THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 24 July 1998

TUPE plus ça change?

Proposed Amendment to the Acquired Rights Directive

Those hoping for greater certainty in the application of the legislation have not been well served by recent developments at European Union level. A Council of Ministers meeting on 4 June 1998 agreed to amend the Directive.

There may be further steps required before ratification, but it looks likely that the changes will go through. The amendment would replace existing Articles 1 to 7 of the Directive with new Articles.

The most significant change is to the scope of the Directive. A new Article 1.1(b) will say:-

"...there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary"

This is a paraphrase of part of the judgment in Suzen, which itself is a mistaken application of part of the Rygaard decision. The preamble to the amending Directive insists that this clarification "does not constitute an amendment to the scope of the Directive as interpreted by the Court".

However, courts will have to apply the wording of the new Directive and this will involve considering whether there is "an organised grouping of resources" and whether it has "the objective of pursuing an economic activity". These are new tests which are not part of the approach set out in Spijkers. Moreover, this new test will apply to all transfers whereas Suzen concerned only a second stage transfer from contractor to contractor.

The effect of this change has provoked intense debate. Unions are angry that it weakens protection, but the Government is adamant that this amendment amounts to a specific inclusion of contracting out and includes all transfers that "have any substance".

The amended Directive makes it clear that the legislation applies to public and private undertakings, whether or not profit-oriented, but writes into the Directive the Henke decision which excludes public administrative reorganisations and transfers of public administrative functions.

The Government says these changes were necessary for the proposed amendments to the UK TUPE Regulations which will "improve the operation of the law in this area". The proposed wording in the amended Directive will not do so: it will lead to further uncertainty and litigation which will be unwelcome for employers as well as employees. Any amendment in the UK should make it clear that contracting out is covered and that public employees are protected when there is a reorganisation.

The amended Directive will require the outgoing employer to provide the new employer with information on the terms and conditions which will transfer. The final version does not include earlier proposals to require only equivalent terms and conditions for public sector staff who transfer and to allow workers of agree less favourable terms after a transfer.

A welcome development allows EU countries to provide that pension rights transfer. It is to be hoped that the UK Government will take up this option, bearing in mind its support for this in its Public Consultation Document.

There are also changes which allow a dilution of employee protection on insolvency by, first, the non-transfer of pre-transfer debts and, second, agreed reductions in terms and conditions on insolvent transfers.

The Government insists its intention is to clarify the law and protect employee rights. The forthcoming revisions to the TUPE Regulations will give it the opportunity to demonstrate this.

Disability, dismissal and reasonable adjustments

Morse v Wiltshire County Council EAT Times Law Report 11 May 1998

The Employment Appeal Tribunal has given important guidance to Industrial Tribunals on the sequence of steps to be considered in deciding a claim for disability discrimination based on an employer's failure to make a reasonable adjustment - a "Section 6 duty". As a preliminary and welcome point, the EAT decided that Section 6(2) does cover dismissal even though there is no express mention of dismissal or termination in the Section.

Mr Morse was employed as a road worker by the employers. As a result of injuries sustained in a road traffic accident, he could not hold a driving licence. The employers wanted to reduce the number of workers because of financial problems and required 74 of the 90 retained workers to hold a driving licence.

Mr Morse was dismissed for redundancy and complained to the tribunal of unfair dismissal and disability discrimination. The employer conceded that Mr Morse was a disabled person and that he had been selected for redundancy for a reason related to his disability but said that the discrimination was justified.

The industrial tribunal held the dismissal fair and said there was no discrimination. Mr Morse appealed to the EAT on the discrimination point.

The EAT held that the tribunal had not correctly addressed the reasonable adjustment argument, breach of Section 6 duty. The EAT decided that the DDA requires a tribunal to go through the following sequential steps when considering a claim for discrimination based on a breach of Section 6.

