Published by **Thompsons** Solicitors.

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 7 JAN 1997

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Hopes rise for part timers on pensions

Dietz v Stitching Thuiszorg Rotterdam [1996] IRLR 692.

A new European Court of Justice ruling raises fresh hopes for part timers denied access to pension schemes. It opens the way for claims to any benefits denied to part timers that are access related such as a pension.

The ECJ also confirmed three crucial points: if employees are to benefit from an occupational pension scheme they must make contributions to cover the time when they were excluded; pension scheme administrators must comply with Article 119 of the Treaty of Rome; workers can take action for discrimination against the scheme administrators as well as their employers.

Ms Dietz was employed part time for seven hours a week from 1972 to November 1990 when she took voluntary early retirement by agreement with her employer. She was excluded throughout the period from the occupational pension scheme. Dietz's claim was for pension entitlement which spanned periods of employment both before and after the ECJ's Barber judgment [1990] ICR 616 and the Maastricht Protocol which became effective on 17 May 1990.

The Barber judgment and the Protocol to the Maastricht Treaty state that pension benefits in respect to periods of employment before 17 May 1990 are not covered by article 119 unless legal proceedings had already been started. That meant there was no remedy for pensions inequality for periods before 17 May 1990.

Since pension rights become valuable by accruing long periods of service and therefore payments, the overall effect has been to delay pensions equality until the next generation. But the ECJ in Dietz ruled that neither the limit on backdating pensions rights in Barber nor the Maastricht Protocol apply in relation to the right to join an occupational pension scheme. This confirms the judgments in both Vroege [1994] IRLR 651 and Fissher [1994] IRLR 662 which stated that Barber and the Maastricht Protocol limitations apply only to the kind of discrimination which employers and pension schemes could reasonably have considered to be lawful at the time. Dietz, by covering benefits relating to access to the pension scheme, reduces the limitation in the Maastricht Protocol still further.

The ECJ says entitlement to a retirement pension under an occupational scheme is inextricably linked to the right to join the scheme - membership would be of no interest to employees if it did not confer entitlement to the benefits provided by the scheme.

The ECJ found that it has been clear since Bilka Kaufhaus [1986] IRLR 317 that discrimination in the award of benefits which result from discrimination in the right to join the scheme are unlawful. Barber and the Maastricht Protocol do not therefore apply in this situation.

Most occupational pension scheme benefits are access related as they are calculated partly on how long the employee has been a scheme member. The practical effect of the Dietz judgment may be less than hoped as the ECJ has reiterated the position on time limits for bringing claims. It confirmed that national rules on time limits apply to actions based on community law, provided they are not less favourable for community law actions than for similar domestic actions, and they do not make the exercise of European law rights either excessively difficult or impossible in practice.

So far the UK courts have upheld the time limit provision of the Equal Pay Act 1970 although the case of Levez (LELR issue 3) and Preston (LELR issue 2) currently before the Court of Appeal could change that.

Not very appealing in the race against time to submit claim

Post Office v Adekeye, Times Law Report 3.12.96

The Court of Appeal has ruled the Race Relations Act does not apply to an appeal against dismissal, thus narrowly defining who is protected from race discrimination in employment.

The Court accepted there was a loophole in the legislation which does not cover people who were dismissed and seeking reinstatement as they were no longer employed.

Ms Adekeye brought a claim under the Race Relations Act 1976 against her former employer, the Post Office, alleging discrimination in her appeal against dismissal. Her claim was lodged within 3 months of the appeal, but more than 3 months from the dismissal itself.

The Race Relations Act prohibits discrimination by employers 'in the case of a person employed by him' (Section 4(2)) and by the employer refusing or deliberately omitting to offer a person employment (Section 4(1)).

The Court of Appeal had to consider whether the Race Relations Act covers discrimination against a dismissed ex-employee seeking reinstatement on appeal. They held that Section 4 (2) required Ms Adekeye to be employed at the time of the discrimination and she was not.

