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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Welcome to our first edition

Welcome to the first edition of Thompsons Labour and European Law Review produced by our Employment Rights' Unit. The Review is a monthly commentary and analysis of key developments in the fields of equal rights, employment, trade union and industrial relations law in the UK and Europe.

Why do you need a Labour and European Law Review? Because of the importance of the issues, and the volume of case law and legislative changes. It is a complex, exciting and, at times, fast moving area.

Used well, the law can be a friend in the workplace.Trade Unions and their members have won significant victories in recent years by strategically and skilfully using the law to their advantage. But you need to be informed and up to date.

The Review will report issues of particular relevance and interest to trade unions and their members to help keep you up to date with key cases and developments.

The authors of the articles form part of the Thompsons Employment Rights' Unit which brings together our expertise in discrimination, labour and european law. The unit is dedicated solely to working with trade unions on those issues. The ERU consists of a team of lawyers in Congress House, London, complemented by a network of lawyers in our regional offices. Professor Brian Bercusson, Director of our European Law Unit, is part of the team.

This month the Review focuses on the Consultation Regulations on redundancies and transfers of undertakings and the implications of the judgment in the judicial review challenge (reported on this page). There are also features on discrimination on grounds of sexuality, TUPE – an area of profound significance – and recent developments on equal pay.

We hope you enjoy the Review. We would welcome your comments. Please contact us if you would like further information on the issues raised, extra copies, or know of anyone else who wishes to receive a copy which is free to our friends and colleagues in the trade union movement. Contact details are on the back page.

Stephen Cavalier
Head of Thompsons Employment Rights' Unit

Employers: duty to consult

Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.

In judgment on a judicial review the High Court highlighted an employer's primary duty to consult over redundancies and transfers of undertakings and said Department of Trade and Industry guidance will have to be rewritten to take account of its criticisms. It went on to emphasise that if employers do not follow the guidelines of the Court they are likely to be in breach of their obligations under the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.

But the High Court rejected the GMB and NASUWT (represented by Thompsons) and UNISON (represented by its legal department) judicial review challenge that the Regulations were unlawful.

The unions argued that the Regulations did not comply with European law, failed properly to implement the Collective Redundancies and Acquired Rights Directives and did not take full account of European Court judgments made against the UK on consultation rights.

In a judgment delivered on 15 May 1996, the High Court said the Government was acting lawfully in restricting the obligation on employers to consult staff only to

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THOMPSONS SOLICITORS

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cases where there were 20 or more redundancies. It was also acting lawfully in excluding those with less than two years' service from bringing unfair dismissal claims when there is a transfer of an undertaking. It rejected arguments that the Regulations discriminated unlawfully against women.

The Court emphasised the positive obligations placed on employers by the Regulations, and in particular the employer's primary obligation to consult.

If the employer fails to consult with appropriate representatives or to invite an election of appropriate representatives, individual employees can bring a complaint to an Industrial Tribunal. This means that if no representatives are elected and the employer has not informed every affected employee of the right to elect representatives, the employer is in breach of the law.

Although the court held that the Regulations did not have to set out detailed procedures for the election of employee representatives, the question of whether representatives are "appropriate" was held to be an objective test. This means the "appropriateness" of representatives can be challenged at a Tribunal. If the Tribunal accepts that the representative was not appropriate, this would mean there had been no valid consultation.

Employers could face industrial tribunal claims

The judgment did not deal adequately with the issue of the independence of the representatives elected by employees. But European law does require representatives to be independent of, and free from interference, domination or constraint by the employer. The independence issue is likely to be of particular concern to the European Commission which is currently considering a complaint against the UK Regulations.

A number of aspects of the High Court decision are flawed.Despite the positive aspects of the decision there remain serious deficiencies in the legislation. The unions have submitted an appeal to the Court of Appeal.

Parental Leave Directive

The Parental Leave Agreement was reached at European level talks between the European TUC and employers' associations and was approved by the Committee of Permanent Representatives in June 1996. The agreement was reached under the Social Agreement procedure of the Maastricht Treaty – "social dialogue" is the Euro-jargon – and implementation is through a Directive under that procedure which gives Governments two years to comply. The Directive does not apply in the UK because the Government has opted out of that part of the Maastricht Treaty.

The Directive provides that any parent, whether by birth or adoption, has a right of unpaid leave of up to 3 months to look after a child up to the age of 8 years. This right is distinct from maternity leave. The right is non-transferrable so each parent has a separate 3 month period which they cannot aggregate or swap.

