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New ruling on public admin staff and TUPE

Henke v Gemeinde Schierke, Verwaltungsgemeinschalft "Brocken" European Court, 15 October 1996

The transfer of administrative functions from one local authority to a new larger authority formed by a number of municipalities is not covered by the Acquired Rights Directive, the European Court of Justice has concluded in a surprise decision. While the case is significant when purely administrative functions are transferred, it does not apply to services contracted out under compulsory competitive tendering.

These services are clearly economic entities which are required to make a rate of return and will remain subject to TUPE when they are contracted out. This should include white-collar service functions as well as services like refuse, catering and cleaning.

More difficult questions may arise when all of a council's functions are transferred to a new body. Where this includes economic activities, including services, one would expect the Directive to apply. We do not know enough about the activities transferred in the Henke case to know how this compares to the situation in Germany.

When the municipality of Schierke was merged with other councils to form the 'administrative collectivity' of Brocken, the councils' administrative functions were transferred to Brocken. Mrs Henke, who was secretary to the mayor's office in Schierke, argued that the council carried out, at least to some extent, activities of an economic character and that it should be regarded as an undertaking.

The European Commission and the governments of Germany and the UK argued that a local public authority does not come under the Directive. The ECJ appears to agree, but without any supporting analysis.

The court asserts that 'reorganization of structure of public administration or the transfer of administrative functions between public administrative authorities' falls outside the Directive. The court refers to the definitions of undertaking in the community languages, again without a proper analysis of the implications.

The crux of the judgment is where the court concludes that the transfer 'related only to activities involving the exercise of a public authority. Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary.'

This is difficult to reconcile with the Court's analysis in Rask (1993) IRLR 133, Redmond (1992) IRLR 133 and Commission v UK (1994) IRLR 392 which establish that the Directive applies to transfers of ancillary functions and non-profit making undertakings. It is likely that when interpreted in the context of those decisions, the impact of the Henke case will be limited - rather like the impact of Rygaard (1996) IRLR 51 which was heralded by employers as a sea change in TUPE decisions, but turned out to be nothing of the sort.

In Henke the court focused on the administrative nature of the functions concerned and the exercise of public authority. Frustratingly, we are not told what functions were transferred, so we cannot make a comparison with authorities in the UK.

Administrative reorganisations in the UK usually involve specific legislation which provides transfer rights for employees. It is difficult to see why the protection of the Directive should be denied to certain groups of workers when, unlike the Collective Redundancies Directive, there is no express exclusion for 'public administrative bodies or establishments governed by public laws', a concept considered in British Coal (1993) IRLR 104.

Same rights for temporary staff

Brown v Chief Adjudication Officer (Court of Appeal, 10 October 1996)

Employers who think temporary staff have few employment rights may find they do have the same rights as permanent staff to things like proper notice and full unfair dismissal rights.

Ms Brown was employed on a day to day contract. She worked from September 1991 until June 1992 on a day-to-day basis, working not less than 24 hours in each week over that period. On 21 June 1992 she injured her neck at work and did not work again until December 1992.

She was denied Statutory Sick Pay because as soon as she was unable to work her daily contract ended. Entitlement to Statutory Sick Pay ends when the employment expires or is brought to an end, because of section 153(2)(c) of the Social Security Contributions and Benefits Act 1992.

The Court of Appeal overturned the refusal of SSP, saying section 153(2)(c) is subject to the provision now contained in section 86(4) of the Employment Rights Act 1996. This says that when a person has been employed for three months and is employed on a fixed term contract of one month or less, the contract shall be treated as if it were for an indefinite period.

Ms Brown had been employed for more than three months. She was on a daily contract - a fixed term of less than a month. This meant her contract should be treated as indefinite. It could only be terminated by the employer giving the statutory minimum notice (in her case one week). Notice had not been given, so the employment continued. This means that section 86(4) of the ERA applies whenever it is necessary to establish if employment has terminated for a statutory claim and where the employee is on a fixed contract of less than a month but has more than three months' service. It illustrates the impact of this provision and the potential implications for employers who seek to minimise rights but instead discover that employees are treated as on indefinite contracts.

This has interesting consequences for employers who make short extensions to fixed term contracts for existing employees. If this is regarded as a new contract, not an extension, the employer will have an employee who is entitled to proper notice and full unfair dismissal rights.

