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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Things can only get better

Welcome to our first edition since Labour's victory in the general election. In this article we focus on legal changes which follow from Labour's manifesto pledges and in future issues we shall highlight in more detail areas of likely law reform.

GCHQ and the minimum wage: Two momentous decisions have already been taken: the restoration of trade union rights at GCHQ and legislation in the Queen's Speech to enable a national minimum wage. These commitments are so long standing, it is easy to overlook their importance, but no-one should diminish the significance, both symbolic and substantive, of these two measures.

Both represent an affirmation of the rights of unions and working people, a recognition of basic standards and a major victory for the trade union movement.

New laws on consultation: The Labour Government has taken another significant step. In our first edition last year we reported the High Court decision rejecting the challenge to the Conservatives' regulations covering consultation on redundancies and transfers. GMB, NASUWT and UNISON took the case to the Court of Appeal. It was due to be heard on 2 June 1997, but the Minister has now agreed to review the legislation and the case has been adjourned while that review takes place.

Working Time and Young Workers: Labour must also legislate to implement the Working Time Directive. The Tories presided over a fiasco.

Their Consultation Paper on proposed legislation to implement the Working Time Directive showed no intention to implement in accordance with European law. Similar considerations apply to the Young Workers' Directive, analysed in this issue.

Social Chapter: Labour will sign up to the European Union Social Protocol and Agreement. This means that, after a transitional period, the Works Council and Parental Leave Directives must be implemented as laws in the UK. A new agreement and Directive on Part-Time Workers is expected shortly.

Human Rights: The Queen's Speech contained a commitment to incorporate into our law the European Convention on Human Rights. This includes such fundamental rights as freedom of peaceful assembly, freedom of association and the right to join trade unions. One must remember that these international standards allow for some restrictions and are open to interpretation (for example they have been held to enshrine a right not to join a trade union), but they will provide a measure against which existing and new legislation can be measured in the courts.

An Employment Bill - but not yet: We cannot now expect primary legislation on individual and collective employment rights until late 1998. This will include Labour's commitments on trade union recognition and on individual rights to fairness at work.

This encompasses specific commitments to recognition when the majority of the relevant workforce vote in favour which will give a right to collective bargaining on pay, hours, holidays and training. There is a commitment to unfair dismissal rights for sacked strikers and a right for trade union members not to suffer discrimination.

On individual rights, Labour is committed to tackling bogus self-employment and zero-hours contracts and combatting age discrimination. This will be part of an overall framework of fair rights at work.

In the interim, until the Employment Bill emerges, there are many beneficial changes which can be made

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THOMPSONS SOLICITORS

Pension rights following business transfers

Adams & Others v Lancashire County Council & Another [Court of Appeal, 15 May 1997]

The Court of Appeal has ruled that pension fund members do not accrue pension rights for future service, following the transfer of an undertaking. The ruling reveals a gaping hole in the legislation.

Adams concerned school meals staff employed by Lancashire County Council. The school meals service was put out to tender and the contract was awarded to BET Catering Services Limited.

It was accepted on all sides that the transfer of the catering contract was a business transfer and the TUPE Regulations applied. As a result the staff remained on the same terms and condition of employment as before, with the exception of their pension rights.

In all but the rarest of circumstances, an employee is not able to remain a member of the former employer's occupational pension scheme following the transfer of the undertaking to the other employer. Inland Revenue restrictions prevent continuing membership as the employees concerned will only have access to the new employers pension scheme (if there is one).

The pension already earned in the old employer's pension scheme will be frozen. That much is uncontroversial. The controversy concerns the right to earn further pension benefits for future service.

The TUPE Regulations and its parent, the Acquired Rights Directive, contain an exception to the general rule that employment rights continue after a business transfer on the same basis as before. The exception is pension rights.

The Adams case concerned the extent of this exception. The staff, supported by their unions, UNISON and GMB, argued that the exception related only to the pension rights already earned up to the point of transfer. It was argued that the terms of employment relating to future pension rights were protected after the transfer as they had been before. The new employer had to offer a "broadly comparable" pension scheme for the staff who transferred.

