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Time's up for the UK

There is no doubt about the main legal issue at the end of 1996 – the Working Time Directive. On 12 November the European Court of Justice gave its judgment in a case brought by the UK government seeking to get the Directive declared void.

The deadline for implementing the Directive was 23 November 1996, three years after it was adopted. In this issue we look at the provisions of the Directive and the implications for employees and unions – in the public and private sector- from 23 November. But first we focus on the judgment itself.

The issue for the court to decide was whether the Working Time Directive was a health and safety measure. The Directive was first put forward by the European Commission in September 1990. It was adopted by the Council of Ministers, representing european national governments, on 23 November 1993.

The UK government had persuaded the other countries to dilute a number of provisions contained in the original draft, but then abstained when the Directive was put to the vote. The Directive was passed because health and safety measures require only a majority vote. The UK brought proceedings in the ECJ arguing that the Directive related to employment rights and therefore needed a unanimous vote.

The ECJ rejected the UK's arguments. It confirmed the concerns of UK employers that, if the Government challenged the legal basis of the Directive, the court would confirm a wide definition of health and safety which gives potential for further measures to be adopted to protect European workers.

The court adopted the definition of health accepted by the World Health Organisation. The WHO describe health as a state of complete physical, mental and social well-being and not simply a question of not being injured or ill. This means taking a broad view of what is the 'working environment', embracing all factors affecting health and safety in employment, not merely exposure to dangerous procedures or hazardous substances.

Where a Directive concerns health and safety in this broad context, the majority voting procedure must be used, even where the measure may have knock-on effects on employment rights and businesses. The ECJ emphasised that 'safety, hygiene and health at work is an objective which should not be subjected to purely economic considerations'.

ECJ confirms wide definition of health and safety

The ECJ rejected the argument that health and safety legislation could only be passed when the need for laws was supported by scientific evidence. Once the European Union has decided it is necessary to improve the existing level of protection of health and safety and harmonise conditions across Europe, it is appropriate to do so by laws which establish minimum requirements, enabling individual countries to adopt stronger laws if they wish. Minimum requirements do not mean that a Directive must be set at the lowest level of protection in the least regulated EU country.

The UK achieved one victory. The ECJ said there was no health and safety reason why the weekly rest period should include Sunday. This part of the Directive is now deleted so workers will not be protected if they refuse to work on Sundays, unless they are shop or betting workers protected by Part IV of the Employment Rights Act.

The reaction to the judgment has ranged from one extreme to another: either it represents the death-knell of the UK economy or it will have virtually no effect on employees or businesses. Neither is true. The Directive will have an immediate impact for many workers and the judgment has long-term implications for legislation on workplace rights at European level.

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Part timers get equal paid time off...

Kuratorium fur Dialyse und Nierentransplantation v Lewark [1996] IRLR 637

Paid time off for part time workers attending full time trade union courses and activities have again come under the legal spotlight.It was thought to be established - Botel [1992] IRLR 423 ECJ – that paying a part time worker only for her part time hours when she attended a course that extended beyond those hours, and where her full time counter parts received their full pay, could amount to a breach of Article 119 of the Treaty of Rome.

Working on the principle that if you don't like the first answer try repeating the question, the German Government brought the seemingly identical case of Lewark to the European Court of Justice. In Lewark the ECJ confirmed the Botel judgment ruling that compensation for loss of earnings for attending a training course on staff council functions is pay under Article 119.

A law which states that full and part time workers attending a training course are compensated up to the limit of their respective normal working hours causes indirect discrimination against women, contrary both to Article 119 and the Equal Pay Directive. It can only be justified if the law in question reflects a legitimate aim of Government social policy, is appropriate to achieve that aim, and is necessary in order to do so.

...except when the EAT says they don't

Manor Bakeries Ltd v Nazir [1996] IRLR 604

Just when we thought the issue was settled our own Employment Appeal Tribunal reached a different conclusion on the question of paid time off for attending union conferences. Mrs Nazir sought compensation of four days' full pay for attending the Bakers Food and Allied Workers Union annual conference, not just her part time pay. Male full time worker delegates received full pay for the period.