EAT deducts half invalidity benefit

Rubinstein v McGloughlin [1996] IRLR 557

An Industrial Tribunal can deduct half the value of invalidity benefit received from compensation awarded for unfair dismissal says the Employment Appeal Tribunal.

Miss McGloughlin was dismissed from her job as a sales assistant. After losing her job, she suffered from anxiety and depression and was unable to work. She received state invalidity benefits.

The IT found the dismissal was unfair due to the employer's failure to follow a fair procedure and, as a consequence of being accused of theft by her employers, Miss McGloughlin was unable to go to work or to seek employment. In calculating her compensatory award the tribunal deducted in full the amount of benefits she received due to her ill health. She appealed to the EAT.

Invalidity benefit is not covered by the Recoupment Regulations 1977, which only provide for the recoupment of Unemployment Benefit and Supplementary Benefit (now Income Support). The EAT considered the case law on common law damages and the deductibility of "insurance type" benefits (including invalidity benefit) at 50%.

They then looked at Section 74 (1) of the Employment Protection (Consolidation) Act 1978 (now s.123 of the Employment Rights Act). This provides that "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances" and constitutes its own code for the assessment of compensation and should not be assumed to be equivalent to the damages for breach of contract.

The EAT decided that in the case of invalidity benefit, which is not a pure "insurance" payment, fully funded by the employee's contributions, to produce a "just and equitable" solution half the invalidity benefit received should be deducted.

Pfaffinger: correction

Pfaffinger v City of Liverpool

Our report on this decision in Issue 4 was misleading. A redundancy payment on expiry of a fixed term contract only breaks continuity for the purpose of future redundancy payments. Continuity for other statutory purposes is not affected. Apologies.

Injunction hits the buffers

Intercity West Coast Ltd v RMT [1996] IRLR 583

The Court of Appeal blocked an attempt to use the break up and privatisation of the railways to muddy the water over who gets balloted for industrial action. The appeal court lifted an injunction preventing industrial action by RMT members.

RMT were in dispute with Intercity West Coast Ltd (ICWC), a wholly owned subsidiary of British Railways Board operating out of Manchester Piccadilly Station.A second wholly owned subsidiary of BRB, North West Regional Railways Ltd (NWRR), also operated out of Manchester Piccadilly. The two subsidiaries held leases on different buildings around the station. RMT balloted members at Manchester Piccadilly employed by both companies.

ICWC challenged the ballot saying their staff should have been balloted separately from staff employed by NWRR as the two company buildings were different places of work. Section 228 of the Trade Union and Labour Relations (Consolidation) Act 1992 requires separate ballots for members who have "different places of work". Section 228 (4) defines place of work as "premises occupied by [the] employer at or from which [the employee] works". ICWC argued that the place of work for their staff was not the station but the individual building they leased. Reference was made to the narrow definition of "occupation" used in property law, an argument accepted by the High Court which granted an injunction.

The appeal court overturned this view, holding that Section 228 should be construed in the context of legislation dealing with industrial relations and the conduct of Trade Unions. It was not relevant, said the court, that in other areas of the law "occupation" might be construed more narrowly.

ICWC had a licence to use the station as a whole for the purposes of their business and the station was premises occupied by them for the purposes of Section 228.

Court condemns abuse of appeal

Clayton v Hereford and Worcester County Council and others

Hereford and Worcester Fire Brigade were accused of abusing the appeals process by trying to get a re-hearing of a sex discrimination case they lost at an Industrial Tribunal. Clayton shows that such a course is condemned by the courts and could leave employers having to pay the full costs of the complainant.

Tania Clayton was subjected to a catalogue of abuse during almost five years of service as a Fire Fighter with Hereford and Worcester Bridgade. She complained to an IT of sex discrimination and victimisation and after a 23 day hearing the tribunal unanimously upheld her complaints.

Her employers and the two Sub Officers sued personally appealed. They claimed the IT had got the law wrong on sex discrimination and victimisation; had wrongly exercised its discretion to allow complaints relating to incidents which occurred outside the three month time limit had wrongly found that certain acts complained of were continuing acts extending over a period; had wrongly allowed expert evidence from a Consultant Psychiatrist on the effects of the abuse on Ms. Clayton; the tribunal Chairman was biased and, finally, all the tribunal's findings of fact were "plainly perverse decisions".