The Court of Appeal disagreed and said domestic or European legislation does not require the transferee to offer a "broadly comparable" pension scheme for the future.

This appears to leave a gaping hole in the protection offered to pension scheme members if the business for which they work is transferred to another employer. The intention which lies behind the Directive is clearly to protect employees in this situation. But according to the appeal court this protection does not extend to pension rights which, in many cases, constitute a significant part of the remuneration package which led the employees to take the job in the first place.

However, the Conservative Government's Legal Advisers said in 1990, that transferred employees who were not offered broadly comparable pension benefits, following a business transfer would be entitled to treat themselves as constructively dismissed and claim compensation for unfair dismissal.

This view has subsequently been repeated in advice given by the Attorney-General and Lord Advocate to all Government Departments and it has been repeated in the Government Guide to Market Testing. The result is that most public sector tendering exercises now require prospective purchasers to offer broadly comparable pensions to transferring employees.

This view was not revised by the Government Law Officers following the earlier decision of the High Court in the Adams case and it has not yet been tested in any litigation. It remains to be seen whether it will be revised following this ruling. No decision has yet been taken by the unions involved whether the case will be appealed to the House of Lords.

Equal pay at last for British Coal Employees

British Coal Corporation v Keeble, [26 March 1997]

Two former British Coal employees, supported by the NUM and represented by Thompsons have won their battle for equal pay despite the fact that they were outside the time limit set by the Sex Discrimination Act for bringing the case. The Employment Appeal Tribunal ruled that it was fair - "just and equitable" in the legal jargon - to extend the time limit.

In particular it addressed the extent to which the principle on claims out of time set out in Biggs v Somerset County Council affected the Tribunal's discretion in such cases.

The two women had received redundancy payments lower than expected because British Coal operated a voluntary redundancy scheme which reduced the payments according to age. For men the reductions applied only to those over of the age 60 whereas for women it was 55. British Coal agreed that the claim was unanswerable and their only defence was that the claims were out of time.

It was the second occasion that the claims had been before the EAT. The claims had initially been heard by an Industrial Tribunal in 1994. On that occasion British Coal had appealed the decision that the claims were in time.

The Employment Appeal Tribunal remitted the case for a re-hearing, saying that the issue of whether or not it was fair to extend the time should be decided after considering the circumstances of each individual case. The EAT suggested that the IT should adopt as a checklist the factors mentioned in Section 33 of the Limitation Act 1980 when reaching their decision as to whether the claims should proceed to a full hearing.

At the re-hearing of the cases the Industrial Tribunal decided it was fair for the claims to proceed having given detailed consideration to the case of Biggs v Somerset County Council and various cases decided under the provisions of Section 33 of the Limitation Act 1980. British Coal appealed this decision to the EAT.

The only ground upon which British Coal relied at the Appeal was that the IT had applied the principle on out of time claims in the wrong way. The IT had taken into account the women's excuses that the delay in presenting the claim was due to a misunderstanding of the true position under European Law.

British Coal argued that the guidance given by Lord Justice Neill in Biggs was to apply to all cases in which an IT could exercise discretion to extend time. The particular passage relied upon by Counsel for British Coal was this: "It would be contrary to the principle of legal certainty to allow past transactions to be re-opened and limitation periods to be circumvented because the existing law at the relevant time had been not explained or had not been fully understood."

It was agreed between all parties and the IT that the discretion given under Section 76 (5) of the Sex Discrimination Act is much wider than Section 67 (2) of the 1978 Act which was under consideration in Biggs. The EAT took the view that if British Coal's interpretation of Biggs was accepted, then the IT would not be able to consider the reason for delay and the effect would be that there would be no excuse for the delay.

The consequences being that unless the delay was very short the Tribunal would have to refuse to extend time. Therefore, an Applicant who had delayed making an application through excusable ignorance of their rights would be no better than somebody who had simply delayed because they could not be bothered to present their claim in time.