Neither had the Post Office either refused or deliberately omitted to offer her employment: she was not seeking a job offer, but the reversal of a decision to dismiss.

The judgment means that ex-employees are not protected from acts of discrimination by former employers. If there is suspicion that a dismissal is tainted by race discrimination this judgment makes it all the more crucial to start Industrial Tribunal proceedings within 3 months of the dismissal itself and not wait for the appeal hearing.

Dad spoils the party

Go Kidz Go Ltd v Bourdouane EAT 10.9.96

Employers are guilty of direct sex discrimination if they fail to take steps to stop sex harassment of staff by non-employees, the Employment Appeal Tribunal has held. The EAT said Ms Bourdouane's employer should have taken steps to prevent her from being subjected to further sex harassment after she complained.

Ms Bourdouane was employed by a company hosting children's parties and was sexually harassed by a male parent. She left the party and complained to her employer but was encouraged to return as other staff were busy. She was subjected to further harassment.

The EAT said an employer has a duty "to take all reasonable steps to prevent such discrimination taking place where it is within his power to prevent it". Mirroring a differently constituted EAT's reasoning in Burton and Rhule v De Vere Hotels EAT [1996] IRLR 596 (LELR issue 6) they said that where an employee is subjected to behaviour which includes elements of a sexual character to which a man would not have been vulnerable that constitutes less favourable treatment on the grounds of sex. It is not necessary to take the further step of finding out how an employer would have treated a male employee.

Burton established a new "control" based test for employers liability for acts of racial harassment by third parties and others. In Burton the EAT held an employer liable for the actions of third parties "in circumstances in which he can control whether it happens or not".

In a legal sense, unforeseen events can still be under an employers control.

By contrast, in Bourdouane, the EAT said that the duty to take all reasonable steps to prevent discrimination necessarily involved a degree of foresight of the risk of discriminatory behaviour.

Bourdouane was decided by a different EAT the week before Burton. It approaches the issue of foresight with rather more caution than the EAT in Burton which expressed the view that it was undesirable that concepts of the law of negligence should be imported into the statutory torts of discrimination.

Health, safety and the sack

Tedeschi v Hosiden Besson Limited EAT 210 1996 (959/95)

Since 1993 it has been automatically unfair for an employer to dismiss for a reason connected to carrying out a health and safety function. This protection covers elected employees, health and safety representatives and other employees who cannot, for some practical reason, make a complaint through the usual health and safety channels where they exist.

The case reiterates what Industrial Tribunals must consider when deciding whether a dismissal was for health and safety reasons. Mr Tedeschi was employed as an assembly line worker. His supervisor thought his performance unsatisfactory and raised it with him. Mr Tedeschi responded by letter stating that the muscular and emotional effort required to do the job were too much for him. His employers responded by transferring him to soldering work.

Shortly after the move, Mr Tedeschi became concerned that extraction machinery was not effective in removing potentially hazardous fumes emitted from the soldering process and produced a pamphlet seeking information from workmates. His employers moved him but he was later dismissed because of his slow work rate.

He claimed he was unfairly dismissed as a result of raising his concerns about health and safety. The IT found the dismissal to be fair, but did not decide upon the principal reason for dismissal, saying it was impossible to extricate the health and safety issues from complaints about his performance. The IT also found that although Mr Tedeschi's concerns about health and safety were genuine, they were not reasonable. He appealed.

The Employment Appeal Tribunal said the burden of proof was on the employee to establish the reason for dismissal in a health and safety case, much as in a dismissal related to trade union activities. It set out new guidelines for unfair dismissal cases which are linked to health and safety.

In order to be successful it was necessary to show:

1. That the employee reasonably believed that the circumstances connected with the work were harmful or potentially harmful to health and safety.
2. That it was not practical to raise the matter through existing health and safety structures at work.
3. That the issue was raised in a reasonable manner.
4. That the employee raising the issue was the reason or the principal reason for the employer to dismiss.

