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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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CONTENTS

Tough sanctions in new consultation proposals

The European Commission is consulting unions and employers' organisations on new proposals for information and consultation of employees at national level – and is stressing the need for effective measures to ensure that employers comply with the requirements.

The proposals follow in the wake of Renault's announcement of the closure of its plant in Vilvoorde, Belgium without any prior consultation. This led to judgments against the company in the French and Belgian courts and motivated the Commission to review the effectiveness of existing European Directives and propose new measures.

Announcing the initiative Commissioner Padraig Flynn emphasised that there must be "respect of the existence of a fundamental social right of employees to be consulted in advance of any decisions likely to affect them".

The Commissioner expanded on this at a conference on "Working Life" organised by the Institute of Employment Rights on 18 July 1997. He emphasised the obligation on employers to consult in advance and to seek suitable alternatives.

He recognised that the significant weakness of the current legislation lies in its penalties. He did not propose to re-open the existing Directives. But the new proposal on information and consultation in national undertakings will contain a requirement that no proposal for restructuring can be put in place until the terms of the Directive have been complied with and that any dismissals which contravened this would be null and void.

This is an extremely welcome development. The fundamental flaw of the current legislation in the UK is that employers who dismiss or transfer employees without proper information and consultation with unions face only limited financial penalties in the form of "protective awards" to individual employees affected. These are not sufficient to deter employers from ignoring the legislative requirements.

The Commission's new proposals will give real force to the judgments of the European Court which require that sanctions for breaches of european law must be "effective, proportionate and dissuasive".

Check-off checks chucked

On 8 July 1997 Margaret Beckett announced to Parliament that the Conservatives' punitive and bureaucratic laws on union subscriptions would be scrapped. The laws, introduced in 1993, required union members to supply written authorisations every three years if they wanted their union subscriptions deducted from their wages by their employers.

As anticipated in LELR issue 11, the Government is using the procedures under the Deregulation and Contracting Out Act to repeal the measure. Ms Beckett said that the Government will consult over the summer on "the scope and content of a deregulation order" and intends to "start the parliamentary stages in the autumn and complete the repeal next year".

The Deregulation Act proclaims the aim of removing "burdens on business" and the Confederation of British Industry supports Labour's move.

The Act requires the Government to conduct preliminary consultation with interested organisations and then lay a draft order before Parliament, plus details of the burden to be removed, cost savings and benefits, the consultations undertaken and representations received and any changes made as a result.

It is a requirement that "necessary protections" must not be removed. This requirement will be satisfied by retaining the right for employees to withdraw consent for deductions at source.

Once the draft order and information has been laid before Parliament there is a 60 day period for Parliamentary consideration, including a select committee, before the legislation can be adopted.

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Pregnancy related sickness and discrimination

Handels-og Kontorfunktionaerernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service (Larrson v Fotex)
European Court of Justice 29th May 1997

Stephenson v F A Wellworth & Co Limited (Northern Ireland Court of Appeal) (DCLD 32 Summer 1997)

The European Court of Justice has once again visited the issue of when the dismissal of a woman for a pregnancy related illness will breach the Equal Treatment Directive. In Larrson v Fotex the court was asked whether the Equal Treatment Directive outlaws an ill health dismissal where the ill health is pregnancy related, arose during pregnancy and continued during the maternity leave, but where the dismissal takes place after the end of maternity leave.

The ECJ had previously ruled (in Hertz [1991] IRLR 31) that the dismissal for a pregnancy related illness, where the illness did not arise until after the end of Ms Hertz's maternity leave and successful return to work, was not a breach of the Equal Treatment Directive.

The ECJ has adopted the same reasoning in rejecting Ms Larrson's claim: pregnancy related ill health dismissals outside pregnancy and the maternity leave period do not automatically fall foul of the Equal Treatment Directive regardless of whether the illness started during pregnancy. Although some disorders are specific to one sex or another, the only question is whether a woman is dismissed because of sickness absence in the same circumstances as a man. If that is the case, then there is no direct discrimination on grounds of sex.

Where the dismissal is outside the pregnancy and maternity leave period, one must compare the treatment of the woman to that of a sick man. It will also always be relevant to consider the fairness of an ill health dismissal where the Applicant has more than two years service at the effective date of termination.

