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School meals staff win equal pay

School meals workers employed by Cleveland County Council are celebrating a £4 million negotiated settlement following Industrial Tribunal claims under Equal Pay laws. The GMB and UNISON members involved will receive individual awards ranging from £900 to £4,800 paid in two instalments: March 1997 and March 1998.

It is the biggest equal pay settlement ever and could herald similar claims against other local authorities. The 1,500 women had already secured over £1 million in a sex discrimination case which was settled in July 1996. Following that success the women, represented by Thompsons, took action to secure equal pay with other, predominantly male, manual workers.

The sex discrimination and equal pay claims followed the compulsory competitive tendering of the school meals service in 1994/95. To make savings the Council imposed a radical change to the wage structure, imposing pay cuts which led to the sex discrimination claims as male manual workers had not faced such pay cuts. In addition. the women workers did not receive the bonuses available to male manual staff, such as parks and refuse workers, and this led to the equal pay claim.

Cleveland County Council no longer exists and has been replaced by four unitary authorities, each with its own pay structure. Talks will now take place with each authority based on the catering staff being entitled to the same bonus payments as other manual workers.

The implications for other local authorities could be immense. Virtually every local authority operates bonus and productivity schemes for male manual workers.

Almost none offers bonus and productivity schemes to female manual workers. The Financial Times estimate the total bill to settle similar sex discrimination and equal pay cases could reach £1.5 billion.

The GMB and UNISON both have significant histories of pursuing sex discrimination and equal pay claims on behalf of members and this could be the most significant yet.

Rodney Bickerstaffe, UNISON General Secretary, said: "Women manual workers are entitled to expect the same treatment as men when it comes to bonus payments. Other councils should now examine their pay rates and ensure they do not end up with similar equal pay claims.

John Edmonds, GMB General Secretary said: "The settlement is fair and is a victory for all women workers. We are delighted that common sense has prevailed."

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Compensation formula

Digital Equipment Co Ltd v Clements (EAT, unreported) 5 December 1996, overturning decision reported at [1996] IRLR 513

Calculating compensation for unfair dismissal is not always easy. Even the Employment Appeal Tribunal has found this a thorny problem. We reported (LELR issue 4) the EAT's conflicting decisions in Cox [1996] IRLR 389 and Clements [1996]IRLR 513. In an unusual, but welcome, move the EAT reconsidered its decision in Clements because it conflicted with the decision in Cox. The outcome is one which will please employees.

The issue concerns the order in which the calculation of compensation should be carried out. The Tribunal calculated Mr Clements' loss at £43,000.

It said that there was a 50% chance he would have been dismissed for redundancy even if a fair procedure had been followed - this meant his compensation should be reduced by 50%. But he had also received a payment of £20,500 from his employers which had to be deducted from his compensation.

How should the calculation be done? If the payment of £20,500 was deducted first this would leave a balance of £22,500 which, when reduced by 50%, gives a final figure of £11,250.

But if the 50% reduction is applied first, the full £20,500 would be deducted from half of £43,000,leaving a balance of only £1,000. The EAT judgment led to Mr Clements receiving the higher figure of £11,250.

The correct approach is first to work out the loss suffered, after calculating lost earnings and other benefits. Then take into account any payments received as a result of the dismissal. This is because the employee must be put financially in the position she or he would have been in if she or he had not been dismissed.

Consequently, the payment received from the employer should be deducted at this stage of the calculation to establish the true net loss suffered, before taking into account any reductions for the chances of a fair dismissal or for contributory fault by the employee.

The EAT distinguished between a deduction - which is for sums received by the employee and is part of the calculation of loss- and reductions, which are applied to the final figure.

In future, Tribunals should calculate the net loss after deducting amounts received from the employer on dismissal and only then apply any percentage reduction which they have decided is appropriate. If this leaves a figure in excess of the statutory maximum for a compensatory award, the 'cap' will apply so that the employee receives only the maximum of £11,300.

The correct approach has now been cleared up. But for how long? The EAT's judgment tells us that the Court of Appeal will be considering the same issue later this year. The EAT has reached a fair and logical conclusion. Let us hope the Court of Appeal agrees.