The EAT could not understand why the tribunal decided Mr Tedeschi's demonstrated concern for his workmates and attempts at investigation undermined the reasonableness of his belief. Consequently the IT's approach to the reason for dismissal and to Mr Tedeschi's beliefs contained serious errors of law. The case was sent back to a different tribunal to reconsider.

Smiths Industries Aerospace and Defence Systems v Rawlings [1996] IRLR 656

Mr Rawlings was an elected health and safety representative and became Chair of the Health and Safety Representatives Committee. As a result, he spent about one third of his working time on health and safety duties and the remaining two thirds on production duties as a machine operator.

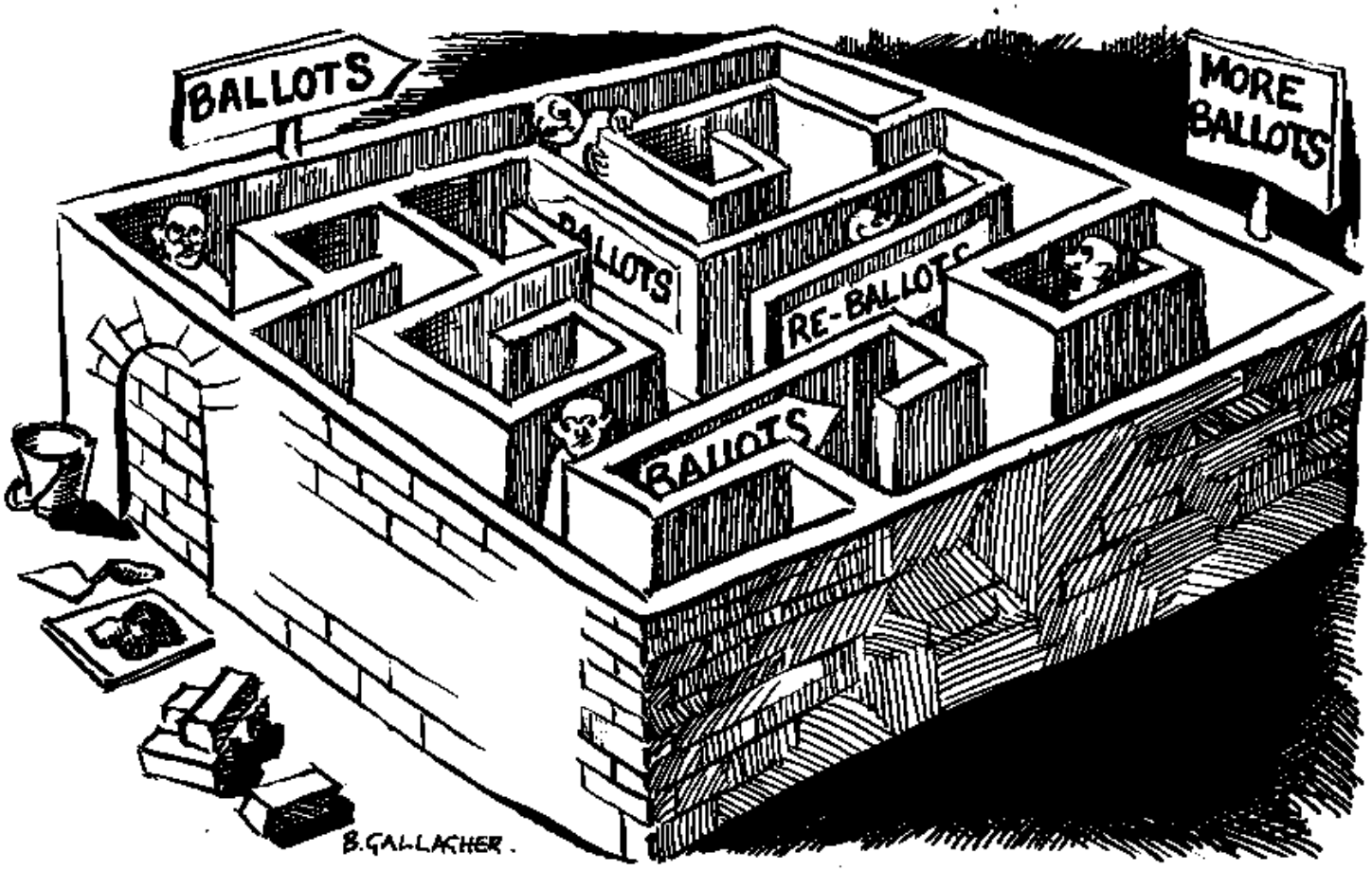
A redundancy situation arose. The employers devised a selection criteria using a points system based purely on performance in the department. The foreman was instructed to disregard activities outside the production role. This left Mr Rawlings third from bottom and he was selected for redundancy. He presented a complaint of unfair dismissal alleging that he had been selected for redundancy because of his health and safety activities.