In Larrson, the ECJ reiterated that sickness absence during maternity leave cannot be taken into account as grounds for a subsequent dismissal. To do so would be a breach not only of the Equal Treatment Directive but also the Pregnant Workers Directive, although Ms Larrson's case arose before the implementation of the Pregnant Workers Directive.

But what of the position when dismissal for a pregnancy related illness occurs during pregnancy? There is conflicting UK case law. In Brown v Rentokil, IRLR [1995] 211 the Scottish Court of Session held that the employee's illness was the reason for her dismissal and it was not relevant that the precise reason for that illness was her pregnancy, which is capable of affecting only women. This case has been referred to the European Court of Justice.

In the meantime the Northern Ireland Court of Appeal in Stephenson v F A Wellworth & Co, rejected this reasoning and held that an illness arising out of and occurring during pregnancy is to be treated in the same way as the pregnancy itself. This is the correct approach.

Where a dismissal for a pregnancy related illness occurs during pregnancy, that dismissal is likely to be in breach of the Equal Treatment Directive, Pregnant Workers Directive, Sex Discrimination Act and Section 99 of the Employment Rights Act 1996.

Harassers: do not pass go, go straight to jail

The Protection from Harassment Act 1997 came into force on the 16 June and now victims of harassment will be able to claim damages, apply for a civil injunction to prevent it continuing or even prosecute through the criminal courts.

The Act creates a civil wrong of harassment, and this provides a new remedy for those facing harassment. Whilst the Act is primarily aimed at stalking, it will also cover those suffering harassment at the workplace on whatever grounds – sex, race, sexual orientation, disability or bullying.

The Act does recognise that certain lawful activities could be caught by its provisions and therefore provides defences where the contact was pursued for the prevention and detection of crime, or under enactment or rule of law, or where acting reasonably in the particular circumstances of the case. This "reasonableness" defence is likely to be of most relevance in employment related cases where employers seek to justify oppressive actions on the grounds of the employee's competence or conduct.

Cases can be brought in the ordinary civil courts against a harasser for damages for loss or injury suffered and for an injunction to restrain future conduct. The Act does not specifically define what sort of behaviour amounts to harassment, only that it includes a course of conduct (including speech) which is alarming or causes distress to the person on at least two occasions.

Although the harasser should, or ought to know that the behaviour in question is harassment, the test to be applied is what a reasonable person would think in possession of the same information. Applicants will have to prove their cases on the balance of probabilities. If an injunction is broken, it could result in criminal sanctions of up to 5 years imprisonment and/or an unlimited fine.

The Act recognises that harassment can be an extremely serious matter and so in addition creates a criminal offence of causing another to fear, on at least 2 occasions, that violence will be used, and the perpetrator knows or ought to know that it will cause the other to fear on each of those occasions. If a reasonable person in possession of the same information would expect fear of violence to result from the behaviour in question, then that is enough to prove the case.

The maximum penalty for this offence is 5 years imprisonment and/or an unlimited fine. The court can also make an order similar to an injunction to protect the victim and award damages for the distress caused in either civil or criminal cases.

An action must be commenced within a 6 year period, which contrasts with the shorter 3 year period for bringing personal injury actions, and sharply to the 3 month period for lodging claims with an Industrial Tribunal. The remedies provided by this Act are completely outside the scope of Industrial Tribunal proceedings and may in certain cases allow victims of workplace harassment to bring claims against individuals long after the time to bring Industrial Tribunal proceedings has passed.

There is nothing which precludes bringing an Industrial Tribunal claim against the employer (within time limits) and at the same time seeking damages and/or an injunction under the Act against the perpetrator.

The Act goes further than the provisions of the Public Order Act 1984 as amended by the Criminal Justice and Public Order Act 1994 which made intentional harassment a criminal offence. The big difference is that it is necessary to prove that the harasser intended to harass, whereas under the new Act the test is wider by looking at the behaviour through the eyes of the reasonable person. It also means that victims can, instead of relying solely on the criminal law to protect them, take their own civil action without having to wait for Police intervention.

Extending the working time directive

The European Commission is consulting on proposals to extend the Working Time Directive to transport workers and junior doctors. Comments must be sent to the Commission by 31 October 1997.