The EAT were satisfied that the comments in Biggs were intended to apply only in the interpretation of the time limits under Section 67 (2) of the 1978 EPCA and did not apply to section 76 (5) of the Sex Discrimination Act. The EAT also took the view that the IT was right to consider the principles in the Biggs case as only one factor to be taken into account when considering what was just and equitable in all the circumstances.

Let them work nights!

In the last months of its long period of office, the Conservative government issued a Consultation Document, with draft Regulations, on the implementation of the EC Directive 94/33 of 22 June 1994 on protection of young people at work. The Directive should have been implemented not later than 22 June 1996.

The Conservative government's attitude on the Directive's requirements on rest periods, breaks and health assessments for young workers doing night work can be compared to Marie Antoinette: let them work nights, without rest or breaks!

The DTI Document on the Young Workers' Directive (YWD), like that on the Working Time Directive, is the usual sad, begrudging concession of minimum entitlements, often distorted and misdescribed, seizing upon almost every possible exemption, derogation, exclusion and narrow definition. It is as if the objective of the government of an EU Member State was not to implement European law, but rather to evade that law, to deny to its citizens, workers, even the young, bare minimum entitlement such as rest periods and breaks during work, or health protection against the risks to young people of excessive night work.

"The government's approach" as stated in the DTI Document (para. 1.5) is that "costs to business" should be minimized (para. 1.8); in contrast, the Directive is "on the protection of young people at work". Space is too limited to highlight all the numerous misleading imprecisions, faulty transpositions, rhetorical and cynical flourishes in the DTI Document and draft Regulations.

Here's just a few examples:

- The false characterisation of the requirement of 2 days' minimum rest in each 7 day period (Art. 10(2)), so that the exceptional 36 hour minimum rest appears the norm (paras. 1.4, 3.2, 3.19);
- The rhetorical assertion that the temporary 4 year exception allowed the UK by Art. 17(1)(b) is "a renewable opt-out" (paras. 1.5, 3.1, 4.1). The reality is that it depends on whether the UK can persuade all the other Member States on the Council of Ministers to renew it in the year 2000.

Employment status of trainees under EU law

The DTI Document and draft Regulations are concerned with the entitlements of a "young person", defined as "an employee who has reached the age of 15 but not the age of 18 and who... is over compulsory school age" (Reg. 2(1)). This is meant to correspond to the YWD's definition of adolescent, which, however, uses the following terms: "any young person of at least 15 years of age but less than 18 years of age who is no longer subject to compulsory full-time schooling under national law" (Art. 3(c)). The difference, then, is that the Regulations protect young persons/adolescents only if they are "employees"; not so for the Directive.

The difference is crucial with regard to young workers on training schemes. It is highlighted, with diabolical subtlety, by the Regulations' definition of "working time", which "where relevant shall include any time spent by the young person working under a theoretical and/or practical combined work training scheme or an in-plant work experience scheme" (Reg. 2(1)). This phrase appears virtually to replicate Art. 8(3) of the YWD, except that the Article does not say "where relevant". The implication of the Regulations is, of course, that where the young worker on a training scheme is not an "employee", the time on that scheme does not qualify as "working time" and is not relevant to the protection offered by the Regulations.

This is not consistent with the Directive. The DTI Document (para. 2.1) concedes that the Directive applies to those "working under a contract of employment, or an employment relationship defined and/or governed by law" (Art. 2(1)). It is clearly a restriction on this scope to limit the Regulations to "employees" as defined in Reg. 2(1): "any individual who works for another person under a contract of service or apprenticeship but does not include anyone who provides services under a contract of services".

First, persons who provide services under a contract (deemed "self-employed") have "a relationship of employment governed by law" and are covered by the Directive. The DTI Document appears to anticipate this by conceding that (para. 2.2): "If it was necessary for adequate implementation to apply the entitlements, in addition, to those who are under a contract personally to execute any work or labour (and who are subject to the protection in current sex discrimination legislation), the regulations would need to be so extended". It will be necessary.

In particular, the exclusion of trainees who are not "employees" is in clear contradiction of the Directive which explicitly includes time spent in work/training schemes (Art. 8(3)). The DTI Document deviously states that "While young people in education, are not actually employees, might find themselves involved in such activities, it is unclear how many adolescent employees would spend time in these ways. However, the regulations provide for any such young employees times so spent counts as 'working time'" (para. 3.5).