1. Is the employer under a Section 6 duty in the first place?

2. If the employer is under a Section 6 Duty, has the employer taken such steps as are reasonable, in all the circumstances of the case, to prevent the working arrangements or features placing the disabled person at a substantial disadvantage?

3. If, and only if, the above two steps are satisfied, should a tribunal then consider the justification defence - was the employer's reason for the failure to comply with the Section 6 duty both material to the circumstances of the particular case and substantial.

In considering this three step approach, an industrial tribunal should apply an objective rather than a subjective test.The tribunal had not properly considered what steps the employer might have taken to enable Mr Morse to be kept on, or to any additional expense likely to be caused before balancing the effect of that expense against the effect of dismissal on Mr Morse.

The case was sent back to the tribunal.

Payback for back pay?

Opinion of Advocate General Leger in Belinda S Levez v T H Jennings (Harlow Pools) Limited Case C/326/96)

Advocate General Leger has cast further doubt on the validity of the two year limit on back pay recoverable by a worker in an equal pay case under Section 2 (5) of the Equal Pay Act 1970. If followed by the European Court of Justice, the opinion will affect all equal pay cases where the amount of back pay claimed is in respect of a period greater than two years before the presentation of the Industrial Tribunal complaint, and in particular, the many thousands of claims lodged by part-timers in relation to their denial of access to membership of pension schemes.

Mrs Levez started working for T H Jennings in February 1991 as a Manager of a betting shop. When she left, in March 1993, she discovered that, contrary to what her employer had previously told her, she had, up until 1992, been paid less than her male predecessor doing the same job.

She applied to the Industrial Tribunal seeking equal pay for work of equal value in September 1993. Her claim was upheld. However, because of Section 2 (5) of the Equal Pay Act 1970, her compensation was limited to salary in respect of the period going back to September 1991, and not the date she started employment. She appealed, arguing that the two year limit on back pay should be overturned as being in contravention of European Law.

It is up to individual member states to decide upon the procedural limitations in domestic legislation giving effect to rights derived from European Law. However, there are two provisos. First, any procedural limitations must be no less favourable than the procedural limitations governing similar actions under domestic law (the so called "principle of equivalence"). Secondly, the procedural requirements must not make it virtually impossible, or excessively difficult, for workers to exercise their rights conferred by European Law ("the principle of effectiveness").

Advocate General Leger concludes that the remedy sought is a claim for back pay and that the appropriate domestic claims for the purposes of comparison are claims where back pay is sought. He does not go on to say which type of claim is the appropriate comparator.

This leaves a number of possibilities. In an ordinary claim for breach of contract, the limit is six years. However, in a claim for arrears of salary arising out of discrimination in pay on account of race, there would be no limit on the extent of back pay available. Likewise, there would be no limit on a claim for back pay under the Disability Discrimination Act 1995 or in a claim for containing unlawful deductions from wages under the Employment Rights Act 1996.

The Advocate General was particularly concerned that, although the six month time limit for presentation of a claim from the date of termination of employment appears to be more favourable than, say, the time limit for a claim relating to unlawful deductions from wages, there is no discretion to extend that time limit. The Advocate General concludes that, taking the two year back pay limit and the lack of a discretion to extend the time limit for bringing the claim together, the principle of "equivalence" is breached.

In relation to the "effectiveness principle", Advocate General Leger finds that, at first sight, there is no objection to the setting of a reasonable limit on the period in respect of which arrears may be claimed. However, he places great weight on the fact that Mrs Levez was effectively deceived by her employer in not being told of the rate of pay of her predecessor. The objective of providing legal certainty could not therefore justify the two year limit in Mrs Levez' case. He concludes that, as there is no power to extend that limit, the two year limit will make it virtually impossible or excessively difficult to enforce European Law rights.

Although the Advocate General does not go so far as to condemn outright the two year limit on back pay contained in Section 2 (5) of the Act, he casts serious doubts as to whether the limit should be applied by Courts in the UK.