The Working Time Directive was adopted in 1993 and came into force at European level on 23 November 1996. The Conservatives unsuccessfully challenged the Directive at the European Court of Justice and failed to implement its provisions. Labour will soon be publishing its proposals for implementation.

The original Directive applies to "all sectors of activity" except "air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training". The Commission estimates that this excludes 5.6 million european workers from the scope of the Directive. The precise number affected by the exclusion depends whether one accepts the Conservatives' controversial assertion that all workers in those sectors are excluded from the Directive, whatever their jobs. On the Tory interpretation, employees in shops at airports would not be protected by the Directive because they were employed in the transport sector. This is absurd.

The Commission proposes "a differentiated approach", which would distinguish between rights given to non-mobile workers and rights given to mobile and offshore workers.

Under this approach, all non-mobile workers would be covered by all the provisions of the Directive concerning breaks, rest periods, holidays, maximum weekly working time, night working and adapting work to the worker. The legislation would allow for flexibility to take account of the need for continuity of service and operational requirements.

Provisions on paid leave, health assessments for night workers, guaranteed adequate rest and a maximum number of annual working hours would apply to all mobile and off-shore workers. There would be specific legislation concerning working time and rest periods for each sector or activity.

It is entirely right that workers in these sectors should be protected against excessive hours and inadequate rest, particularly when one takes into account the health and safety of the workers themselves and the travelling public.

One can but endorse the view of the European Commissioner, Padraig Flynn, that "it is very difficult to believe that firms who have to rely on employees working excessively long hours can be good for the global economy. Minimum standards regarding the protection of health and safety of employees are a key element in the search for improved competitiveness. This is good for employment in the long-term."

The Treaty of Amsterdam

The Amsterdam European Council of 16-17 June 1997 raised some hopes for the future of labour law in the EC and the UK. A new Title on Employment was introduced into the EC Treaty.

This means labour market policy aimed at tackling unemployment moves from political declarations to a concrete legal framework. In addition, some important changes are likely to impact on the future EC law on sex equality (dealt with in the next issue of LELR).

The best-known outcome was a result of the new Labour government in the UK. The "social chapter" (the Protocol on Social Policy to the Maastricht Treaty, and the Agreement annexed to it) was integrated into the EC Treaty. It replaces the former Articles 117-122 with new provisions. It will take effect when the Amsterdam Treaty is ratified by all the Member States.

The Conclusions of the Amsterdam Council noted "with great satisfaction the willingness of the United Kingdom to accept the Directives which have already been agreed under the Agreement and those which may be adopted before the entry into force of the new Treaty". The legal means of achieving this, however, were not specified.

Apart from ending the UK opt-out by integration of the "social chapter", however, the Amsterdam Treaty introduced some changes, in particular, to the "social chapter", with potential consequences for the future of EC and UK labour law.

UK Presidency: January 1998

The UK assumes the Presidency of the European Council for the six months beginning 1 January 1998, including formal responsibility for the EC labour law and social policy agenda under the "social chapter". The other Member States were prepared to simply ignore the UK opt-out and declared "that the United Kingdom will now be invited to express its views in discussions on acts to be adopted on the basis of the said Protocol".

This is legally risky. It is uncertain whether the UK's vote could count towards a majority decision, for example, approving or rejecting a proposal brought under the "social chapter" before the Amsterdam changes are ratified. There may be a question of procedural propriety if the UK speaks in the discussion under the opt-out provisions, even if it does not vote.

Nevertheless, by clearing the way for the UK Presidency to act, an opportunity exists for the new Labour government to set the EC agenda on labour law and social policy for the first half of 1998.

Social Charters

The new Article 117 of the EC Treaty (formerly Article 1 of the Maastricht Agreement) sets out the social policy objectives of the Community and the Member States agreed at Maastricht. But it adds "having in mind fundamental social rights". Two sources of such rights are specified in the new Article 117.

First, the Social Charter of the Council of Europe (1961) is the "social rights" equivalent (e.g. right to organise, right to bargain collectively) of the European Convention on Human Rights, which the present Labour government is committed to introducing into UK domestic law. The question must now be: why not also the 1961 Social Charter?