The Directive protects young people in such schemes regardless of their legal status as "employees", and Regulations which deny this should be challenged. In this way, the Directive could be significant for the legal status of trainees (and not only of young workers on training schemes) in UK law.

Enforcement of EC labour law

The DTI Document says with authority (para. 5.2): "no fault or liability would arise for an employer simply because a young person refuses to take up a due entitlement".The impression is of employers helpless when faced with the unlawful demands of their young employees to forgo rest periods or breaks or to insist on working at night. Liability only arises to grant "that entitlement" (Reg. 8). It is not an offence to employ young people for the hours prohibited; only if an entitlement is requested and refused.

This approach to enforcement raises two issues under EC law which are central to the enforcement of UK labour law. First, are entitlements enough to comply with the requirement that rights are provided Secondly, if not, what is required?

The first issue arose also under the Government's proposals on enforcement of the Working Time Directive. The employee claims the entitlement and the employer refuses. What then? The assumption is that the employee persists and takes the rest period or break, or refuses to work nights, and the employers take action detrimental to the employee or even dismisses. The employee is given the right to complain. But what is compensated is the entitlement, there is no remedy.

Insult follows injury. The DTI Document asserts (para. 5,22) that "working 'excess' hours (i.e. during breaks, rest periods, night) would create no valid claim for 'extra' wages above and beyond what was properly due under the contract of employment. Even if an employer insisted, or might have insisted, on the employee working longer than allowed under the law, the employee's remedy would not lie in making any claim for extra pay, but simply in the remedies provided for by the regulations. The regulations provide no remedy save for compensation when the employer punishes the employee for asking for the entitlement! To say this is inadequate compliance with EC law is an understatement.

What then? The DTI document has the grace to concede (para. 5.8) that "since young people - in contrast to older workers in general - may be reluctant to assert or insist upon entitlements in direct confrontation with their employer", the protection against detriment or dismissal would not suffice. The proposal is to allow for enforcement through criminal sanctions, with the responsibility resting with the DTI, through the Health and Safety Executive: "a comprehensive national network". This is to be the mechanism for dealing with the case where (para. 5.11) "an employer refuses to grant entitlements provided for by the regulations but does not actually penalise or dismiss any young employee who requests them".

To burden the over-stretched HSE with this responsibility is cynical. Contrary to its own assessment of the likelihood of young workers confronting their employer, the DTI Document hastily added that there is no question of the HSE undertaking an investigation or review of employer practices without a complaint. Even the Conservative government felt obliged to canvass, however unwillingly, the alternative possibility of granting enforcement powers also to local authority (paras. 5.18-19).

The YWD thus raises, in even more acute form than the Working Time Directive, the problem of adequate enforcement of EC labour law. The overlap between the regulation of working conditions (working time) and health and safety make acute the failure of UK labour law in providing effective remedies for violations of workers' rights under EC law. It is only a question of time before UK law is forced to confront these issues. The Labour Government is bound to consider these issues in a more constructive way.

Fight for lesbian and gay rights marches on to Europe

R. v Secretary of State for Defence ex parte Perkins [1997] IRLR 297 - High Court

The High Court has referred to the European Court of Justice the question of whether discrimination based on sexual orientation is a breach of the Equal Treatment Directive. The move advances the battle to achieve employment protection and equality for lesbians and gay men at work.

The ECJ has been asked to rule whether Article 2(1) of the Directive, which provides that "there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly", covers sex discrimination based on sexual orientation.

Mr Perkins was discharged from the Royal Navy because he is gay. This follows the Armed Forces ban on homosexuality. Mr Perkins challenged this policy and brought judicial review proceedings claiming that his discharge is a breach of Article 2(1) of the Equal Treatment Directive.