Where equal pay case negotiations are currently taking place, we recommend that the vulnerability of the two year limit be taken into account and used to increase amounts of back pay to workers.

Legislating for Fairness at Work

Fairness at Work White Paper, DTI May 1998 (Cm 3968)

This article looks at the proposed changes to individual employment rights. The following article focuses on collective issues, including industrial action, protection and representation for individual trade union members and the controversial provisions on trade union recognition.

Next month we shall focus on family friendly policies.

THE "THIRD WAY"?

The White Paper has a personal foreward from the Prime Minister. He emphasises that even after the proposals in the White Paper are implemented, "Britain will have the most lightly regulated labour market of any leading economy in the world". The proposals are designed to "put a very minimum infrastructure of decency and fairness around people in the workplace".

This is the "third way" advocated by Tony Blair: steering a path between deregulation and employment protection. It centres on "the belief that fairness at work and competitiveness go hand in hand" (paragraph 1.11). It appears that this approach is now rejected by the new President of the CBI who derided the third way and spoke of "pest control" to deal with unions. This attitude proves that fairness cannot be left to voluntary measures by employers: legislation is necessary.

LAST WORD BEFORE THE ELECTION

The Government stresses that once Fairness at Work becomes law it does not envisage any further employment rights legislation. It emphasises the other measures already taken or proposed (for example on minimum wage, whistleblowers, tribunal procedures and implementation of European measures).

But we must assume that measures omitted from this legislation will not appear elsewhere before the next election. Royal Assent is not expected before next summer.

WIDER PROTECTION

We have reported frequently on the issue of employment status and employment rights (most recently Carmichael v National Power - issue 23). Labour has shown a positive approach, ensuring wider protection by adopting a broad definition of "worker" in the proposed legislation on the minimum wage and working time. It now proposes to extend this approach to other rights at work. This is an extremely welcome and progressive proposal.

UNFAIR DISMISSAL: QUALIFYING PERIODS AND LIMITS

The qualifying period on unfair dismissal will be reduced from 2 years to one year. This is a welcome development, no doubt influenced by the European Court case of Seymour-Smith where the Advocate General is due to give his Opinion on 14 July. But one year is still too long and if the implementation is not brought forward before the rest of the legislation, there will still be indirect discrimination claims by those who have lost out in the meantime.

The abolition of the maximum compensatory award for unfair dismissal deserves sustained applause. The Government should have accompanied this by abolishing the maximum limit on a "week's pay" which determines basic award and statutory redundancy pay.

It has not done so, but proposes instead to uprate this and other maxima. It is unlikely that this uprating will fully match the levels of inflation since the limits were first introduced. This will mean that subsequent index-linking will not remedy the injustice.

The Government should also address the proper calculation of compensation, by removing the unfairness caused by deducting payments in full even where loss has been reduced by a percentage (Digital Equipment v Clements - see issue 19).

Critically, the Government should remove the test which says that a dismissal is only unfair if it is outside "the range of reasonable responses of a reasonable employer". This case-law test has undermined the original purpose of the legislation.

FIXED TERM CONTRACTS

Fixed term contracts lead to unfairness and abuses (see Kelly-Phillips v BBC- issue 21). The

Government recognises that workers are often obliged to accept fixed term contracts for open-ended jobs, often successively renewed over long periods of time.

In a welcome move, the Government proposes to prevent workers on fixed term contracts giving up their rights to claim unfair dismissal when the contract comes to an end. They may still sign away rights to redundancy payments.

ZERO HOURS

Labour's manifesto promised to deal with the issue of zero-hours contracts. The Government has been persuaded that it needs to "retain the flexibility that those contracts offer business". It considers that the National Minimum Wage and Working Time Directive provide important protection, but seeks views on whether further action is necessary to prevent potential abuses.

WHAT IS MISSING?