The EAT held that since attending a union conference is not work, the money received from the employer is not pay, and so does not fall within the protection of Article 119. The delegate was paid for time off in accordance with a collective agreement rather than a contract of employment.

The EAT distinguished between a union conference where, it claimed, pleasure and work may coincide, and trade union training courses. The training courses, such as in Botel, are a type of work and German Staff Committees promote social dialogue in which the employer has an interest.

Nazir appears a strange judgment given the wide definition of pay within the meaning of Article 119. The definition of pay includes any financial benefit received by the worker, either directly or indirectly, in respect of his employment from his employer and irrespective of whether it is received under a contract of employment, a legislative provision or on a voluntary basis.

Common sense suggests this should include payment received under a collective agreement regarding paid time off for trade union activities. The purpose or desirability of an employer giving paid time off to attend a union's annual conference would be relevant to the issue of objective justification, but not to the meaning of pay.

Years of full time work don't count for redundancy

Barry v Midland Bank Plc, Times Law Report, 25 October 1996, EAT

A woman bank clerk has failed in an equal pay claim over the calculation of contractual redundancy pay. Ms Barry worked full time for eleven years at Midland Bank Plc before returning to work part time after the birth of her child. She took voluntary redundancy two years later and her severance pay was calculated on the basis of her having worked part time for all her 13 years' service.

The Equal Opportunities Commission previously failed in the Court of Appeal in a similar challenge to the calculation of Statutory Redundancy Pay (R v Secretary of State For Employment Ex Parte EOC [1992] ICR 341). The Employment Appeal Tribunal in Barry followed the Court of Appeal findings in the EOC case.

The EAT held that, despite the fact that more women than men were affected by changing from full time to part time employment, there was no breach of Article 119 of the Treaty of Rome. The EAT found that the Midland Bank redundancy scheme did not treat women less favourably than men and it was not applied to Ms Barry in a discriminatory way.

The EAT went onto find that, if there was a variation between Ms Barry's contract and that of a male comparator, the difference was due to a material factor not based on sex - namely administrative convenience plus the intention to cushion employees against the loss of their work, particularly older, long serving employees.

Good news for RSI sufferers

Pickford v ICI CA 18 July 1996

A secretary who suffered from writers cramp has won a claim for damages in one of the few pieces of good news for Repetitive Strain Injury sufferers. The case is significant because of the Court of Appeal's comments on rest breaks and on the balance between risk of injury and the cost of safety measures.

Ms Pickford lost her case in the High Court but appealed. In a majority decision, the appeal court found in her favour. The court had strong words to say on safety instructions and costs of providing information.

The court held that "those who are liable to do a great deal of typing on a VDU should be told that they must take breaks and rest pauses.... it is advisable to explain why this is necessary, especially if the employee asks or there is any risk that the instructions will not be obeyed".

The court also rejected the argument that the cost of giving such advice and instructions was excessive compared to the risk of injury. The court held that "even to be disabled for a few months is not something that can be ignored"

Racial remarks – no joke!

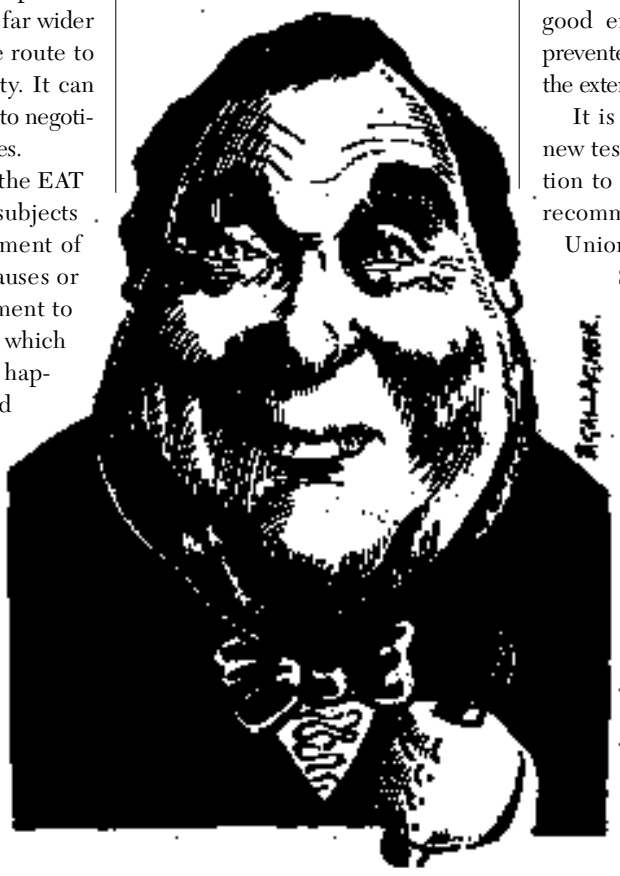
Burton and Rhule v De Vere Hotels, EAT [1996] IRLR 596