The Industrial Tribunal concluded that Mr Rawlings' health and safety activities did not contribute in any material way to his selection for redundancy and therefore the dismissal was not automatically unfair. The tribunal did find that the dismissal was unfair because in carrying out the selection exercise the employers had disregarded his performance of health and safety duties. The employers appealed.

The Employment Appeal Tribunal found that the dismissal was not unfair because Mr Rawlings had been selected for redundancy on the basis of criteria which ignored his performance of his duties as a health and safety representative. The protection afforded to health and safety representatives against dismissal in a redundancy exercise was neutral. Reps must not be disadvantaged for performing health and safety duties, but equally they were not entitled to any advantage over their fellow employees in the selection pool.

The EAT said the tribunal was mistaken in re-writing the employers redundancy selection criteria to include an assessment of the employee's role as a health and safety representative. It would be wrong to allow management's evaluation of how an elected representative performed his or her duties to be part of a redundancy selection exercise.

Tories plan tighter restrictions on industrial action and trade unions



When the Conservative Government is at a loss for legislative action it turns to its traditional pastime of anti-union laws. The Green Paper (the earliest stage of consultation) on Industrial Action and Trade Unions calls for responses by 28 February 1997. This date reveals the true motive. No legislation is intended in this Parliament. The intention is to raise trade unions and industrial action as an election issue.

This does not mean that the Green Paper should be ignored. Labour will come under pressure on these issues during the election campaign. It could also be an issue for a Labour Government-particularly if industrial disputes follow soon after its election. If the Conservatives were to be elected, some or all of the proposals may find their way onto the statute book.

The Green Paper shows the Conservatives have lost none of their determination to apply new constraints to unions. And it is despite the assertion from the President of the Board of Trade, Ian Lang, that the number of days lost

through strikes has been cut by 94% since the 1970s. We are told that problems remain, specifically a lack of regulation of strikes in essential services and the need to take account of the broader interests of the community.

The Government says the perceived upturn in strikes results from 'economic growth and the continuing fall in unemployment'. It has attacked recent strikes affecting fire services, public transport and the postal service. So what is the government proposing?

Disproportionate or excessive effects

The Government returns to its theme of restricting strikes in essential services or 'near monopoly' services. The Green Paper rules out a ban on those strikes, but instead proposes to remove legal protection from industrial action which has 'disproportionate or excessive effects'. This would mean that even where a ballot had been held, and all the other current legal requirements had been followed, the union could still face an injunction or a claim for damages.

It would be left to the judges to decide whether the action caused or 'was likely to cause' disproportionate or excessive effects. This is designed to tempt employers, or members of the public, to take action against unions. They would hope that a judge would be persuaded that the strike had disproportionate effects and therefore an injunction should be granted because the inconvenience to the employer, or the public, outweighed the interests of the employees.