Second, the Community Charter of the Fundamental Social Rights of Workers (1989), previously rejected by the former UK Conservative government, which included fair remuneration, adequate social protection and freedom of association and collective bargaining.

These instruments are now reference points for labour law and policy in both the Community and the Member States. But there are a number of potential difficulties. Does "having in mind" mean that the law of the EC and the Member States should conform to these Charters? Must the European Court of Justice have the Charters in mind in interpreting EC law (even when the two instruments are not always precisely in agreement)?

In the case of the 1961 Charter, the situation could become complicated because ratifying States may select only some of its 19 articles and 72 paragraphs. That Charter also has a 1991 amending Protocol and a 1994 Collective Complaints Protocol. It has been given sometimes generous interpretation by the Committee of Independent Experts responsible for its application. How will all this material influence EC labour law?

Nonetheless, the reference in an EC Treaty Article to the Social Charters reinforces fundamental social rights in EC law. Article 117 is stronger than a mere mention in the

Preamble to the Treaty on European Union (which the Amsterdam Treaty reinstated after they had been dropped from even this lowly status by the Maastricht Treaty). They may even have acquired more status than the better known European Convention on Human Rights, explicitly referred to in Article F of the Maastricht Treaty, but not subject to the jurisdiction of the ECJ (though possibly an interpretative aid).

Non-regression

Article 117 of the EC Treaty specified social policy objectives and explicitly included a "non-regression" clause. The EC aimed to "promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained".

Ominously, the "social chapter" of the Maastricht Treaty failed to include this "non-regression" clause. This created the ugly possibility of some Member States using economic and monetary integration to justify regressive social policy. The Amsterdam Treaty's new Article 117 re-incorporates the non-regression clause – a positive signal.

The European Parliament

The Maastricht Agreement empowered the Council of Ministers to adopt directives in new areas of labour law and social policy, either by majority vote or unanimity, using the "co-operation procedure" (Article 189c of the EC Treaty). This enabled the European Parliament to propose amendments, which the Council could either adopt by qualified majority (if the Commission agreed) or by unanimity (if the Commission objected). The Council could reject Parliament's amendments, but only by unanimous vote.

The new Article 118 changes the procedure: the Council is now to "act in accordance with the procedure referred to in Article 189b...". This is the new "co-decision" procedure. If the Council does not agree to Parliament's amendments, conciliation is attempted to agree a joint text. If agreed, Parliament must approve, and then the Council can approve it by qualified majority. But if no text is agreed, Parliament can block the measure.

This change means that the European Parliament will have a much more important role in determining the content of EC labour law in the future. Commission proposals and Council decisions will have to take into account the wishes of Parliament, on pain of a possible veto.

Implementation of EU agreements

Article 4(2) of the Maastricht Agreement (now the new Article 118b(2) of the EC Treaty) appears to impose obligations on "management and labour and the Member States" by requiring that collective agreements concluded at EU level "shall be implemented". However, when this was agreed in 1991, the Member States attached to this provision a Declaration which explicitly renounced any: "obligation to apply the agreements directly, or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation".

This Declaration, by disowning any obligation on Member States, appeared to strip the Article of much of its potential, and was hotly disputed. The Commission took the view that the Article "is subject to the... declaration", while the Economic and Social Committee contested its legal status.

Happily, the Amsterdam Treaty has now clarified the position. It attaches the identical Declaration, in italics, to the new Article 118b(4), but the front page of the Treaty states clearly that "Declarations to the Final Act are in italics, in order to distinguish them from legally-binding Treaty texts". The implication is that the Member States do have an obligation to implement EU collective agreements; their disclaimer has no legally binding effect.

The right of association and collective bargaining

New Article 118c of the EC Treaty agreed in Amsterdam sets out the tasks of the European Commission in the labour law field: "[to] encourage co-operation between the Member States and facilitate the co-ordination of their action in all social policy fields under this chapter, particularly in matters relating to... the right of association and collective bargaining between employers and workers".

The equivalent Article 5 of the "social chapter" agreed at Maastricht previously specified tasks "in all the social policy fields under this Agreement". However, despite this broad wording, it was seen as a potentially backward step.