The Employment Appeal Tribunal has set out a new test for employers' liability for acts of racial harassment by a third party who is not a fellow employee or agent. Although decided in the context of employer liability for third parties, the new "control test" has far wider implications as a separate route to establish employer liability. It can also be used by employees to negotiate anti harassment measures.

In this important case the EAT found that "an employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances in which he can control whether it happens or not". In Burton and Rhule two of the hotel's black employees were racially abused and harassed at a Round Table dinner by the guest speaker Bernard Manning and several other guests.

At the Industrial Tribunal they claimed direct race discrimination against their employers. They argued that their employers could and should have prevented the harassment by vetting Manning's material.

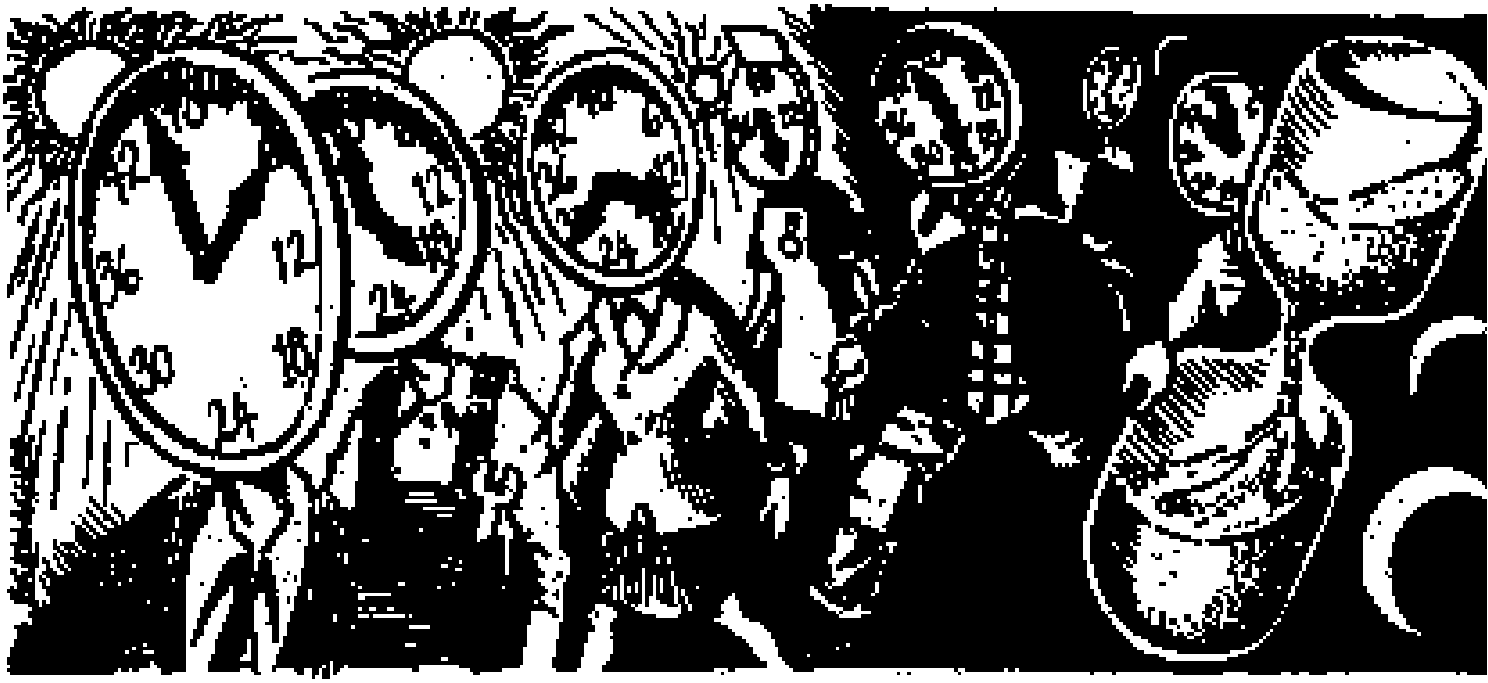
The IT found that the employees had been racially harassed but had not been "subjected to" that harassment by their employers. The IT held that the employers had not knowingly allowed the harassment to happen, nor could they have foreseen that Manning would behave as he did.This approach was rejected at the appeal. The EAT suggested that an IT should use its industrial experience in deciding whether a particular act was sufficiently under the control of the employer so that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it.