Considerable discretion is given to EU countries on the details of how they implement the Directive. It is possible for individual countries to decide whether the leave should be full-time or part-time; split up or in one block; whether one year's service is required before exercising the right; what notice an employee has to give ; whether an employer can postpone parental leave; and whether to make special arrangements for small employers.

Employees will be protected against dismissal for requesting or taking parental leave and will be entitled to return to the same, or an equivalent or similar job. Rights acquired at the date parental leave started will be maintained but the status of the employment relationship during the period of parental leave is left to each country.

The Directive contains a non-discrimination clause prohibiting discrimination on grounds of sex, race or sexuality. Whilst this Directive does not apply to the UK it represents a useful basis for negotiation, particularly with multinational employers.

UK employers were party to the negotiations through the european employers' federation and will be conscious that a change of government would mean this Directive would be adopted as part of the Social Agreement legislation.

What is Industrial Action ?

FBU v Knowles [1996] IRLR 337

The Fire Brigades Union disciplined two members for breaking union policy and enroling as retained firefighters in addition to their existing full-time duties at another station. The members claimed the policy amounted to "other industrial action" and therefore discupinary action against them was in breach of the law. The EAT – with Thompsons instructed by the FBU – said the disciplinary action was not unlawful because the FBU policy was not industrial action. It was imposed for safety reasons and not to enhance the union's bargaining position at negotiations, nor did it affect the way FBU members performed their existing duties as full-time firefighters.

Although the case related to internal union discipline, it will be of interest in cases brought by employers on the question of whether a union's policy or recommendation to refuse to take on additional non-contractual duties amounts to industrial action.

The purpose behind the policy will be relevant. An appeal will be heard in the Court of Appeal this month.

New Legislation

Employment Rights Act 1996
Industrial Tribunals Act 1996

Two new pieces of employment legislation received Royal Assent on 22 May and come into force on 22 August this year. Both are consolidation acts, which mean they bring together existing laws rather than introducing new ones.

The Employment Rights Act will replace the Employment Protection (Consolidation) Act and the Wages Act 1986 and also draws together some provisions from the Em-ployment Acts of the 1980s, the Sunday Trading Act 1994, the Betting, Gaming and Lotteries Act 1963 and the Pensions Act 1995.

Some parts of the Collective Redundancies and Transfer of Undertakings (Protection of Emploment) (Amendment) Regulations 1995 are incorporated, but interestingly the TUPE Regulations themselves have been left separate – fuelling speculation that the Government is leaving itself plenty of room to manoeuvre if the Acquired Rights Directive is changed.

The Industrial Tribunals Act 1996 brings together legislation on Industrial Tribunals, the Employment Appeal Tribunal and social security benefit clawback. This is an interesting move bearing in mind that the operation of Tribunals is under review following the Government's consultative Green Paper.

In addition to these two Acts there is the discrimination and equal pay legislation, soon to be joined by the Disability Discrimination Act, as well as the last piece of consolidating legislation, the Trade Union and Labour Relations (Consolidation) Act 1992.

- ***The Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996:*** give Industrial Tribunals the power to award compensation for indirect sex (not race) discrimination in cases heard after 25 March 1996.

Bank Nurse is an Employee

Clark v Oxfordshire Health Authority EAT May 1996

In a case pursued by the RCN the EAT has held that a bank nurse was an employee and therefore entitled to employment protection rights in law. The Tribunal said employee status will depend on the wording of the contract concerned, but pointed to the contractual documents which referred to "employment" and that factors such as pay, grievance, discipline and trade union membership pointed towards an employment relationship.

EAT blocks attempt to hurdle two year barrier

Focsa Services (UK) Limited v Birkett [IRLR] 1996 325

An attempt to overcome the two year qualifying period for unfair dismissal claimants and the restrictive rules on damages for breach of contract fell foul of the Employment Appeal Tribunal. The employee had worked for the employer for 4 months when dismissed.

The Industrial Tribunal implied a term into the contract that the employee had a contractual right not to be unfairly dismissed and awarded him compensation on the basis that he would not have been dismissed had a proper disciplinary procedure been followed. The EAT rejected this and said that damages were limited to net pay for the contractual notice period of one week, plus any period for which the employment would have been extended whilst the disciplinary procedure was carried out.

It's good to talk... and that's official

At least other Europeans think so, with the British Government forced into fresh Regulations which guarantee employers must consult with staff over collective redundancies and transfers of undertakings.

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 may yet prove to be a temporary curiosity in the history of employee consultation. That depends on developments in the Court of Appeal, Europe or the General Election. In the meantime, the defects in the Regulations, combined with the interpretation given by the High Court (see front page) means an employer who chooses to by-pass unions and consult with "appropriate representatives" faces legal uncertainty.