The EAT unanimously rejected the entire appeal saying the grounds of appeal were "an abuse of the whole Appeal process" and "an attempt to secure a re-hearing of the whole case".The EAT said it wanted a full explanation of the reasons why the Brigade retracted their original admission of fault and fought the case for 23 days before appealing when they hear any application by Ms Clayton for the costs of fighting the appeal. The EAT said that a senior Brigade Officer remark to staff that "the good news is that you are getting another member of the watch" and "the bad news is that the new member of the watch is a woman", was capable of having detrimental consequences for Ms Clayton. The EAT rejected a submission that calling Ms Clayton "a stupid fucking cow" was not gender neutral and was a discriminatory comment. They also rejected the criticism that the tribunal's decision was perverse.

Cases head for the ECJ

There are a large number of cases pending before the European Court of Justice from all over Europe. This is one of the reasons why trade unions across Europe need to become increasingly aware of European law and how it is developing.

Pending cases involving the Acquired Rights Directive - on which the United Kingdom TUPE regulations are based - have been put forward by national courts in Belgium, Germany and Spain. Cases involving EC law on sex equality are the result of legal action in Belgium, France, Germany, Greece, Ireland and Italy. Cases on remedies for violation of community employment and social security law are coming from Germany and Italy, as well as the United Kingdom.

In June of this year the European TUC Legal Experts Network (NETLEX) decided to establish a Working Group to co-ordinate trade union litigation strategy. A look at the following cases pending before the European Court of Justice shows why this step is necessary.

Transfers of undertakings. One of the most difficult issues in recent years has been the question of when there is a transfer of an undertaking, particularly where no tangible or intangible business assets have been transferred. The ECJ's expansive approach in Schmidt [1994] ECR I-1311, extending the protection of the Directive, led to much employer discontent. Pressure was brought to bear on the Commission to re-define and narrow the concept of transfer protected by the Directive.

In Rygaard [1995] ECR I-2745, however, the court, by insisting that the transfer had to be of a "stable economic entity", seemed to respond to the pressure by throwing doubt on whether a transfer involving a contract to carry out specific works was covered.

Now, two cases from Germany, Ayse Suzen v Zehnacker Gabaudereinigung and Moll v Mesghena, are soon to be decided. Both involve contract cleaners changing employers. The Advocate General's views in the Suzen case suggest a more restrictive approach.

The sensitivity of the issue is evident in other similar cases pending from Germany including Seidel and Santner, and from Spain including Hidalgo and Gomez Perez.

It is expected that the court, against the background of the recent conflict over revision, will make another attempt to state clearly when the protection of the Directive applies. A recent advisory opinion by the EFTA Court on this question - Eidesund v Stavanger Catering, decided 25 September 1996, reviewed all the recent cases and distinguished Rygaard as an unusual case of a transfer "limited to performing one specific works contract". This supports the view of the Employment Appeal Tribunal in Tuck v BSG. The EFTA court reiterated that termination of a catering contract with one company and the conclusion of a new contract for the same services with another company, does not exclude the Directive from being applicable.

Another important issue is the question of the mandatory effect of a transfer on employment. In the pending case from Belgium of Rotsart de Hartaing v Benoidt and IGC Housing Service the European Court is asked whether all employment contracts are transferred automatically, without any option on the part of transferor or transferee. In an opinion on the case Advocate General Lenz stated that they have no choice: all existing employment contracts are automatically transferred, even where the transferee rejects the employees. On the question of the mandatory nature of the transfer, the European Court may also take note of the view of the EFTA Court in Langeland v Norske Fabricom, decided 25 September 1996: as a matter of public policy the Directive's protection is: (paragraphs 42-43)

"independent of the will of the parties to the contract of employment, the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees."

Another case from Belgium, Jules Dethier Equipment v Dassy and SOVAM, concerns the Directive's exclusion of insolvency procedures, and asks whether a voluntary liquidation aimed at keeping the company going is excluded from the Directive. In the opinion of Advocate General Lenz, the Directive applies in such a case.