£28,500 race bias award not excessive

HM Prison Service and others v Johnson (IDS Brief 582)

The Employment Appeal Tribunal has ruled that a £21,000 compensation award for injury to feelings caused by serious and prolonged racial discrimination was not excessive. The award was larger than any other reported award for such injury since the lifting of the statutory limit to compensation.

The EAT said it was the worst case it had encountered. It was not unreasonable, the EAT said, to make separate awards of compensation against individuals who, in the course of employment, acted out of sheer malice and victimised him on racial grounds.

The case concerned an 18-month campaign of discrimination against a prison officer who was humiliated, ostracised, ridiculed and treated with contempt.

At the appeal the Prison Service argued that although the Industrial Tribunal was entitled as a matter of law to apportion the damages for injury to feelings between the employer and the two employees, that should not happen in practice save in exceptional circumstances. To keep individual employees in the proceedings as separate parties caused unnecessary complications, was inconvenient, gave rise to the possibility of overlap in the assessment of compensation and could give the complainant the opportunity to vent personal animosity and take revenge. It was preferable that the employer who was vicariously liable for a very wide range of his employees actions should be liable to pay compensation.

Mr Justice Smith said that although it was possible to order the employer to pay, by finding him vicariously liable for his employees behaviour, it would not necessarily follow that it should be done. It was a question for the discretion of the Tribunal.

The EAT upheld the IT's award against the Prison Service of £20,000 for injury to feelings, £7,500 aggravated damages and £500 against each of the Prison Officers.

Employer must give maternity rights guidance

Gray v Smith (Belfast Industrial Tribunal

An Industrial Tribunal has ruled that an employer who failed to provide any guidance concerning maternity rights waived his right to strict compliance with the statutory notification procedure.

Ms Gray was employed as a clerical worker by Mr Smith but did not have a written contract of employment. In October 1994, she informed Mr Smith orally, that she was pregnant.

He did not have a written maternity policy and did not give her guidance or advice as to her rights to maternity leave or pay. At the end of January 1995 Ms Gray said she wanted to go on maternity leave on the 10 February. Her baby was born on 10 April.

In June she asked when she could resume work and was told there was no job for her. The IT accepted that Ms Gray had failed to comply with the statutory obligation to notify her employer in writing the fact that she was pregnant and of her expected week of childbirth.

She argued that the employer had waived or was estopped from relying on the requirement that notification must be in writing when he accepted her verbal notifications. She relied upon the House of Lords decision in Scally (1991) IRLR 522, that an employee cannot reasonably be expected to be aware of a contractual term unless it is drawn to their attention,which applied to a situation where an employee would be subject to a detriment if she was not informed of her obligations.

The IT noted that Mr Smith had not given Ms Gray a contract of employment nor any guidance about maternity rights. In these circumstances he had waived his rights relating to compliance with the strict provisions of the Northern Ireland equivalent to Section 75 of the Employment Rights Act 1996.

The IT held that Ms Gray was discriminated against on the grounds of sex and unfairly dismissed. She was awarded £6,000 for injury to feelings, and £1,924 financial loss.

Time limit runs from date of last act of discrimination

General Medical Council v Rovenska (Times Law Report 31.12.96)

The Court of Appeal has ruled that the 3 month time limit for lodging a complaint of race discrimination runs from the date of the last discriminatory act.

This case concerned a Czech doctor who qualified in 1973. She came to England in 1992 and sought political asylum, which was granted. In 1994 she obtained an honorary contract as a Research Registrar at Thomas' Hospital.

Dr Rovenska requested limited registration from the General Medical Council. As a foreign national, she needed to have passed or been exempted from a test by the Professional and Linguistic Assessments Board. Dr Rovenska failed the test twice so she sought exemption from the test. Doctors from certain Universities in Australia, Canada, Hong Kong, New Zealand, Singapore, South Africa, the USA and West Indies did not have to take the test.

After her fourth application was refused by the GMC on the 2 December 1991, she sent the GMC a new reference confirming her quality of work but on the 10 January 1992 she was again rejected.