It is likely that in applying this new test ITs will pay greater attention to the preventative measures recommended by the European Union's Code of Practice on Sexual Harassment and the Commission for Racial Equality's guidance on racial harassment.

The EAT refused to endorse the negligence test of foreseeability to establish employer liability in this area. Knowledge or foreseeability may be relevant to the control test but is not essential to establish liability. The EAT said it was "undesirable that concepts of negligence should be imported into the statutory torts" of discrimination.

Time is on our side



The political row over the Working Time Directive has rather overshadowed the detail of the provisions and their practical effect. The Directive has offered two extreme responses: it will wreck the UK economy (© UK Government 1996) or it is a toothless piece of Brussels nonsense (© UK government 1993).

As the dust begins to settle, workers need to know the main aspects of the Directive and its likely impact.

Who is protected?

The Directive applies to 'workers', not merely employees (Article 2). The Employment Rights Act 1996 definition of workers includes employees and anyone who works under a contract to provide services personally, except where the relationship is one of customer or client. The Directive, by applying to 'workers', means freelances and casual staff are covered.

Certain sectors of industry are excluded [see box 2], notably transport workers and junior doctors (Article 1.3). Draft legislation is expected on transport workers soon.

European countries can pass laws to exclude other groups of workers like managing executives and family workers [see box 2] from the main provisions. But these workers must remain entitled to the provisions on paid holiday, health and safety for night and shift working and the principle of adapting work to the worker (Article 17.1).

What is working time?

Any time when a person is working, at the employer's disposal and carrying out his activities or duties (Article 2). This may lead to controversy on travel to and from work locations, zero-hours contracts and 'on-call' arrangements. A rest period is any time which is not working time.

Minimum periods of rest and breaks

Workers are entitled to a minimum period of 11 consecutive hours rest in each 24 hour period (Article 3).

In every 7 day period, workers are entitled to a minimum uninterrupted rest of 35 hours, which may be reduced to 24 hours if objective, technical or work organisational conditions justify (Article 5). The rest period entitlement is averaged over a 14 day period, so providing 70 hours uninterrupted rest over two weeks would satisfy the Directive, even if there was less than 35 hours rest in one of those weeks (Article 16.1).

Where the working day is longer than 6 hours, every worker is entitled to a rest break. The details of this, including duration and terms on which the break is granted, must be laid down by 'collective agreements or agreements between the two sides of industry' (a phrase which recurs throughout the Directive). Only where collective agreements have not established these details should they be set by legislation (Article 4).

Annual Leave

For the first time in the UK there will be a statutory right to paid leave (Article 7). The entitlement will be three weeks per year, but must increase to four weeks by November 1999 (Article 18(1)(b)(ii)). The leave cannot be replaced by payment in lieu, except as payment for leave which has accrued but has not been taken when employment ends.

With the exception of the general exclusion of transport workers, none of the other exceptions or modifications alters the right of all workers to three weeks paid annual leave.

Box 1

The Main Provisions

- 11 hours rest per 24 hours
- One period of 35 hours rest each week
- Paid annual leave of 3 weeks (4 weeks by November 1999)
- Rest break if work longer than 6 hours
- Average working time over 4 months must not exceed a weekly 48 hours
- Normal hours of work for night workers must not exceed aver age of eight
- Free health assessments for night workers
- Employers must adapt work to the worker

These provisions are subject to possible modification by laws or collective agreements as discussed in this article

The 48 hour week?