This is not the first occasion on which the Ministry of Defence's ban on homosexuality has been challenged in the UK Courts. In the case of R. v Ministry of Defence ex parte Smith [1995] IRLR 585 High Court and 1996 [IRLR] 100 CA, the Court of Appeal rejected an earlier challenge to the ban and said that in their view "any common sense construction of the Directive .... leads to the inevitable conclusion that it was solely directed to gender discrimination and not to discrimination against sexual orientation ... If the European Union is to prescribe discrimination on the grounds of sexual orientation that must be achieved by a specific Directive and not by an extended construction of the 1976 Directive".

The Smith case was decided before the European Court of Justice decision in P v. S and Cornwall County Council [1996] IRLR 347 ECJ which we reported in edition 1 of the LELR. In P v S the ECJ said it was a breach of the Equal Treatment Directive to discriminate against a male to female transsexual for a reason related to change of sex or gender reassignment.

We commented in edition 1 that logically the European Court decision should also apply to discrimination on grounds of sexuality. In edition 3 of the LELR we reported on the case of Grant v South West Trains Limited where the Industrial Tribunal at Southampton said that the decision in P v S "is at any rate persuasive authority for the proposition that discrimination on the grounds of sexual orientation is unlawful" and referred that question to the ECJ. This case will shortly be considered by the European Court.

It appears that the High Court share our view, and the view of the Southampton Tribunal, on the applicability of the case of P v S to discrimination on the grounds of sexual orientation. The Court said that after the case of P v S it was "scarcely possible to limit the application of the Directive to gender discrimination as was held in the Smith case".

In Mr Perkins' case, the High Court conclude that in its view the opinion of the Advocate General in P v S and the judgment of the ECJ "do afford Mr Perkins a significant prospect of success".

The Court explained its reasoning behind this conclusion commenting that if, as the Advocate General indicated in P v S, transsexuals right to sexual identity embraces the right to marry persons of the same sex; to allow discrimination against transsexuals on grounds of sexual orientation would undermine, if not totally defeat, the protection to which the ECJ ruled they were entitled.

The Court commented that the social policy reasoning of the Advocate General in P v S was equally applicable to gay workers and said "homosexual orientation is a reality today which the law must recognise and adjust to and it may well be thought appropriate that the fundamental principle of equality and the irrelevance of a person's sex and sexual identity demand that the Court be alert to afford protection to them and ensure that those of homosexual orientation are no longer disadvantaged in terms of employment".

In its judgment the High Court made several useful comments about the approach to construction of European Legislation which should be adopted by the UK Courts stressing that European law does not take on a static role. The concern of the ECJ was to ensure that the law reflects not outdated views but current values.

The Court also referred to Europe the questions of whether or not the ban on homosexuality was capable of being justified under the Directive and whether acts done for the purpose of ensuring the combat effectiveness of the Armed Forces fall outside the scope of the EC Treaty and therefore of the Directive.

Courts stop sleight of hand in sickness and disability benefits schemes

Bainbridge v Circuit Foil UK Ltd [1997] IRLR 305

Adin v Sedco Forex International Resources Ltd [1997] IRLR 280

Two recent rulings, one by the Court of Appeal in England the other from the Court of Session in Scotland, have foiled attempts by employers to prevent employees from receiving contractual sickness and disabilities benefits.

The Court of Appeal ruled in Bainbridge that a sick pay scheme incorporated in an employee's contract of employment continues until the employee's contract is varied or notice of termination of the scheme is given. In Adin the Court of Session ruled that if disability benefits are provided under a contract of employment, employers cannot prevent an employee benefiting from the scheme, if the claim is well founded, by dismissing them.

In the first case Mr Bainbridge's contract of employment incorporated short term and long term sick pay schemes supported by an insurance policy paid for by the employers. In 1985 he developed industrial dermatitis and was unable to return to work.

He was paid in line with the short term sick pay scheme and then paid the amount he would have received under the long term scheme until March 1993 when he was made redundant. He was then told that no further payments would be made.

His employers said that he was not contractually entitled to payments under the long term sick pay scheme because they had failed to pay the insurance premiums in March 1992 and this terminated the scheme. Mr Bainbridge was not informed of this until he was made redundant.

