups of workers being dismissed on an ad hoc basis during that period and without any consultation with the unions.

Until now employees have not been choosing which weeks they wished to be covered. From now they should have that choice.

IMPLICATIONS

The combination of the two cases would mean that in circumstances where employers were making sporadic payments it is likely that workers would be able to claim up to the maximum eight weeks pay without partial payments made by the employers being set off against them for those weeks. Unfortunately, although the House of Lords decided that the Redundancy Fund had not properly dealt with the Swan Hunter cases they were not prepared to order a remedy by making the Secretary of State redo the calculations.

As a result the Employment Tribunal made nine protective awards against the administrative receivers. Each award was for the maximum of 90 days. However when the Swan Hunter workers made their applications for payments from the Redundancy Fund the awards were reduced, in many circumstances down to nothing.

This was particularly so for the first two rounds of redundancies where the Secretary of State set off notice payments against the protective award. This was a practice that had been declared unlawful by the European Court of Justice but the Government did not change the law until

November 1993 and the provisions were not retrospective so that the first two sets of redundancies were dealt with under the old law.

As a result Swan Hunter workers challenged the calculations that had been made in respect of their insolvency entitlements. These cases were initially successful before the Employment Tribunal but the matter to the House of Lords which upheld the original payments made by the Secretary of State was appealed.

WHAT IS AN INSOLVENCY?

In the House of Lords the main reason that the cases were unsuccessful was that the House of Lords accepted a new argument by the Secretary of State that the administrative receiverships were not insolvencies for the purposes of the European Directive. The reason for this is that they are not governed by Court Orders but are administrative provisions invoked primarily by bankers.

The Insolvency Directive was introduced in 1980 before the Insolvency Act 1986 which created administrative receiverships. The European Directive is based upon the concept of Court supervised insolvencies.

As Swan Hunters were not insolvent within the meaning of the 1980 Directive the Swan Hunter workers were therefore not protected by European Law and could only rely upon the domestic protections. They were therefore unable to challenge the calculations made by the Secretary of State.

WEEK'S PAY

Prior to the hearing in the House of Lords the Secretary of State did not concede that the method of calculation which had been adopted was incorrect particularly in the way the Department had used the ceiling of £205 on a weeks pay.

Essentially the Department had aggregated the various sums due to the individual workers and applied the £205 per week limit to the total. At the House of Lords it was conceded that in fact the calculations should be done guaranteed element by element rather than aggregated into one lump sum.

The lesson from these cases is that workers who have claims against the guarantee institution should ensure that they check how the payments that they have received from the Secretary of State have been calculated and which weeks have been used to form the basis of payment. It is quite clear that the methods of calculation have been incorrect in a number of ways and may now be open to challenge.

Consultation for the many ...but not the few

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999.

Our very first issue featured the challenge to the Conservative legislation on consultation on redundancies and transfers. The challenge was initially unsuccessful, but the case was taken to the Court of Appeal by the three unions involved - GMB, NASUWT and UNISON. The general election intervened and the unions agreed to put the appeal on hold pending proposed legislative changes to be introduced by the new Labour government.

The consultation paper on the Labour proposals was published in February 1998, but it was not until 7 July 1999 that new Regulations were published. There was no period for consultation on the new Regulations, despite changes from the proposals in the consultation document. The new Regulations came into force on 28 July 1999. They apply to dismissals or transfers taking place on or after 1 November 1999.

NO RIGHTS WHERE FEWER THAN 20 REDUNDANCIES

The significant change is the government's decision to retain the 20 redundancy threshold as the trigger for consultation. There is no threshold for consultation on transfers of undertaking.

Employers are only obliged to consult with unions or employee representatives where 20 or more employees are to be made redundant in the same establishment.

This is a significant blow. It retains the adverse change introduced by the Tories in 1995, which Labour strongly opposed. It goes back on the proposal in the consultation paper. It means that substantial numbers of workers remain deprived of any right to consultation through representatives in connection with redundancy dismissals.

The original challenge was on the basis that this change could not be introduced without an Act of Parliament, because of the wording of the European Communities Act 1972 and the Trade Union and Labour Relations (Consolidation) Act 1992, and that it discriminated against women, who are more likely than men to be employed by small employers with 20 or fewer staff.

The High Court rejected those arguments and the unions are considering whether to pursue these points to appeal.