Most media comment has centred on maximum weekly working time. This is an average of 48 hours per 7 day period (Article 6). The average is calculated over 4 months (Article 16.2). Periods of sickness absence or paid annual leave are not included in calculating the average.

Periods used for averaging in the Directive are called 'reference periods'. The reference period for averaging weekly working time can be extended to six months by collective agreement or laws for the special categories (see box 3). It may even be extended to 12 months where there are objective or technical reasons concerned with the organisation of work (Article 18.4). But this can only be done by collective agreements or agreements between the two sides of industry, as in the pioneering agreement reached between MSF and the Heating and Ventilating Contractors' Association.

48 hours: the opt out

The much-vaunted opt out from the 48 hour requirement depends on a country introducing legislation to implement the Directive. If the UK took no action, the 48 hour provision would apply in full. This is probably a major factor in the Government's decision to introduce some form of legislation.

If the UK goes for the 'opt out', it will not be a soft option. The choice not to apply the 48 hour requirement at least until November 2003 carries with it obligations (Article 18.1(b)(1)).

The UK would have to ensure that individuals only work more than a 48 hour week (on average over a 4 month period) if they have agreed in advance with their employer. No-one must be subjected to any detriment for refusing to agree. The employer must keep records of all those working more than 48 hours and make those records available to 'the competent authorities', who may take action to protect the health and safety of the workers concerned.

Hold back the night

There is special protection for night workers. A night worker is someone who usually works at least 3 hours of 'daily working time' (sic) at night. Night is defined as a period of at least 7 hours to be defined nationally, but which must include the hours of midnight to 5 am: so it could be 10pm to 5am, midnight to 7am, or any permutation in between (Article 2).

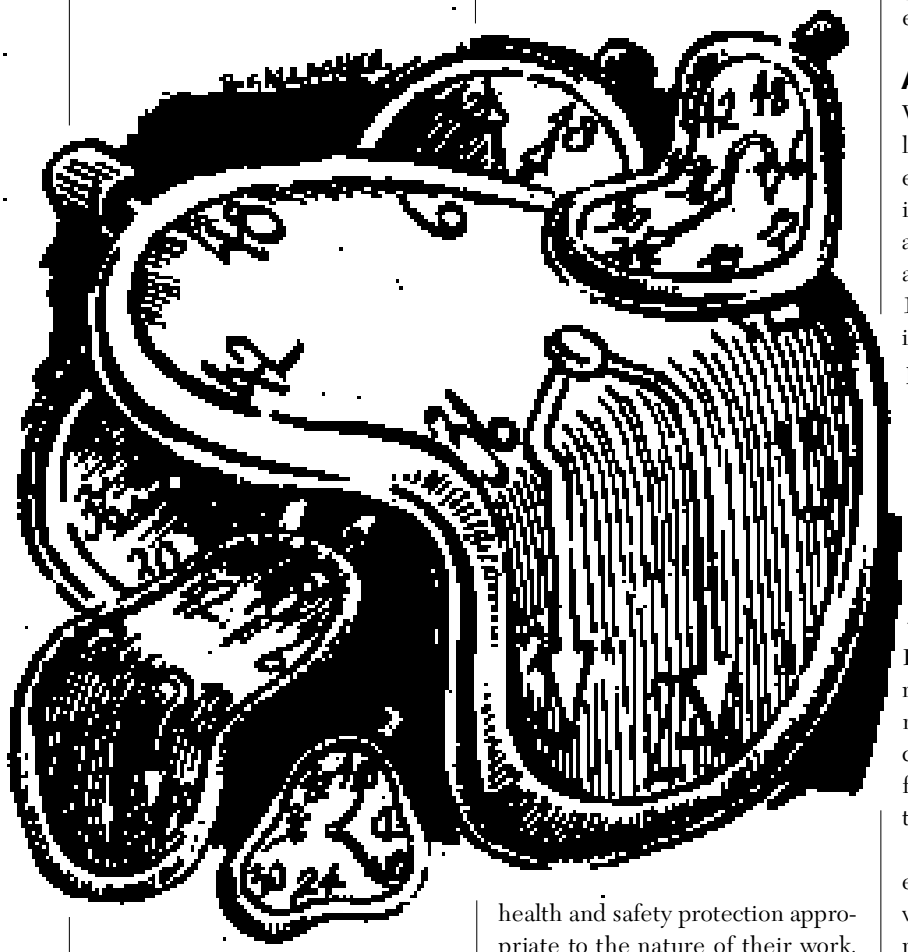
Normal hours of work for night workers must not exceed an average