Disappointingly, there is nothing in the proposals which deals with an issue critical to fairness at work: workplace bullying. Current legislation does not provide adequate protection. A positive right to dignity at work is required, backed up by enforcement mechanisms which allow the issue to be resolved in the workplace.

There are no proposals to extend the coverage of discrimination legislation. In particular, there is no mention of employment rights for lesbians and gay men. Recent pronouncements from the Home Office give cause for concern on this issue and the outcome of the Grant case (see issue 20) highlights the need for urgent action.

Beyond recognition

Fairness at Work White Paper, DTI May 1998 (Cm 3968)

In this article we highlight the key features of the Government's proposals on trade union recognition and other aspects of collective representation at work. We shall be submitting a formal response to the proposals.

THE STATUTORY RECOGNITION PROCEDURE

It is the proposals on recognition which have attracted most interest. The Government wants the starting point to be voluntary agreements between unions and employers. Where an employer fails to give a positive response to a request for recognition within 14 days the union can activate the statutory procedure.

The procedure is to be administered and enforced by "a re-structured and reinforced" Central Arbitration Committee ('CAC').

MULTI-UNION CLAIMS AND INTER-UNION DISPUTES

The CAC will not deal with an application where another union is already recognised for the bargaining unit, nor where two or more unions make competing claims for recognition covering all or part of the same workforce. Any such disputes must be sorted out by the unions before an application is made.

The procedure will allow two or more unions to make joint applications and all the references below to support and majorities apply to the combined strength of the unions submitting the claim.

REASONABLE SUPPORT

The CAC must first determine whether the union has "reasonable support" among the employees for whom it is seeking recognition.

The Government will issue guidance for the CAC on how reasonable support should be defined. Membership records or a petition may be evidence of support.

BARGAINING UNIT

The union's request for recognition must set out its proposed bargaining unit. If this is not agreed by the employer, the CAC will determine the appropriate bargaining unit. In doing so, the CAC must take particular account of the bargaining unit's compatibility with the need for effective management as well as:

- Views of employer and union
- Existing bargaining arrangements
- Avoiding small fragmented bargaining units

- Characteristics of employees within and outside the unit
- Location of employees
- The union must demonstrate reasonable support in the bargaining unit chosen by the CAC before the application can proceed.

MAJORITY SUPPORT

If the employer does not accept that the union has majority support in the bargaining unit, there are two ways this can be determined.

MAJORITY MEMBERSHIP

If the CAC is satisfied that more than 50% of the bargaining unit are members of the union, this automatically counts as majority support. There is no need for a ballot. This is a significant improvement on the legislation in the USA where ballots are required in all cases.

BALLOTS

Where membership does not exceed 50%, there must be a ballot, conducted by an independent scrutineer. This may be at the workplace, unless there is a risk of interference in which case a postal ballot is required. Interestingly, under US legislation postal ballots have resulted in more success for unions seeking recognition than workplace ballots. This is because of the extent to which US employers can "persuade" workers to vote against recognition.

To avoid the pitfalls of the 1975 legislation, the employer will be under a legal duty to co-operate with the ballot and to supply lists of names and addresses. The cost of the ballot will be shared equally between the employer and the union.

Recognition will only be granted where a majority of those voting and 40% of those entitled to vote have supported recognition.

Suppose, in a bargaining unit of 100 there is a ballot for recognition. 80 people vote. 41 vote in favour and 39 against. There is support from a majority of those voting and 40% of those entitled to vote. Recognition is granted.

Where membership does not exceed 50%, there must be a ballot.

In contrast, if there had been a turnout of 50 people, with 39 voting in favour and 11 against, although the union had secured support from 78% of those voting, it would be denied recognition as its support was less than 40% of the total electorate.

This has caused understandable resentment and concern. It is a far stiffer test than that faced by politicians seeking election and a glaring anomaly when compared with the 24.6% of the electorate who voted "yes" in the referendum which will lead to a Mayor for London.