In March 1992 she lodged an application for indirect race discrimination on the grounds that the proportion of Eastern European nationals who could comply with the requirements for exemption was smaller than the proportion of nationals from the exempted Countries who could.

The Industrial Tribunal ruled her complaint was out of time since it was lodged more than 3 months after the last refusal in December.

Dr Rovenska appealed. The EAT decided her complaint was in time since she complained of a continuing act of discrimination arising out of the maintenance and operation of a scheme still in force. The GMC did not accept the ruling and went higher to the Court of Appeal.

Lord Justice Brooke said that if the regime which the GMC had selected for its exemptions policy was inherently discriminatory as Dr Rovenska maintained, every time it refused to allow her limited registration without first taking the Assessment Board's test it would be committing an act of unlawful discrimination. The letter in January 1992 invited the GMC to grant the doctor an exemption, but the GMC refused it. The application had been made within 3 months of the last refusal and was therefore in time.

Union reps the best

Health and Safety (Consultation with Employees) Regulations 1996

In 1995, the Government passed new legislation on consultation on redundancies and transfers in response to a European Court of Justice judgment which said that the previous position was unlawful. The Government was required to legislate so that employers could not avoid obligations by refusing to recognise unions.

The legislation, the Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment)Regulations, attempted to undermine trade unions by allowing employers to consult with elected representatives, even where a union is recognised.

The Government took a different tack on safety consultation. This was foreshadowed in a letter from the Secretary of State at the time, Michael Portillo, to the Health and Safety Commission on 1 May 1995. He said: "In essence, I believe employers should continue to consult the representatives of a recognised trade union where a union is recognised; elsewhere the employers should consult elected representatives of their employees or ... their employees directly."

The difference in approach is interesting and the real motivation behind the government's approach is not revealed. Mr Portillo's letter merely states that "the considerations on health and safety differ in some respects from those on redundancies and transfers", without specifying those considerations or differences.

It is possible - if unlikely- that the government was prepared to acknowledge the effective role played by safety representatives and committees in reducing workplace accidents. A more likely explanation is that the government could not adopt the 'ad hoc' approach taken on transfers and redundancies where it requires representatives to be elected only when the need to consult arises. Safety is a continuing concern and requires a continuing presence.

An approach which, in effect, required all employers to arrange or permit elections for representatives of all staff not "of a description for which a trade union is recognised" would not have been attractive. The other pragmatic reason is probably that the expertise of trade union representatives, and the amount of training provided by unions, reduces the potential training burden on employers and state.

The role of safety representatives and elected representatives in employee safety may yet evolve further as the Government appears to envisage a possible role for them in reaching agreements under the Working Time Directive, as indicated in the DTI Consultation Document published on 6 December 1996 (see page 6 in this issue of LELR).

The Health and Safety (Consultation with Employees) Regulations came into force on 1 October 1996. These Regulations apply where there are employees not represented by safety representatives under the existing regulations (Reg 3). Remember that under the existing law, trade union appointees represent "employees or groups of employees", not merely union members. There is no need to restrict them to only representing grades or occupations which are covered by union recognition.

Many, if not most, employers who currently deal with union safety representatives will find that the most effective approach is to continue with that approach and, indeed, to extend the union role to cover any groups of employees not yet covered, who would otherwise need to have elected representatives in place.

The Directive provides that representatives act on behalf of all employees, so it would be unlawful for UK law to restrict their functions to unionised categories. Where there are groups of employees not covered by union recognition, then the employer must provide for elected representatives. This is in addition to existing union representatives. Those union representatives cannot be superseded or replaced by the elected representatives.The employer does have the option of consulting

directly with individual employees (Reg 4). While consultation with individuals remains important,even where representatives exist, it is unlikely that employers of any size will find consultation with individual employees a realistic alternative to consulting through representatives. Where representatives have been elected the employer must tell the employees the name of the representative and who she or he represents.

Either the employer or the employees can trigger an election. The right is for workers in "a group of employees" to elect representatives from amongst their number. A group of employees is not defined.

This means that the number of representatives and their sphere of responsibility are left open, which may not make for the most effective consultation and may lead to a plethora of representatives. There should be a provisions for a safety committee in non-union situations. A committee, and some overall scheme on "groups of employees", constituencies, number of reps etc, would seem minimum requirements.