of 8 hours in any 24 hour period. If night work involves special hazards or heavy physical or mental strain it must not exceed more than 8 hours in any 24 hour period (Article 8).

workers must notify 'the competent authorities' (Article 11).

Night and shift workers

Night and shift workers must have



health and safety protection appropriate to the nature of their work. Health and safety facilities must be available to them at all times and must be equivalent to those available to the day shift (Article 12). Laws may modify the application of daily and weekly rest periods to shift workers to take account of changes of shift and activities where there is a long gap in the middle of the day, for example cleaners (Article 17.2.3)

Adapting work to the worker

Wide-ranging consequences may follow from the requirement that employers who organise work according to a certain pattern must take account of the general principle of adapting work to the worker (Article 13). This applies especially to alleviating monotonous work, or work at a pre-determined rate, for example work on a production line. The employer must pay particular attention to the need for breaks.

Flexibility: special categories

Article 17.2 of the Directive lists special categories (see box 3) where the application of parts of the Directive may be modified by national laws or collective agreements. Unless laws are passed or collective agreements reached, the full force of the Directive will apply to those special categories.

The provisions which can be excluded are those on daily and weekly rest breaks and duration of night work, plus the provisions on reference periods. This means no exclusion of the provisions on annual leave and the 48 hour week -

The reference period for calculating the average must be set 'after consultation of the two sides of industry or by collective agreements or agreements between the two sides of industry at national or regional level' (Article 16.3). This aspect of implementation will prove interesting as, so far, there has been no consultation.

Night workers are entitled to free health assessments and, if they have health problems related to night work, are entitled to transfer to day work (Article 9). The work of certain categories of night workers may be made subject to specific protection or conditions if the workers face health and safety risks linked to night-time working (Article 10). Employers who regularly use night

Box 2

EXCLUDED SECTORS

From the Whole Directive

Transport: air, sea, road, rail, inland waterways, lake
Sea fishing
Doctors in training

Laws may exclude from most provisions

Duration of working time not measured or set in advance
Particularly:
Managing executives
Family workers
Clergy

although the reference period for averaging the 48 hours may be extended to 6 months (or in exceptional cases 12 months by agreement – see above).

Although the strict provisions of the Directive may be excluded, the workers concerned must be given equivalent periods of compensatory rest. Only in exceptional cases where that is not possible, for objective reasons, can the obligation to provide compensatory rest be replaced by an obligation to provide adequate protection.

The Government will have to legislate for these areas or leave it to collective agreements. The special categories provisions should not mean that every worker in those industries can have their protection modified: in those industries which involve the need for continuity of production or service, it should only be those who are engaged on activities necessary for that continuity who are affected.

Flexibility: all employments

The Government can only modify the application of the Directive for the special categories by law. Employers and workers in all industries have the power to modify the application of the Directive in similar respects by 'collective agreements or agreements between the two sides of industry'. These agreements may be at national or regional level or at a lower level within a national or regional framework (Article 17.3).

Immediate implications

The Directive had to be implemented by 23 November 1996. Although the UK Government may move quickly to implement, it did not meet the deadline. The UK can pass the necessary laws by Regulations which can be pushed through Parliament quickly and with limited debate. We shall comment on the implementing legislation in future editions. In this edition, we focus on the position in the interim, before the UK has passed its own laws.

The legal position differs as between public and private sector workers. Workers employed by state bodies like central government, local authorities, health trusts and the privatised water companies can enforce the Directive against their employers – it has 'direct effect'.