The 40% requirement is to be reviewed after two years if it is unworkable. It will be. There are unlikely to be many (if any) ballots under the procedure. Unions will rely instead on the test of majority membership.

SMALL EMPLOYERS

Workers in firms with fewer than 20 employees are to be denied the right to recognition. This is arbitrary and unfair.

The Government is rightly proposing to abolish the 20 redundancy threshold for consultation rights as it recognises that employers organise their businesses in a way to avoid their legal obligations: the same applies to recognition.

Workers in small firms are often more vulnerable and in need of protection and advice. A disproportionate number of workers in small firms are women. Statistics show that recognition raises wage levels, so the 20 employee threshold is discriminatory and may be open to legal challenge.

CONSEQUENCES OF RECOGNITION

Where recognition is granted, the union and employer must reach a procedure agreement. If this is not achieved within three months, the union may apply to the CAC for a legally binding procedure agreement based on a standard model. This is a radical departure from the presumption of collective agreements which are not legally binding.

Recognition will cover pay, hours and holidays, plus any other issues which the union and employer agree to include. The Government is considering whether training should also be included.

Employees covered by collective agreements will still be able to agree different individual terms and conditions.

DERECOGNITION

The White Paper says "there will be a broadly similar procedure" for resolving disputes

where an employer seeks to derecognise the union because he believes the majority of the bargaining unit no longer supports recognition. The Government does not specify the test or procedure.

The legislation must place strict tests on the circumstances in which this procedure can be activated otherwise employers will seek to initiate ballots which are costly and de-stabilise industrial relations in the hope of undermining the union.

NEW APPLICATIONS AND CHANGES

The legislation will not permit unions to apply for recognition covering substantially the same group of workers within three years of a previous unsuccessful application. Employers will not be allowed to apply for derecognition within three years of a recognition declaration or an unsuccessful derecognition attempt.

If there is a change in the bargaining unit, either the union or the employer may apply to the CAC to determine the appropriate bargaining unit. This may lead to further ballots. The legislation must be drawn tightly to prevent employers gerrymandering to undermine existing bargaining arrangements.

- Timetable and enforcement
- Union requests recognition
- Employer has 14 days to respond
- If employer willing to negotiate, has 28 days
- If no agreement, union applies to CAC
- CAC decides whether to proceed (reasonable support, inter-union etc)
- CAC tries to broker agreement, allowing 28 days
- No agreement, CAC decides bargaining unit within 7 days
- CAC determines if majority membership
- If not, ballot to be carried out within 21 days
- Declaration of recognition
- Three months to reach procedure agreement
- No agreement, apply to CAC
- CAC attempts to broker agreement, if not imposes one

If the procedure is legally binding, the union or employer can apply to court for an order requiring that the procedure be followed and for contempt of court if this is disobeyed.

If either party considers the other is not honouring an agreement which is not legally binding, it may apply to the CAC which may impose a legally binding agreement. There does not appear to be any means of appeal against the CAC's decision on any issue, which is likely to mean its decisions are susceptible to judicial review.

PROTECTION AND ACCESS

Employees who campaign for (or against!) recognition will be protected against detriment or dismissal. Trade unions will have reasonable access to employees "during the campaign": which leaves open the question of access in order to achieve "reasonable support".

INDIVIDUAL REPRESENTATION

In an extremely welcome step, workers will have a legal right "to be accompanied by a fellow employee or trade union representative of their choice during grievance and disciplinary procedures". This clearly allows representation by officials employed by the union. Ministers have made clear that this is a right of representation, not merely attendance.

PROTECTING UNION MEMBERS AND ACTIVISTS

The pernicious House of Lords decision in Wilson and Palmer will be partially reversed by outlawing discrimination by omission on grounds of trade union membership, non-membership or activities. More is needed to correct the deficiencies of this law. Blacklisting of trade union members will be prohibited.