The proposed Regulations do not say what happens if there is a dispute on the conduct of an election or the "representativeness" of the representatives. The lack of any specific legal obligations makes enforcement almost impossible. This absence of any effective remedy has proved a significant issue in the judicial review proceedings over the redundancy and transfer consultation regulations. It is compounded in the safety sphere where the Regulations specifically deny employees and representatives the right to bring a civil claim for any failure to comply.

There is a difference between the functions of a union appointed safety representative and those of an elected representative. The functions under the 1996 Regulations are far more limited.

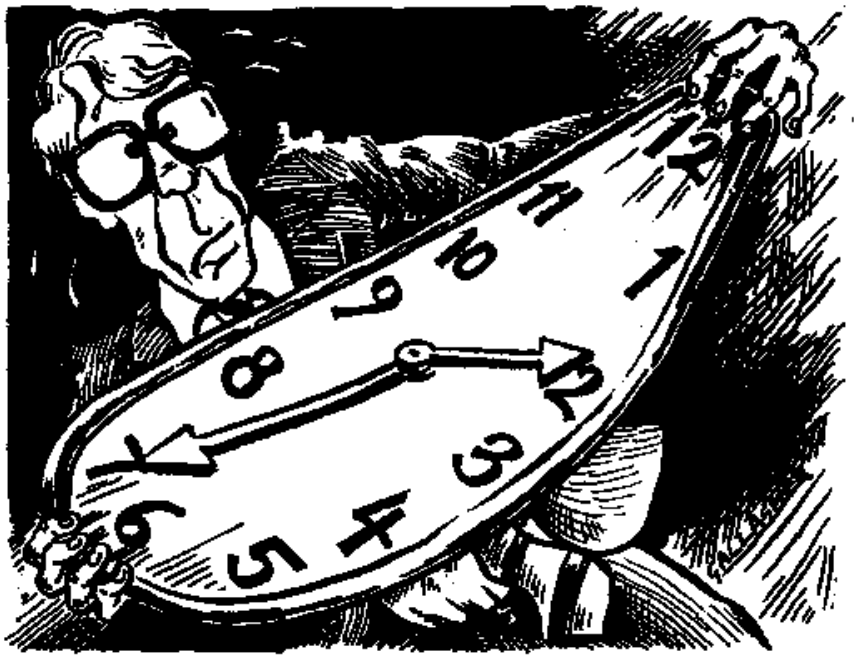
The employer must consult the representatives on matters relating to health and safety at work and must provide training, time off and facilities for the representatives to carry out their functions. But those functions consist only of making representations (on the same issues as union safety representatives) without the functions of inspection.This means that elected representatives are confined to an inferior role, with statutory functions which are less intrusive and which are essentially reactive: a representative can only make representations on matters of which he becomes aware. This deficiency is difficult to justify and sits awkwardly with the emphasis on prevention in European law and the effective conduct of the representatives' remaining functions.

The memorandum which accompanied the proposal for these Regulations stated merely that these additional functions "would not be required of elected representatives". But would they be aware of this potential wider role?

Even if they were, they appear to lack the clout to carry it out effectively, as the right to time off and facilities is limited to carrying out the statutory functions (Regulation 7), and protection against dismissal or detriment arises in relation to "participating in consultation" or in an election.

The protection given on health and safety consultation is wider than redundancies and transfers in this respect: all those participating in elections are protected against detriment for doing so. This must include those organising the election or voting in it, not merely those who stand as candidates.

Stretching the meaning of time



DTI Consultation Document on Measures to Implement the Working Time Directive

On 6 December 1996 the Department of Trade and Industry published a Consultation Document on measures to implement the Working Time Directive in the United Kingdom. The deadline for responses is 6 March 1997.

This means that the UK will not pass legislation to implement the Directive before March. It is quite possible that the necessary legislation will not be passed this side of the General Election.

The Consultation Document states that "at the end of the consultation period, the Government will take stock of the position in the light of responses received. Implementing legislation will be drafted and the Government will consider whether there needs to be any further consultation before implementation measures are put before Parliament" (para 1.5).