Sex equality. One of the most controversial decisions in this field was Kalanke in which the Court declared unlawful a hiring procedure in Bremen which gave automatic, unconditional and mandatory preference to women. Now a carefully crafted question from Germany is testing this point in Marschall v Land Nordrhein-Westfalen. This case involves a rule which gives priority to women where they are fewer in a grade, but allows for exceptions where reasons specific to a male candidate predominate. If some discretion exists, is the positive action lawful?

When is there a transfer of an undertaking?

Ireland's Labour Court has referred Hill v Stapleton which concerns job sharing. It asks whether it is lawful that employees who convert from job sharing to full time work are not credited as full time workers for their job sharing period for the purpose of progress on an incremental pay scale. An important point on justification of indirect discrimination was the finding of fact that there was no link of seniority with skill.

Another case involving part-time workers comes from Germany. Gerster v Bayern asks whether it is lawful to calculate periods of service involving one-half to two-thirds of normal working hours as counting as seniority towards promotion only as two-thirds normal working hours. Other sex equality cases pending include, from France, CNAVTS v Thibault which asks whether denying a woman a performance assessment, and, consequently, the possibility of advancement in her career, on grounds of absence from work by reason of maternity leave, violates the equal treatment Directive.

Two other cases from Denmark also concern pregnancy discrimination. Pedersen et al v Kvickly Skive et al, asks whether Danish legislation, which provides for full pay during illness, but not for women unable to work as a result of pregnancy, violates EC law where abnormal pregnancies cause women to be off work as medically unfit.

Larsson v Fotex asks whether the equal treatment Directive prohibits dismissal as a result of absence following the end of maternity leave, if the absence is due to illness during pregnancy which continued during and after maternity leave.

A case from Italy, Balestra v INPS, concerns differential age limits between men and women for the purposes of early retirement, and the calculation of pension benefits, and consequent differential treatment as regards credited contributions.

Remedies. Two cases question the limits on compensation imposed by national law. The United Kingdom case of Sutton asks whether payment of interest is required when a social security benefit is denied contrary to EC law, and from what date. EC law requires effective remedies, and UK limits on back-dated claims are under challenge.

A case from Germany, Draehmpael v Urania, challenges German legislation requiring fault. Two cases from Italy take up the Francovich saga, Danila Bonifaci v INPS and Palmisani v INPS, both challenge Italian law seeking to impose procedural limitations on such claims.

Clearly a number of important judgments are going to be made that will effect workers all over Europe. So keep your eyes on the ECJ.

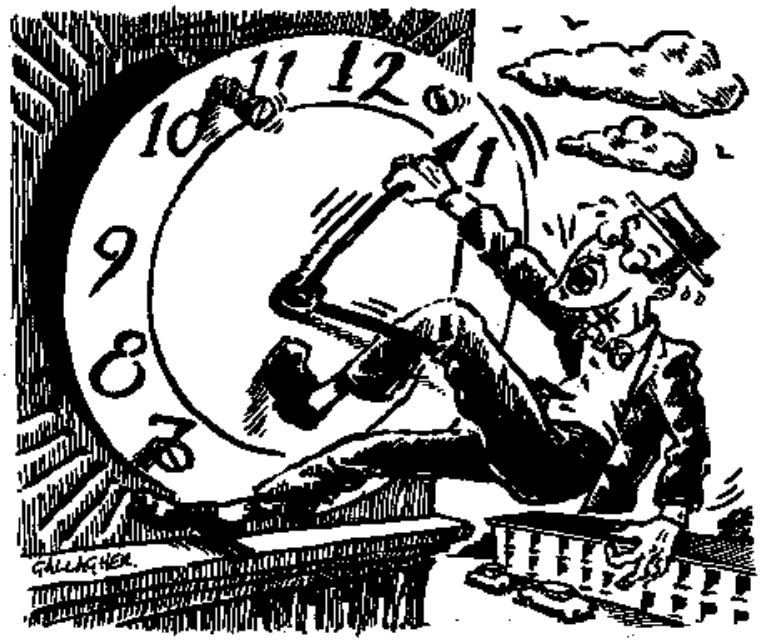
EAT adds another twist

Meade and Baxendale v British Fuels Limited [1996] IRLR 541.

In Wilson and others v St Helens Borough Council [1996] IRLR 320 the Employment Appeal Tribunal decided that if contractual terms were changed because of a transfer of an undertaking, the original contract of employment remained in force. This meant that any variations were ineffective and gave full effect to the protective aim of the TUPE Regulations confirmed in Regulation 5(1).