EMPLOYEE REPRESENTATIVES AND CONSULTATION

In this area, the news is better. The Government proposals go a long way to meet the points raised, although some concerns remain. The key elements of the changes to the law are as follows:

CHOICE OF REPRESENTATIVE

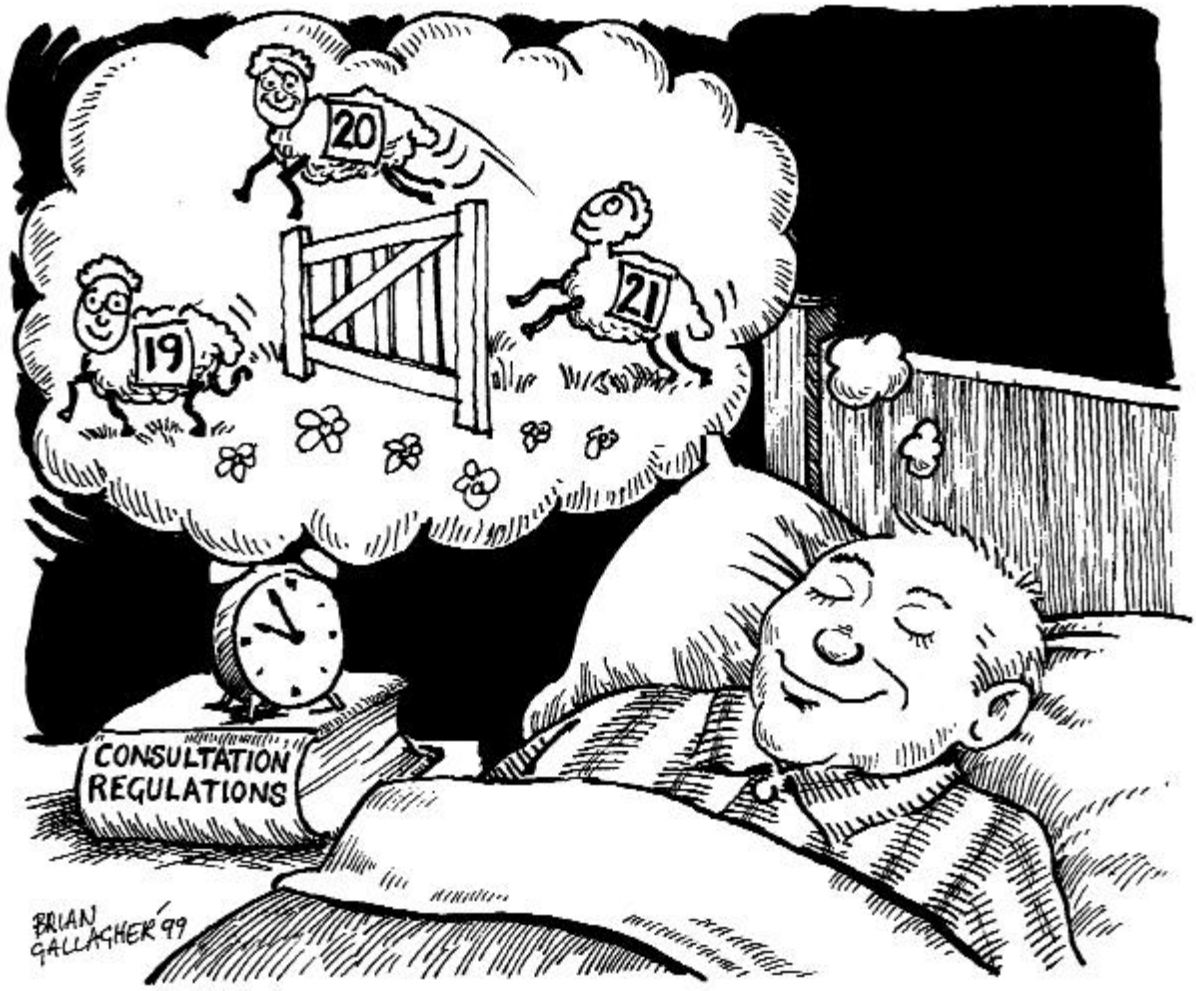
Where a trade union is recognised, the employer must consult with the union. It is only where there is no recognised union that the employer has a choice between representatives specifically elected for the purpose of consultation or those appointed or elected by the employees for other purposes, but with authority to represent.

OBLIGATION ON EMPLOYER

Where there is no recognised union the employer must invite employees to hold an election. If they do not do so within a reasonable time, the employer discharges his obligation by informing individual employees of the information required under the legislation.

WHO ELECTS THE REPRESENTATIVES?