The history: the regulations were adopted in response to a series of European Court judgments against the UK. The Court said UK law did not comply with European law because it let employers avoid consultation on redundancies or transfers by derecognising or refusing to recognise a union.

Predictably the Government has responded by trying to sideline trade unions. The UK Regulations seek to establish a situation where an employer may choose to consult either with a trade union or with elected representatives, even where a trade union is recognised.

The Regulations have a number of defects and do not appear fully to comply with European law. The High Court recently rejected a challenge to the legality of the Regulations, but in doing so gave guidance on their interpretation which can be put to positive use by unions (see front page).

What the regulations say: the Regulations apply to all employers whenever there are 20 or more redundancies in a workplace or where there is a transfer of an undertaking. They can choose to consult either the union or "appropriate representatives". Following the High Court judgment, the question of whether representatives are "appropriate" is not merely a decision for the employer – it is an objective test.

Challenging the employers over "appropriate representatives": if the employer chooses to by-pass the union and consult with representatives who are not "appropriate", this can be challenged at an Industrial Tribunal. This is particularly important because the Regulations provide no guidance on how elections should be conducted, how many representatives should be elected or how the constituencies should be determined.

> Employers cannot avoid consultation

Nor do they provide that representatives must be independent or free from interference or constraint by the employer, the implicit requirement of European law.

But an employer who opts for an "appropriate representative" consultation rather than consultation with unions steps into an as yet uncharted minefield and is open to legal challenge.

The right to challenge consultation with an inappropriate representative is an important one - and it can be exercised by an individual employee. It should make employers very wary of consulting with elected representatives in preference to a union because a successful challenge at a Tribunal puts the whole consultation process back to square one.

The electorate: who can elect "appropriate representatives"? In the case of redundancies the representatives must be elected by the "employees who may be ... dismissed". On transfers they must be elected by employees who may be affected by the transfer.

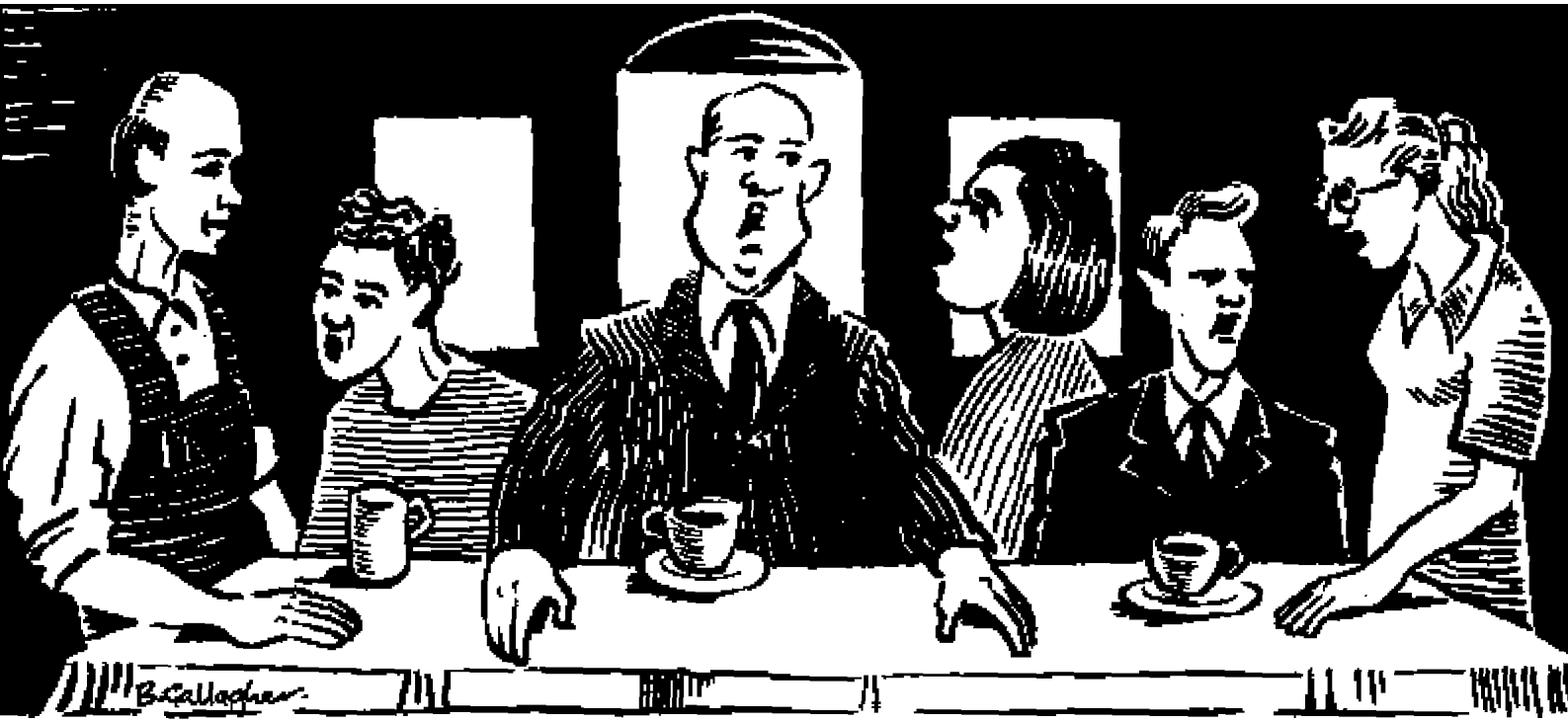
It will not be easy to define these constituencies accurately. In a redundancy situation, if the employer decides there may be redundancies in shop A and invites the staff within that shop to elect representatives, the consultation must be with a view to reaching agreement and avoiding those redundancies.