The Court of Appeal held that Mr Bainbridge was covered by the sick pay schemes until he was notified to the contrary. His rights under his contract of employment continued until notice was given that his contract had been varied and that the scheme was terminated. Mr Bainbridge remained entitled to payment under the scheme.

In the second case, Mr Adin worked on the North Sea. In January 1992 he became ill with stress and was admitted to hospital. At the end of March 1992 the Personnel Manager phoned him and said in the light of his condition he would not be required to take up employment as a Rig Manager. In May he received a letter of termination.

His contract included benefits provided under short term and long term disability plans, details of which were set out in a guide for employees. Mr Adin subsequently claimed that he was disabled from working from November 1992 until December 1994 and that he was entitled to payment of disability benefits under the contract of employment for that period. His employers said he was not entitled and that his employment was not terminated due to his ill health.

The Court of Session commented that the provisions dealing with benefits for disability are "part of a remuneration package of the employee under the contract, not some form of charity on the part of the employer". They concluded that the right to the disability benefit is established by the combination of the contract terms and the unfitness of the employee and, once the right is established, the benefit is payable.

The court ruled that, as a matter of construction of the contract, the employers were not entitled to sidestep Mr Adin's claim to benefit by dismissing him during the short term benefit period.

Take Care!

Brightman & Others v Cornwall Care Ltd [Industrial Tribunal, 11 April 1997]

An Industrial Tribunal in Truro, Cornwall, has ruled that dismissals and offers of revised Contracts of Employment six months after a transfer of an undertaking were related to the transfer and therefore unfair and ineffective.

The case sends a clear message to the employer that merely delaying implementing transfer related changes by six months in an attempt to distance the changes from the transfer, and avoid the effect of the Regulations, will not necessarily be successful.

The case arose out of the transfer in April 1996 of 18 of the 20 Cornwall County Council run residential care homes to Cornwall Care Limited, a registered charity created and supported by the county council.

The Council had been aware since 1992 of the need to reduce the wage bill at the homes if they were to remain competitive with similar services provided by the private sector. In early 1994 the Council advised the unions that wage cuts were necessary and finally made a decision in December 1994 that the homes would be transferred out to Cornwall Care.

On reviewing the viability of the homes it was recognised by both the council and Cornwall Care Ltd that wage cuts would be necessary even after the transfer. In January 1996 the unions were consulted in relation to the April 1996 transfer and were told that changes to terms and conditions would have to be made.

The transfer took place and Cornwall Care continued to consult with the unions in relation to the changes in the terms and conditions until the decision in Wilson v St. Helens Borough Council [1997] IRLR 320 resulted in the Union, UNISON, withdrawing from the consultation process.

Cornwall Care then dismissed with notice all employees with effect from the 30th September 1996 and offered immediate re-employment on new terms and conditions. All staff went onto the new terms and the union members submitted claims to the Industrial Tribunal on the basis that their dismissals were automatically unfair by reason of their connection with the transfer and that the variation in their terms and conditions were ineffective.

The tribunal found that the transfer had only taken place to allow negotiations on the changes which the Council were unwilling to implement themselves. The tribunal found that the subsequent dismissals resulted from the failed negotiations and therefore had to be related to the transfer.

In coming to its decision the tribunal found that it had a choice between the conflicting decisions of Wilson v St. Helens Borough Council and Meade & Baxendale v British Fuels Limited [1996] IRLR 543 which held that employees were free to negotiate new terms after a dismissal without offending the Regulations. The tribunal preferred the Wilson decision as falling within the spirit of the TUPE Regulations.

The outcome of the Appeal in the Wilson case will however be a major factor in assessing the importance of the present case. Latest reports suggest that the case will be referred to the European Court for a decision – which could take up to 2 years.

Things can only get better *(continued from page 1)*

through secondary legislation such as changes to Regulations and the Codes of Practice and Guidance issued under the Conservative Government.

Labour's commitments on employment rights may not meet all the aspirations of unions and their members, but the proposals to which they are committed will have a significant beneficial impact and may yet be a springboard for the wider reforms which, after the last 18 years, are long overdue.

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