The representatives in redundancies are not now elected by those whom it is proposed to dismiss. They are to be elected by "any of the employees who may be affected by the proposed dismissals or may be affected by measures connected with those dismissals". This change to a broader category is welcome.



CONDUCT OF THE ELECTION

Unlike the Tory law, the new Regulations contain requirements for the conduct of the election. There is no change on the timing ("long enough before the time when consultation is required"), but there are now specific provisions on fairness, representativeness, classes of employees, term of office, candidature, no unreasonable exclusion, entitlement to vote and voting in secret.

BURDEN OF PROOF ON EMPLOYER

This responds to a number of concerns raised. There are still gaps, for example there is no provision on voting free from interference or constraint. The most significant aspect is placing the legal burden on the employer, when challenged, to prove that the election complied with the statutory requirements.

BRINGING CLAIMS

Individual employees are now given a remedy where the employer's failure relates to the election of employee representatives. The burden is on the employer to show that the representatives were "appropriate" and that the requirements relating to the election have been complied with. This is a positive step.

REMEDIES

In a particularly welcome development, the maximum remedy for a failure to consult on 20 or more redundancies is changed to 90 days pay across the board, a significant increase where there are between 20 and 100 employees proposed as redundant. The maximum compensation for a failure to consult under TUPE is increased from 4 weeks' pay to 13 weeks' pay.

WHAT NEXT?

The unions are considering whether to continue to appeal to the Court of Appeal. The Regulations do represent a step forward, but the retention of the 20 employee threshold for redundancy consultation is a major disappointment which continues to deprive many employees of the right to have their representative involved in consultation.

Shrink wrapped pay

Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse (Case C - 309/97) IDS Brief 638, June 1999

Under European law a predominantly female group of psychotherapists could not claim equal pay with a predominantly male group of psychotherapists even though the jobs they did were essentially the same, the European Court of Justice has ruled.

In Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse (Case C-309/97), the ECJ decided that the difference in the qualifications of the male and the female psychotherapists meant that the two jobs could not be treated as the same, so that no comparison could be made for equal pay purposes. The men were qualified doctors, the women qualified psychologists.

The ECJ accepted that the tasks performed by the two groups were "seemingly identical". But it then decided that the two groups of psychotherapists ""draw upon knowledge and skills acquired in very different disciplines", the women drawing on their experience as psychologists and the men on their experience of medicine. The ECJ was also influenced by the fact that the male psychotherapists were qualified to carry out duties in other fields, whereas the female psychotherapists were not.

This is a very disappointing judgment and conflicts with UK case law and the Equal Pay Act as it narrows the scope for comparison between workers in a "like work" case. It is a well established principle in UK law that like work is to be judged on the nature of the work actually performed practice, and not what an employee might be required to do under their contract or what they are capable of doing.

The test is whether the work done is of the same or broadly similar nature. In Europe under Article 141 (formerly 119) the entitlement is to equal pay for the same job.

The ECJ have said in this case that professional training is a possible criterion for determining whether different employees are performing the same work. Other relevant factors, according to the ECJ, include the nature of the work and the working conditions.

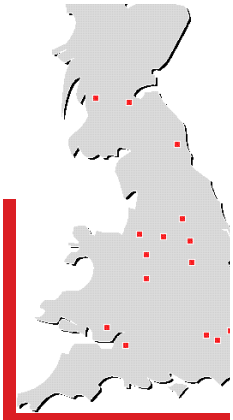
The judgment does not say that different qualifications will always meant that same work cannot be established. Frustratingly the ECJ did not set out why training requirements would be relevant.

The most likely explanation is that the very different training of doctors to psychologists actually affected the nature of the work activity performed by each group as psychotherapists and the way they carried out their tasks - even though the tasks were the same. This will be less likely to apply in other cases.

This case should also not affect the existing UK case and scope of the Equal Pay Act which looks at the nature of the work in practice, since domestic law can be wider than European minimum equality law requirements.

Under UK law, the difference in qualifications between the two groups should properly have been considered at the material factor defence stage, rather than the comparison stage. Once the Applicants have shown they are engaged on like work to a male worker, the burden of proof shifts to the employer to justify the pay differential on grounds unrelated to sex. In the UK it would be at this stage that issues of qualifications and training would arise.

In any event UK law also enables comparisons for equal pay purposes to be made by the equal value, as opposed to the "like work", route. That avenue, in UK law, would also still be open to Applicants in the same position as the Austrian psychotherapists who were dealt with so harshly by the ECJ.



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