This was partly because Article 2(6) of the same "social chapter" explicitly stated that "The provisions of this Article shall not apply to... the right of association, the right to strike or the right to impose lock-outs". This was seen by some as excluding the Commission from taking initiatives in these areas.

By its explicit reference to, indeed, emphasis on the right of association and collective bargaining, the new Article 118c raises a question mark over whether the scope of Article 2(6) of the former "social chapter", although retained in Article 118(6), has been narrowed. It does not now seem arguable that it can limit Commission initiatives related to the rights of association and collective bargaining under new Articles 188a and 118b of the EC Treaty.

These allow for labour and management to reach agreements at EU level which "shall be implemented". The new wording of Article 118c is significant in not only taking the brakes off Commission initiatives in this area, but encouraging them particularly in such matters. The Commission should follow the example of the European Parliament, which is considering own-initiative proposals on trade union rights. Such initiatives may influence the current UK debate over union recognition, industrial action, and other trade union rights.

TUPE: Changes in Contracts

Wilson & others v St Helens BC
Meade and other v British Fuels Limited
(Court of Appeal 10 July 1997, unreported)

The transfer of undertakings legislation (TUPE) is designed to protect the rights of employees when a business changes hands. This includes situations where the provision of services is contracted out.

It is often said that TUPE preserves those rights at day one. Workers are entitled to ask – how long does this protection last and can the employer make adverse changes to the contract after the transfer?

The answer is – as with many legal queries – "it depends". The Employment Appeal Tribunal (EAT) in Wilson said that a change in contract, where the reason for the change was the transfer, was ineffective and unenforceable, even where the employees agree or carry on working without protest.

A different EAT tried to get round this in Meade. These contradictory conclusions led to appeals to the Court of Appeal which has taken a different approach to that taken by the EAT in both cases.

The Court of Appeal accepts that, if there is no dismissal and employees therefore transfer from one employer to another, an employer cannot change terms and conditions (even by agreement) where the reason for the change is the transfer itself. This part of the EAT decisions in Wilson and Meade remains.

However both cases had a particular feature: when the transfers occurred the employers did not think that TUPE applied. The employers in both cases dismissed employees and paid redundancy, the employees were then re-engaged by the new employer.

The Court of Appeal had to decide whether that dismissal was effective: did it bring to an end the contract with the previous employer or was the dismissal of no effect because TUPE meant that contracts automatically transferred to the new employer?

The Court of Appeal's answered "it depends". It depends on whether the dismissal by the old employer before the transfer was because of the transfer or because of "an economic, technical or organisational reason entailing changes in the workforce" (an "ETO reason" TUPE, Regulation 8(2)).