The Government suggests that the court would take into account risks to life, health or safety; threats to national security; serious damage to property or to the economy; or significant disruption to everyday life or activities of a region. We are told that the courts should take account of the intensity, frequency and duration of the industrial action and whether it would have been practicable to take action which caused less disruption. In crude terms, the more effective the action, the more likely it would be held to be unlawful.

We are told that this would not involve the courts in assessing the merits of an industrial dispute. This is disingenuous. 'Disproportionate' and 'excessive' are relative concepts: they must be assessed by reference to some factor and the grounds of the dispute will inevitably become relevant.

Contrary to the Government's assertions, this proposal is more punitive than legislation in other countries, where restrictions focus on ensuring emergency cover is provided, not outlawing the strike altogether. In other countries where there is a restriction on the right to strike it is usually accompanied by a disputes resolution procedure such as arbitration. The Government expressly rules out compulsory arbitration, presumably because the outcome would be binding on recalcitrant employers, nor will it impose a requirement on employers to seek conciliation through ACAS.

> Trade unions have faced a procession of punitive Acts of Parliament

More balloting restrictions...

Any doubt that the real motive is to place further obstacles in the way of lawful action is quickly dispelled by the next proposals. Unions would have to give 14 days notice after the ballot result before taking industrial action. Bearing in mind that action must commence within 28 days this gives virtually no room for manoeuvre. It is completely unjustified when the employer has already had considerable notice of the ballot and can no doubt anticipate the outcome.

Obviously, too many ballots have been successful as the Government proposes to require a majority of those entitled to vote, not merely those voting. The irony that the Tories have been in power since 1979 without a majority of the popular vote appears to be lost.

...and more ballots

There is also a proposal that unions must re-ballot two or three months after continuous action begins, or after a specified number of instances of discontinuous action, and again at regular intervals. The idea is to maximise the opportunity for employer propaganda or members voting to return because of financial hardship, or threat of sanctions, and to use up union funds on repeated postal ballots.

Removing rights to information and time off

The Government proposes to remove statutory rights to disclosure of information and time off for union duties or activities. This means that even where a union is recognised, there would be no legal redress if an employer withheld bargaining information, refused reasonable time off or withheld pay for time off. Graciously, the Government does not propose to remove rights in relation to health and safety, redundancies and transfer of undertakings consultation. They have no choice: any reduction in rights would be prohibited by European law.

A last throw?

Trade unions have been subjected to a procession of punitive Acts of Parliament since 1979. The Government still has the gall to say that these proposals are necessary to achieve a 'balance'. The Industrial Relations Branch of the Department of Trade and Industry is calling for responses by 28 February 1997. Let us hope that this morally bankrupt administration never has the opportunity to pass these crass proposals.

Protection for workers sent to work in EU

The name may have an odd ring to it, but the Posted Workers Directive's aim is to protect the rights of workers sent abroad to work in another European Union country.

The Directive, adopted on 24 September 1996, comes into effect on 24 September 1999. Approved under the EC Treaty, it is binding on the UK. It has a number of remarkable features.

The Directive covers the growing number of workers sent to work temporarily in another Member State. Such arrangements are common in the construction industry, transport, telecommunications, entertainment, repairs, maintenance and servicing. There are, for example, around 60,000 British and Irish building workers in Germany alone.

What conditions of work apply to these workers: those of the enterprise's (and worker's) home country, or those of the host country? Foreign employers could undermine terms and conditions by applying the poorer conditions of the home country rather than the higher conditions of the host country.

The Rome Convention of 19 June 1980 says that, whichever law applies, the workers should have the protection of the laws of the host country. This ECJ reinforced this approach in its decision in Rush Portuguesa (1990) ECR I-1417. The ECJ held that "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed , even temporarily, within their territory ..."

This allowed Member States to force enterprises sending workers abroad to respect local legislation and collective agreements. Austria, Germany (on 26 January 1996), Luxembourg and France passed laws requiring respect for local conditions.

The Posting Directive goes a step further by making this a requirement of EC law. Article 3 (1) says that "Member States shall ensure that ... undertakings ... guarantee workers posted to their territory" certain terms and conditions of employment.