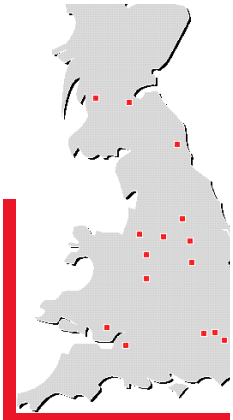
INDUSTRIAL ACTION

Employees who are dismissed for taking part in official industrial action supported by a ballot will be allowed to pursue claims for unfair dismissal. The White Paper says that the Tribunal would not get involved in the merits of the dispute, but would have to decide "whether the employer had acted fairly and reasonably taking into account all the circumstances of the case". This aspect of the legislation will need particularly careful drafting and the Government recognises there are issues on the tests to be applied and the level of compensation.

Unions will no longer be forced to disclose names of individuals to be balloted or called upon to take part in industrial action, only to identify the group or category of employees. The law and Code of Practice on industrial action ballots are to be simplified, although there are no specific proposals yet.

....and finally
the CROTUM gets the sack.

Single parents and shift work



London Underground Limited v Edwards (No.2)Court of Appeal 21 May 1998

The Court of Appeal has held that London Underground indirectly discriminated against Susan Edwards, a single parent with a young child, when it introduced a shift system which made it impossible for her to continue in her employment and care for her children. In LELR No. 10 we reported the decision of the Employment Appeal Tribunal in this case.

Susan Edwards worked for London Underground since 1983. She qualified as a train driver in 1987, her baby was born in the same year.

She was able, by swapping shifts with colleagues, to organise for herself a shift pattern in which she could accommodate her domestic and childcare arrangements. In 1991, London Underground had a re-organisation which involved a new shift work system.

The tribunal found as a fact that it was necessary for Susan to work during the day because she had sole care of her child and that under the new system it would have been more difficult for her to arrange any exchange of shifts. This would mean that she would have to work longer hours than previously. She was presented with the alternative of either signing an acceptance of the new roster or facing dismissal.

Susan Edwards' case proves how difficult it is to bring a claim of indirect sex discrimination and succeed. The woman affected, first of all has to prove that her employer applied a "requirement or condition" which applied equally to a man. Susan Edwards complained of discrimination in the applying of a condition or requirement that made it impossible for her to continue in her employment.

The woman then has to prove that the proportion of women (or men) who can comply with the condition or requirement is considerably smaller that the proportion of men (or women) who can comply. Susan Edwards' case demonstrates that this is an evidential and statistical nightmare.

It took Susan Edwards two trips to both the Industrial Tribunal and the Employment Appeal Tribunal and one to the Court of Appeal to establish that the change in shift pattern at London Underground discriminated against her.

London Underground argued that since Ms Edwards was the only female train driver who could not comply with the new shift arrangements, the proportion of women who could comply with the arrangement was statistically 95%. The equivalent statistic for male train drivers was 100%.

This London Underground argued, was not sufficient to demonstrate that a considerably smaller proportion of women could comply with the new arrangement. Their argument ignored that fact that there were 21 female train drivers compared to over 2,000 male train drivers. The Court of Appeal confirmed that the Industrial Tribunal was entitled to look at the wider statistics of the gender pattern amongst train drivers.

The Judgment will assist in women arguing indirect sex discrimination in working patterns which are not family friendly where the appropriate pool for comparison is predominantly male. It does not assist however in areas where the workforce is predominantly female such as the health service.

Susan Edwards' case highlights the inherent difficulties in defining the relevant pool for comparison purposes and assessing the differential compliance rates required to prove disparate impact.

The Court of Appeal was not prepared to lay down a rule of thumb in relation to small percentage differences, as to what is "considerably smaller". In Susan Edwards case a 5% difference was enough. The Court of Appeal said that the IT was entitled to take into account the common knowledge of the high preponderance of single mothers having care of a child.

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