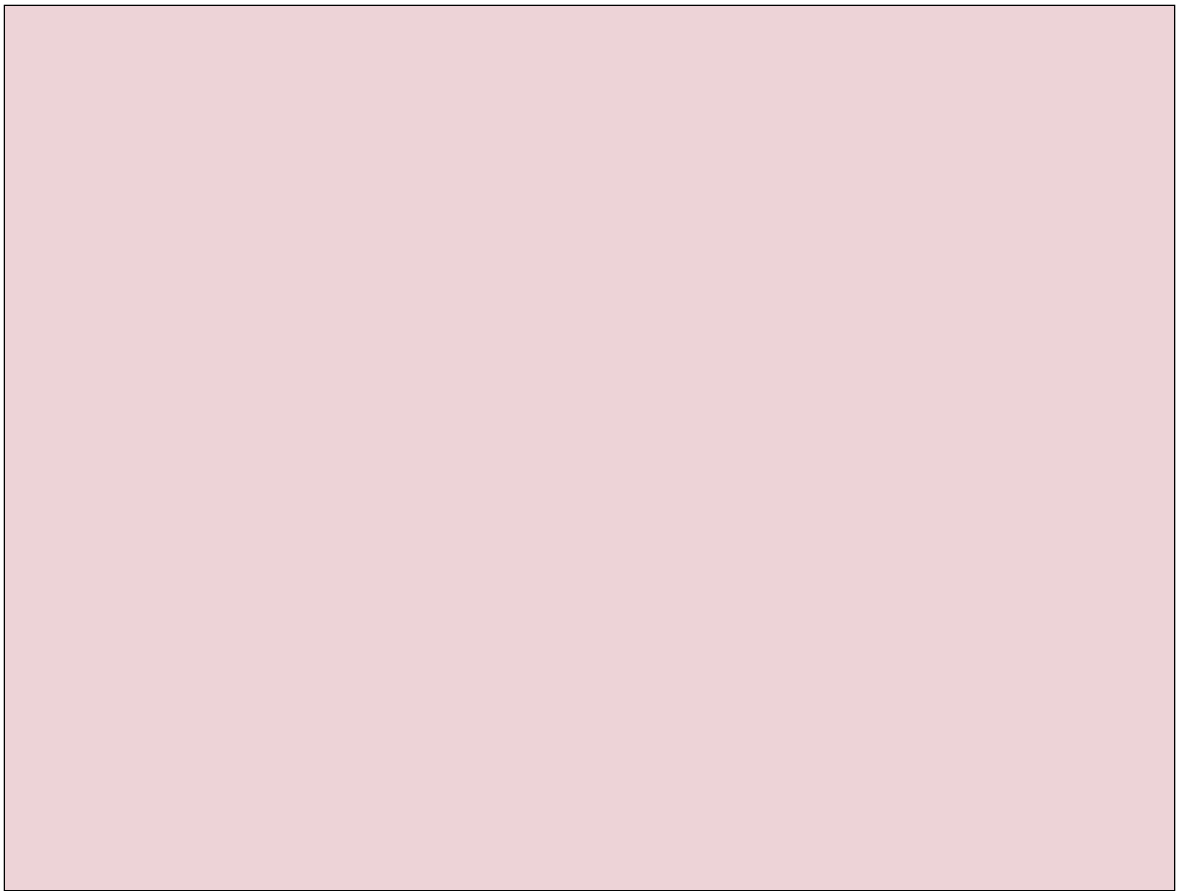
The Appeal Court decided that if the dismissal was "solely" because of the transfer of the business, then any dismissal is not only automatically unfair it is also ineffective, because of Litster v Forth Dry Dock [1990] AC 546. This means the employee remains employed on the old terms and conditions which transfer to the new employer.

This is what happened for Mr Meade and his colleague employed by British Fuels. This leaves unanswered questions, not least that Regulation 8 of TUPE provides that a transfer-related dismissal is automatically unfair. This presupposes that the dismissal is effective: there can be no unfair dismissal if the dismissal has no effect.

The Appeal Court reached a different decision in the case pursued by Mr Wilson and his colleagues. In that case, members of staff employed by the old employer were either redeployed or were made redundant. Some were offered and accepted jobs with worse terms and conditions with the new employer: this last group are the employees with whom the case is concerned.

The Industrial Tribunal appeared to say that their contracts were transferred, but because the employers could have dismissed them for an ETO reason, they were entitled to make changes to the contract. This was rejected by the EAT.

The Appeal Court arrived at an unfavourable decision for employees, but by a different route. This approach depended on the Court's finding that the home for boys in the St Helens case could not have continued without cuts in staff and pay, whoever was running it. This meant that the dismissals and offers of new jobs were for an ETO reason.



The Court of Appeal went on to say that, although a dismissal before the transfer (where the reason was the transfer) was invalid, a dismissal where there was an ETO reason was not. This means that where an employer dismisses for an ETO reason before a transfer, the dismissal is valid and the employee's contract does not transfer to the new employer. The employee is left only with a claim for unfair dismissal: she or he cannot claim a continuing entitlement to the old terms of contract.

What are the implications? Remember that these cases both arose when employers and employees did not appreciate that TUPE may apply, so notice of dismissal was given and redundancy payments made. In most recent instances, employers will have accepted that TUPE applies, so no dismissal will have taken place. This means that the new employer cannot change terms and conditions, even by agreement, where the reason for the change is the transfer itself.

More problems may arise in future where employers try to avoid existing contractual rights by dismissing employees at the point of transfer and the new employer employs them on worse terms and conditions. This will only help employers if the dismissal and re-engagement are for an ETO "entailing changes in the workforce". If it is only a change in terms for existing staff, with no changes in the workforce, it is automatically unfair (see Berriman v Delabole Slate [1985] IRLR 305) and invalid, so liability for existing contracts will pass to the new employer on the same terms and conditions.