Which workers are covered?

The only types of workers specifically excluded from coverage are merchant navy seafarers (Article 1(2)). It seems to include mobile workers employed in transport undertakings, though the Member States inserted a (non-binding) statement in the Council Minutes excluding such workers as well as workers in the press, broadcasting or entertainment business.

Article 2(2) provides that "the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted". Employment protection law in Britain excludes many workers, building and transport workers in particular, who are defined as "self-employed". The Directive does not let this exclusion follow them abroad.

Terms and conditions

The host country conditions which must be respected include (Article 3(1)):

- maximum work periods and minimum rest periods.

A statement in the Council Minutes, probably with building workers in mind, claims that rest periods cover "periods of inactivity caused by inclement weather". This highlights the uncertainty about the legal position of rest periods, an important issue under the Working Time Directive.

- minimum paid annual holidays.

The Member States in the Council Minutes asserted that this covered "national social fund benefits, governed by collective agreements or legal provisions, provided that they do not come within the sphere of social security". This may have been provoked by a decision of the ECJ, Case 272/94: Climatec, 28 March 1996, which ruled that the EC Treaty allowed an undertaking to avoid paying employer's contributions to some benefit schemes in the host country where the undertaking was already liable for comparable contributions in its home country. The Court misunderstood contributions towards an employer's loyalty bonus scheme and a scheme covering bad-weather payments - both parts of pay packages - and classified them as comparable social security benefits. The Member States were anxious that paid holiday schemes be properly classified and remain mandatory entitlements for posted workers.

■ minimum rates of pay, including overtime rates (but not supplementary occupational retirement pension schemes);

The Directive says minimum rates of pay are set by the law and/or practice of the host Member State.

■ health, safety and hygiene at work.

The scope of this has been enormously expanded by the European Court of Justice decision of 12 November 1996 rejecting the UK challenge to the Working Time Directive.

Which labour standards apply?

Rush Portuguesa gave equal status to legislation and collective agreements. This led to a fierce political struggle as some Member States sought to exclude collective agreements as standards. The compromise reached was that:

■ collective agreements would only be mandatory for activities listed in an Annex (mainly construction) (Article 3(1));

■ but Member States could opt to apply collective agreements to other activities (Article 3(10)).

What is particularly interesting and potentially significant, however, was the types of collective agreements which were to be mandatory. These are agreements (Article 3(1)) "which have been declared universally applicable", which means they (Article 3(8)): "must be observed by all undertakings in the geographical area and in the profession or industry concerned".

Systems of extending collective agreements beyond the parties to them, to cover whole sectors or geographical areas, are used in many Member States to ensure that collectively agreed standards are not undermined. Similar provisions guaranteeing recognised terms and conditions existed in the UK (Schedule 11 to the Employment Protection Act 1975 and the Fair Wages Resolution 1946), until repealed by the Conservative Government.

The question is what happens where there are no such mandatory collective agreements. The Directive goes on to say (Article 3(8)):

"In the absence of a system for declaring collective agreements ... to be of universal application ... Member States may, if they so decide, base themselves on:
- collective agreements ... which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory".

They question is how to interpret the word "may" in the context of the Directive. There are at least two possibilities:

i. collective agreements are optional in the absence of a system for declaring them of universal application - i.e. there may be no applicable standards apart from legislation;
ii. in the absence of a system of declaring collective agreements to be of universal application, Member States may choose either or both of the two options mentioned in article 3 (8) outlined above. But they must choose one.

It is arguable, in other words, that the Directive requires the application in certain activities (construction) of mandatory collective agreements; the Member States have only to choose which collective agreements to apply.

An EU requirement for the compulsory application of collective agreements is of great importance for future labour law and policy in the UK. It envisages a role for the type of centralised bargaining that has been the target of much of the labour policy and legislation of the Conservative government.