Only four months after Wilson comes the Meade case which, while not being a retreat from the Wilson judgment, has certainly knocked some of the shine off it.

In Wilson the EAT was not influenced by delay on the part of the employees in raising a complaint. The test of whether TUPE applied was simple: was there a direct link between the transfer of the undertaking and the variation in the employees' contracts?



In Meade, the EAT appears to have gone off on a different tack. The EAT was required to consider again the effect of new contractual terms imposed after a transfer.

The employees in Meade were dismissed and paid redundancy pay and money in lieu of notice. The employees were re-employed by a new undertaking on inferior terms and some months later signed a new statement of terms and conditions confirming the inferior terms. More than one year after the transfer of employment, proceedings were commenced in the Industrial Tribunal.

In a surprising decision the EAT concluded that the original dismissals were effective and the prevailing contractual terms were those currently existing and agreed between the parties. Effectively the EAT directed that the employees should have claimed unfair dismissal, relying upon Regulation 8 of the regulations. But where does that leave Regulation 5 which says that a relevant transfer shall not operate so as to terminate the contract of employment of an employee employed immediately before the transfer?

In Meade the EAT would not accept that the dismissals were ineffective because of Regulation 5. The EAT sought to raise a false distinction between the type of dismissal in Meade and that in Wilson.

In Wilson the employees were dismissed by reason of redundancy prior to the transfer and, although redundancy payments were not

received, this was because of special rules applying to redeployment between local authorities. The absence of a payment does not undermine the fact that there were dismissals.

The Acquired Rights Directive and the TUPE Regulations are there to protect employees. A key principle is that a relevant transfer automatically transfers the contract of employment.

This key principle - the very heart of the purpose of the Directive and the Regulations - would be defeated if employees could be dismissed and then re-employed on inferior terms. A dismissal and re-engagement connected to the transfer should not override the protection of TUPE Regulation 5.

This leads one also to consider the impact of Regulation 12 which says that any provision of any agreement is void in so far as it attempts to exclude or limit the operation of Regulation 5 (and other provisions).

The decision in Meade to accept the validity of a dismissal based upon a mistaken view of the law, followed by an inferior contract, surely runs contrary to Regulation 12 and the purpose of the Regulations.

In Meade the EAT went on to consider the position if the contract did transfer to the new employer. The EAT accepted that the new contract would be invalid because of Regulation 12 and the Wilson decision.

On the facts of the case there could be no break in the link between the transfer and the new contract.

However, the EAT went on to say that this situation could not go on forever, and that the longer the time since the transfer the easier it would be to establish a lawful variation by conduct or agreement. In Wilson the EAT did not accept the time factor as confirming agreement by conduct, and it must be right that a variation which is of no legal effect does not simply become lawful over time.

The real point about time must relate to variations and agreements in relation to the new terms following the transfer. The longer the time after the transfer the more difficult it will be to establish the direct link between the transfer and any changes to the contract.

Such matters are for Industrial Tribunals hearing the facts. But in doing so there must always be proper regard to the purpose of the Regulations.

Some aspects of the decision in Meade in relation to the dismissal are unsatisfactory, but if no dismissal occurs the Meade judgment is in agreement with Wilson.

Both Wilson and Meade started with employers claiming the TUPE Regulations did not apply. In most transfer situations the parties now accept the application of the Regulations so the dismissal point may be less important in the future.

Certainly it will be a very foolish transferee who arranged for employees to be dismissed before employing them on inferior contracts. If the dismissals were related to the transfer they would be automatically unfair.

The employer cannot rely on the "economic, technical or organisational reason" defence - known as ETO - where there is no change in the workforce.

Protection when only part transfers

Buchanan-Smith v Schleicher [1996] IRLR 547 (EAT)
Securicor Guarding Limited v Fraser Security Services [1996] IRLR 552 (EAT)

An employee can be protected by TUPE when only part of an undertaking is transferred. In Botzen [1986] 2 CMLR 50 the European Court of Justice said that the test was whether the employee was 'assigned' to the part transferred.

But it is not always easy to establish whether a particular employee is protected, although two recent cases give some clue. In Buchanan-Smith the employee worked for two parts of a business.