There is a risk that employers will use this decision in an attempt to get round TUPE. There will be pressure on employers to dismiss everyone before transfer so the new employer can take on existing staff on new terms. This is unlikely to work.

First, the dismissal must be for a genuine "ETO". Secondly, it must be before the transfer. Thirdly, the existing employer (be it public sector or contractor) must pay out redundancy payments to all staff affected; payments they will not get back, whatever the outcome of the case.

This is a financial burden employers will be keen to avoid if they are trying to save money by putting a contract out to tender, particularly where redundancy payments above statutory levels apply – for example in local government.

The case may well go further. In the meantime, employers would be wrong to assume that they can avoid TUPE in all cases by the simple expedient of dismissal and re-employment. This is likely to expose both old and new employers to potential claims.

It remains the case that changes introduced because of the transfer are invalid. Only dismissals, or agreed changes which would have occurred even if the transfer had not taken place, should fall outside the protection of TUPE.

Disabling decisions

R M O'Neill v Symm & Company Limited (2700054/97 11/6/97) (Unreported) Industrial Tribunal

Hopkins v ERF Manchester Limited (2400863/97 28/4/92) (DCLD 32 Summer 97) Industrial Tribunal

Schanz v Herefordshire Community NHS Trust settlement

The employment provisions of the Disability Discrimination Act 1995 have been in force since 2 December 1997: How is the case law developing?

Not very quickly. So far we have come across only two Industrial Tribunal decisions, both of which were unsuccessful, and a widely reported settlement of £16,000. Many of the Tribunal regions appear to have adopted a policy of holding a preliminary hearing to establish whether the Applicant is disabled within the meaning of the Act.

This may account for the lack of case law so far. Over 300 cases have already been issued nationwide under the DDA.

O'Neill is a very significant Industrial Tribunal decision because, although the Applicant did not succeed, the Industrial Tribunal found that ME (Mialgic Encephalomyelitis) or Chronic Fatigue Syndrome or Post Viral Syndrome, not only exists but amounted to a disability in this case. The IT heard evidence from two ME Specialists and had the written report of Ms O'Neill's GP confirming the diagnosis. The IT found that Ms O'Neill was dismissed after three months for sickness absences. But they also found that, as her employer did not know that she was disabled, they could not have discriminated against her. The dismissal, they said, was related to the absences, not the fact that the Applicant was absent with a disability. It will be for the Employment Appeal Tribunal to decide whether this is a false distinction.

It is also debateable whether an employer's state of knowledge about an employee's disability is relevant. As in sex discrimination cases, if the Tribunal finds that the Applicant is disabled, and that employee has been treated less favourably than non-disabled staff, should it matter whether or not the employer knew that the employee's condition amounted to a disability under the Act?

In O'Neill's case the employer did not know that she had ME. If they had known, but had not appreciated that it was a disability under the DDA, then they may not have had a defence.

If this decision is upheld or followed in other cases it may encourage employers to adopt a position of wilful ignorance of the condition of their workforce. It may also place employees in a dilemma: do they disclose they have a disability?

In Hopkins the applicant suffered from rheumatoid arthritis. His treatment meant he needed an apprentice to complete jobs. He was dismissed with less than two years service as the company wanted to save costs. Mr Hopkins was selected because he was inefficient due to his incapability.

He failed to establish in the IT that his condition amounted to a disability under the Act. The tribunal found that although the condition was adverse, its effect was not substantial.

Hopkins represented himself and did not bring expert medical evidence to the tribunal. The burden of proving disability falls upon the Applicant and Hopkins underlines the importance of bringing sufficient evidence to the Tribunal to establish the disability.

More encouragingly, other cases are succeeding through negotiated settlement of Tribunal proceedings. In another ME case, supported by MSF, Alison Schanz received a £16,000 out of court settlement from Herefordshire Community NHS Trust. She was dismissed after a ten month absence, but at a time when her doctors had certified her fit for a gradual return to work. Her case was brought by the Thompsons Birmingham office.

The Schanz case should be a welcome reminder to employers that, whatever its shortcomings, the DDA can lead to awards of substantial damages.

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