Private sector workers cannot use the Directive to sue their own employers. But if they suffer a loss because the Government has failed to implement a provision which grants individual rights which are sufficiently unconditional and precise, then they can bring a claim against the Government. This is based on the Francovich case [1992] IRLR 84 where the ECJ established that Govern-ments could be obliged to pay compensation in those circumstances. This was reinforced by the recent case of Dillenkoffer (unreported, 8/10/96 ECJ) which said this applied where a Directive was implemented late and someone lost out in the intervening period.

Fear of legal action will drive the Government to legislation, as will the wish to utilise the provisions which modify how the Directive applies. There is the distinct possibility of individual claims immediately after 23 November. Perhaps the most obvious provision is the entitlement to paid annual leave. It is unconditional, precise and breached by many employers.

Legal cases are only part of the picture. The most important aspect of the Directive is its cooperative approach to working time which involves discussion and agreement between employers and unions ('the two sides of industry'). The details of breaks must be established through that route, and only failing that by consultation. Flexibility in operation of other provisions of the Directive can be achieved through the same route. This represents an opportunity for unions and employers to make strides towards practical implementation which protects workers whilst recognising the needs of the particular industry. These issues are unlikely to be best dealt with by legislation, the tone, content and timing of which will be aimed more at the General Election and the EU Inter-Governmental Conference.

Box 3

Special Categories

Workers who live a long way from the workplace
Workers who have workplaces a long way apart
Security guards, caretakers and surveillance
Where there is a forseeable surge of activity, particularly agriculture,tourism. postal services
Activities requiring continuity of service or production, particularly:

- hospitals, residential institutions
- prisons
- docks, airports
- press, radio, television, film
- post, telecommunications
- ambulance, fire, civil protection
- gas, water, electricity
- refuse collection and incineration
- industries where work cannot be interrupted on technical grounds
- research and development
- agriculture

Pregnant women revisit the sick man

Iverson v P&O European Ferries (Dover) Ltd, Industrial Tribunal 15 July 1996, case No: 3172/194 (unreported)

Crees v Royal London Insurance, EAT, October 1996 205/96 (unreported)

Can a woman on maternity leave compare her pay and contractual benefits with those of male colleagues on sick leave for the purposes of equal pay and anti-discrimination legislation? How far can a woman take the "sick man comparison"?

In Iverson v P&O an Industrial Tribunal has helped clarify the European Court of Justice judgment in Gillespie [1996] IRLR 214. Ms Iverson was absent on maternity leave, but under her contract of employment was not paid profit related pay for the period of her maternity leave, nor did she accrue holiday entitlement.

She would have earned both holiday entitlement and PRP if she had been at work or on sick leave. The IT held that the Equal Pay Act 1970 applied and she had received less favourable treatment than her male comparator.

The man would have received full profit related pay and holiday entitlement had he been on sick leave. The IT held that an equality clause must be implied into her contract of employment to provide her with the right to full holiday entitlement and profit related pay that would have otherwise accrued during her maternity leave.

The IT also found that the employers were not able to establish that the variation in her contract was due to a genuine material factor, other than a difference of sex, as neither a man on sick leave nor a woman on maternity leave was contributing to the profit of the company during their absence. The IT said the employers had breached both the Equal Pay Act 1970 and Article 119 of the Treaty of Rome.

The Sex Discrimination Act 1975 did not apply as the benefits claimed constituted a payment of money which is excluded under the Sex Discrimination Act. If the decision of Iverson is followed by other tribunals it may hold good for other contractual benefits in addition to PRP and holiday pay.

Maternity rights have also been considered recently in relation to unfair dismissal. In Crees the Employment Appeal Tribunal found that in the absence of any more preferable contractual provisions, the statutory right to return to work following extended maternity leave requires a physical return to work in the ordinary sense of language, in addition to complying with the notice provisions.

Since Mrs Crees had not physically returned due to ill health she had not been dismissed, and therefore could not claim unfair dismissal. Mrs Crees had postponed her return to work at the end of the extended maternity leave period and had fully complied with all the notification requirements, but ill health continued to prevent her return.

Although she sought to delay her return, and sent another sick note to her employers, she was told she had forfeited her right to return. She argued that her compliance with the notice requirements, and submission of a sick note, amounted to a valid exercise of her return to work which entitled her to protection against unfair dismissal. Leave to appeal to the Court of Appeal is pending.

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