The Government plainly intends to adopt a grudging and minimalist approach to implementation: the same approach which created such legal difficulties over the Acquired Rights Directive. The Government intends to pass Regulations as a token implementation of the Directive, intending to repeal the legislation if it succeeds in persuading the other EU countries that the Directive should not apply to the UK.

This approach runs through the proposals. The Government seeks to implement in a way which grants minimal rights and involves minimum disruption to existing legislation.

The Government even goes to the extent of warning employers not to incorporate the new statutory entitlements into terms and conditions, otherwise employees would gain contractual rights which could not be unilaterally withdrawn.

Thompsons has prepared a detailed briefing on the Consultation Document which has been sent to trade unions. This article highlights some of the main features of the proposals.

No Substantive Rights

The Consultation Document does not propose substantive rights for workers which can be directly enforced against their employers. It does not propose statutory rights to breaks, rest periods, holidays etc.

It proposes merely that workers should not suffer detriment or dismissal for asserting their entitlements. A worker, for example, would not be granted a right to insist on 4 weeks paid leave, but if he asked for leave, he could not be sacked or disciplined for doing so.

If the employer refuses the leave, the only remedy which the Consultation Document seems to suggest is for the worker to defy the employer, take the leave and have the right to a remedy if the employer takes action. This is ludicrous and would not amount to proper implementation.

Workers

The Government tries to limit the application of the Directive to employees, even though the Directive covers 'workers', which should include anyone who works under a contract to provide services personally.

Excluded Sectors

The Government tries to draw the excluded sectors as widely as possible so that anyone in the transport sector is excluded, even 'retail staff working in airports'. This is unsustainable.

Collective Agreements

Many of the provisions of the Directive may be modified by collective agreements or 'agreements between the two sides of industry'. The Consultation Document suggests that agreements between the two sides of industry could be reached with elected representatives, without any guarantees of independence or representativeness, and without any mechanism by which those representatives would be accountable to those they are supposed to represent.

This takes no account of the European Commission's challenge to the role of elected representatives in the Collective Redundancies and Transfer of Undertakings Regulations 1995 and the lack of safeguards in those Regulations (see LELR issues 1 and 4). It appears to ignore the proper interpretation of 'the two sides of industry' which must mean a higher level than an individual employer and individual employee representatives.

Breaks

It is suggested that legislation need only provide for a five minute break which can be taken at the workstation.

Holidays

The Government suggests that employees could be required to work 48 (or 49) weeks in any year before qualifying for any statutory paid leave.

Overview

These are just some of the areas where the proposals do not appear to implement the Directive. The overall structure of the proposals is fundamentally flawed. It does not allow for effective enforcement by workers. Indeed, enforcement by workers may not be enough on its own.

Most other EU states provide for enforcement through a labour inspectorate. A combination of individual rights and effective enforcement by an agency or inspectorate seems the most appropriate model.

Put the boot into discrimination: judgment of Towering proportions

Jones v Tower Boot Company Limited (unreported),Court of Appeal

In a landmark judgment the Court of Appeal has given a wide definition to the words 'in the course of employment' to give them their natural and ordinary meaning in discrimination cases.

Both the Sex Discrimination Act and Race Relations Act make employers liable for acts of discrimination committed by their employees in the course of their employment. It does not matter whether or not it was done with the employer's knowledge or approval.

But employers will not be liable if they can prove that they took the steps that were reasonably practicable to prevent the employee - the individual discriminator - from carrying out the acts of discrimination.

It therefore begs the question of what actually amounts to 'in the course of employment'. The definition of that phrase becomes crucial in defining the parameters of the law.

Raymondo Jones had suffered appalling racial abuse - both physical and verbal - during his month of employment at Tower Boot Limited, where he was the first ever black or ethnic minority employee. During his employment he had his arm burnt with a hot screwdriver, was whipped on the legs with a piece of welt and had metal bolts thrown at his head. He was also subject to racial abuse. He left the job after a month because of his treatment.

The Industrial Tribunal found that Tower Boot Limited was liable for the acts of race discrimination and awarded £5,000 compensation. Jones had neither named the individual perpetrators nor claimed race discrimination against them directly, so that part of his claim failed.