The Employment Appeal Tribunal held that where an employer has more than one undertaking, but only one is transferred, an employee may be assigned to the part transferred even if they also carry out activities in the part which is not transferred. The EAT said it is not necessary for an employee to work exclusively in the part transferred to fall within the protection of TUPE.

The EAT was influenced by the fact that Mrs Buchanan-Smith was taken on by the new employer to continue functions in the part transferred, which suggested that she was assigned to that part pre-transfer.

In the GMB's Securicor case guards who worked at a particular site were assigned to that site, where they carried out their main duties. The EAT found in their favour despite the guards also having additional duties they sometimes performed elsewhere and despite a mobility clause which the employer could have relied on to transfer them to other sites.

An interesting point arises. There is no requirement for an employee to work exclusively in the part transferred to be treated as employed in that part. The test does not appear to be purely based on the amount of time spent on duties in that part. It may be a qualitative test: the nature of the employee's link with the part transferred.

This leaves open the possibility that an employee may be assigned to more than one part of a business. An employee who works exclusively on two parts of a business and splits their time equally between them should properly be regarded as assigned to both and should be protected by TUPE if one or other part transfers.

Protective awards "made worthless"

Potter and others v Secretary of State for Employment, Court of Appeal 30.9.96.

The Court of Appeal dealt a severe blow to former Swan Hunter shipyard workers seeking compensation - a protective award - for a failure to properly consult on redundancies announced after the company went into receivership. The decision has made many protective awards worthless, and not just for those employed by Swan Hunter.

The perverse result of the court's decision is that the greater the length of service and the greater the breach of the law by the receivers, the less protection individuals have. The unions are seeking leave to appeal to the House of Lords.

Swan Hunter went into receivership on the 13 May 1993. The receivers, Price Waterhouse, promised the unions that workers would be paid and that work would continue. A week later Price Waterhouse issued a media statement saying they were seeking 300 redundancies. On 28 May they summarily dismissed 400 staff.

Unions pursued claims for protective awards. The Newcastle Industrial Tribunal held that it was difficult to imagine a more clearcut default: the receivers in this case had made no attempt to consult on the redundancies. They awarded a maximum of 90 days compensation.

But because the company was technically insolvent the receivers had no obligation to make any payments, leaving the Secretary of State for Employment to pick up the bill. The Secretary of State cut the payments by making a whole series of deductions leaving many workers with nothing and the highest award at £1,640.

Seven test cases were launched claiming that the various deductions and limits were unlawful and in breach of the European Insolvency Directive. These claims were successful at the IT.

The Employment Secretary appealed to the Employment Appeal Tribunal which upheld parts of the appeal. The EAT held that the Secretary of State was entitled to limit the protective award to a maximum of 8 weeks and to limit the pay out to a maximum of £205 per week (the statutory redundancy pay limit), but was not entitled to deduct notice pay from the awards. The unions appealed as did the Employment Secretary.

There were 3 issues to be dealt with by the Court of Appeal: was the limit of a week's pay at £205 per week in accordance with the Insolvency Directive; was the Government entitled to deduct notice pay from the award and; if there was a breach of the directive could individuals pursue Francovich claims against the Government in the Industrial Tribunal.

The court decided that, if there was a Francovich claim, then this had to be pursued in either the High Court or the County Court and could not be pursued in an Industrial Tribunal.

The Court of Appeal held that it was not clear that the £205 limit was in accordance with the objective of the Insolvency Directive and would have considered referring the matter to the European Court of Justice. The court decided this was not necessary because the individuals who pursued test cases were not entitled to any protection under the Insolvency Directive and thus the £205 limit was irrelevant. The core of the court's decision was that entitlement to guaranteed payments under the Insolvency Directive depended upon the date of dismissal. The court held that the protection under the Insolvency Directive only related to payments for a period before the dismissal.

As the protected period ran from 28 May, which was the date of dismissal, the staff were only entitled to have their pay protected for that day, for which they had already been paid. This, of course, means that the more flagrant the breach of law by the receivers the less the protection for the individuals concerned.

This is a disappointing decision for Swan Hunter workers which will also have a major impact on thousands of other workers. The Government subsequently changed the law so that set offs for notice money cannot be made. But the court's interpretation of the extent of the protection under the Insolvency Directive will still have an on-going effect unless the House of Lords allows the appeal.

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