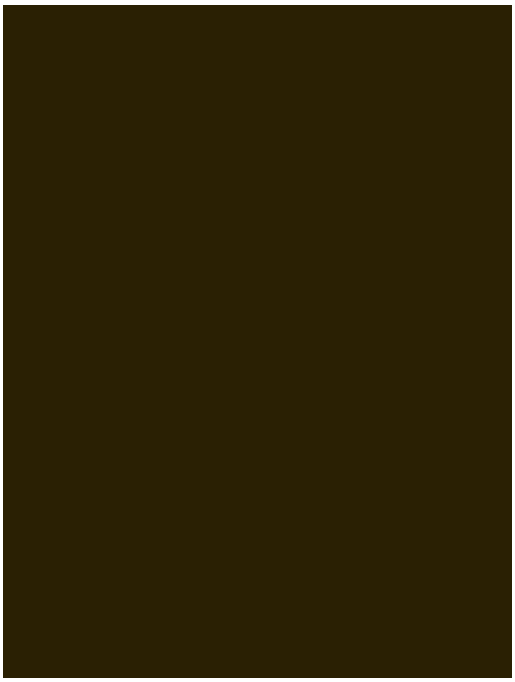
Conclusion

The potential importance of this Directive is highlighted in the Conservative Government's Memorandum to the Intergovernmental Conference on the revision of the Maastricht Treaty on European Union. The Government describes the Posted Workers' Directive as an abuse of the Treaty by "granting rights to employees" and asks for the Treaty to be amended to prevent this in the future. Fortunately, few other Member States share this vision of the future labour law of the European Union.

Right to pay increases following a transfer

BET Catering Services Limited v Ball and Others (EAT, 28 November 1996, unreported)

The Employment Appeal Tribunal has upheld the right of staff to get a pay rise in line with a national pay agreement when they have transferred to a new employer.



The Richmond Council school meals service was contracted out to BET. The staff, UNISON members, transferred and were protected by TUPE.

The issue was whether they were entitled to pay increases in line with the national increase negotiated by the unions and local authority employers.

Each individual employee's contract incorporated the provisions of the National Joint Council for Local Authorities Services (Manual Workers) Terms and Conditions. The NJC set pay increases annually.

BET refused to pay the NJC wage increases agreed after the transfer. There had been no changes in the terms and conditions of the staff.

At the Industrial Tribunal, the argument focused on the effect of TUPE on collective agreements. The EAT rightly concentrated on the fact that the national collective agreement had been incorporated into individual contracts, so each individual's contractual right transferred with them.

BET argued that the effect of the incorporation of the NJC terms may be different after the transfer. The Tribunal should have looked at the intended consequence when the employees ceased to be in the public sector and the new employers could have no influence on the outcome of the NJC negotiations, in which they do not participate.

The EAT rejected this argument. It said there is no conceptual difficulty in an employer agreeing to, or inheriting, a system under which employees are paid wages set by reference to awards of other employers, even where the employer cannot influence those awards. Employees are entitled to the NJC terms and conditions and to pay increases and other improvements.

This is an important decision, particularly when taken in conjunction with Wilson v St Helens BC [1996] IRLR 320 in which the EAT said that employers and employees could not agree changes to contracts where the transfer was the reason for the change.

This increases the importance of making sure individual contracts or statements of terms expressly refer to collective agreements. It is also important that collective agreements make it clear that increases or improvements apply automatically to employees covered by the agreement. Section 1(1)(j) of the Employment Rights Act 1996 requires that written statements of employment particulars must include details of any collective agreements which directly affect the terms and conditions of employment. Where employees are facing a transfer, they should check that their written particulars accurately reflect the position on collective agreements. If not, unions and employees should consider putting pressure on the present employer to make sure the written particulars clarify the position, otherwise this will lead to disputes with the new employer on whether the collective agreement is incorporated.

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DESIGNED BY DW DESIGN, LONDON
PRINTED BY TALISMAN PRINT SERVICES, RAINHAM