The Tribunal made no findings of fact against management's direct role in the discrimination. But the EAT overturned the decision finding that, since the discrimination was not carried out 'in the course of employment', Tower Boot Limited was not liable.

A majority of the EAT gave a narrow definition of 'in the course of employment' identical to that used in common law, such as employer negligence. They said the employer is liable for the employee's acts which are authorised by the employer. An employer will only be liable for acts which are not authorised if they are so closely linked with authorised acts as to amount to a way of doing an authorised act. The use of a screwdriver for the purpose of burning a colleague's arm and the other attacks on Jones did not fall within that definition, the EAT said.

In a powerful judgment, the Court of Appeal overturned the EAT and stressed the need to give the words a broad definition and their natural meaning. Tribunals must interpret the everyday meaning of 'in the course of employment'.

The purpose of the law is to eliminate discrimination in employment and to widen the net to make both employees and their employers liable for acts of race and sex harassment. It is only if an employer can show that it has taken the reasonable steps to prevent acts of discrimination, that they will be able to escape liability.

The law should be interpreted to enable it to achieve its purpose and therefore be given a broad reading.

It is hoped that the judgment will encourage employers to take preventative measures to prevent discrimination and harassment from happening in the work place. It is likely that reasonable steps will continue to be judged by the standard set in the Codes of Practice by the Equal Opportunities Commission, Commission for Racial Equality and European Commission.

Bugging and burgling - proposed new powers would make them legal

The Police Bill currently going through Parliament has been introduced by the Government backed by claims that it will assist the Police in the fight against crime and will legalise the 2,000 covert bugging operations which take place every year.At present, the use by the Police of bugging devices is wholly unregulated by statute and is subject only to 1984 Home Office Guidelines.

The Guidelines do not confer legal immunity, and therefore covert entry by the Police into private property to plant bugs is unlawful and could be subject to legal action. By contrast, the security services are regulated by statute and the Home Secretary's prior authority will justify entry, effectively granting legal immunity.

The Bill has attracted almost universal criticism from civil libertarian groups, the judiciary and lawyers. It would allow Chief Constables (or subordinates) to authorise the legal use of bugs in cases of serious crime, with no control by the Courts or Ministers.

The only provision for any kind of check would be a Commissioner to review such activities after the event, and investigate any complaints. But the Commissioner's decision could not be appealed or questioned in Court.

Thankfully, during its passage through the House of Lords, the Government suffered a defeat when Peers, backed by Labour and Liberal Democrats, forced an amendment to ensure that prior authorisation for intrusive surveillance operations be obtained either from senior judges, serving as security Commissioners, or alternatively circuit judges. This leaves the Bill in disarray, and it remains to be seen what action the Government will now take.

In other ways the Bill remains unamended and continues to cause serious concern. The police will still have grounds for the wide ranging use of bugs in the investigation of serious crime, albeit with prior judicial approval.

A serious crime is defined as an offence which "involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose". This definition is unacceptably wide and vague.

Although commentators focussed on the effect on mass public protests concerning live animal exports or road building projects, the implications for trade union activities are clear: industrial action, and other forms of protest planned by trade unions and their members, could give rise to a reason under the Bill for the police to seek to bug individual trade unionists and officials, and also their union and lawyer's offices.

It is alarming that there are no exceptions at all under the Bill for journalists or for those in professional practice such as lawyers (and indeed doctors). This essentially erodes the vitally important principle of professional privilege, whereby those consulting lawyers can be confident that what passes between them and their professional advisors is confidential.

Trade unions seeking legal advice about a proposed course of legal or industrial action could find those consultations the subject of Police surveillance and interference, so infringing the union's ability to organise its activities effectively.

Whilst prior judicial approval may act as some constraint on the police, the right to consult lawyers in confidence should be preserved. At the very least, the use of bugs should be limited to investigating the activities of the solicitor who is suspected of knowingly participating in criminal activity, rather than lawyers simply engaging in the day to day activity of giving legal advice.

Trade union activities should be exempt. It is to be hoped that further amendments will be made to the Bill before it finds its way to the Statute Book.

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