If the consultation process leads to the possibility of redundancies in shop B instead, those redundancies cannot take place without consultation with the staff in shop B, so it is back to square one to elect representatives of those employees – or risk a Tribunal.

If, on the other hand, the employer had consulted from the outset with representatives elected jointly by shops A and B, those representatives may not have been "appropriate" if it was in reality only the employees in shop A who "may be dismissed" at the point the consultation took place.

Invitation to elect: employers cannot avoid consultation. They are under a primary obligation to consult. They could only get away with not consulting if there are no elected representatives after they had invited the employees to elect them "long enough before the time the consultation is required to begin". This must mean an invitation communicated to every employee who would be entitled to vote in such an election.

The election: if an employer opts for an "appropriate representative" election, they also have the difficulty



of how the election should be conducted. There is no guidance on this.

The employer must ensure that only those entitled to vote are given the opportunity to do so. That must include those off sick or on holiday. Both workplace and postal ballots raise potential difficulties, as do situations involving groups of companies where employees of each company affected must elect representatives employed by that employer.

Although the Regulations leave the timing and the conduct of the election potentially up to the employer to decide, employers may find this an unwelcome freedom. The consultation must begin "in good time" before the redundancies or transfer.

Any election process may be vulnerable to challenge, on grounds of the number of representatives allowed, the number of candidates, voting methods, canvassing, facilities for candidates and voting constituencies.

Staff councils: the Regulations allow for consultation with a staff council or other body which is "regularly informed or consulted about the employer's financial position and personnel matters". This can be challenged if the body is not "appropriate" and employers are particularly vulnerable if the body is elected by the whole workforce when only a part of the workforce are likely to be affected by the transfer or redundancies.

The consultation period: the election process will prolong the consultation period required as the statutory period for consultation cannot begin until there are representatives to inform and consult. The employer will be hampered in taking steps which will affect the redundancies or transfer while the election is taking place, at the risk of criticism for presenting the elected representatives with a foregone conclusion and not consulting "with a view to reaching an agreement".

Taking the initiative: the Regulations do not say that any election must be organised by the employer. They merely provide that the representatives must be elected for the specific purpose of dismissals proposed by him.

In many cases employers can no doubt be persuaded that consulting through elected representatives is a legal minefield and consultation with the union is the most appropriate (and less risky) option. In other situations, and certainly where no union is recognised, there may be advantages in the union and/or employees initiating the election, notifying the outcome to the employer and requiring him to consult with their elected representatives or face a challenge.

THE REGULATIONS APPLY WHEN:

- there are 20 or more redundancies
- there is a transfer of an undertaking

ALL EMPLOYERS MUST CONSULT:

- "in good time"
- with a union
- or "appropriate representatives" who can be elected for this purpose

IF THE REPRESENTATIVES ARE NOT APPROPRIATE:

- the employer could face an Industrial Tribunal Claim

OTHER HURDLES FOR EMPLOYERS CHOOSING TO BY-PASS UNIONS AND CONSULT "APPROPRIATE REPRESENTATIVES":

- regulations don't mention how elections should be conducted
- ***or*** how many representatives should be elected
- ***or*** how constituencies should be determined
- ***or*** who can elect "appropriate representatives"
- ***or*** that employers must organise the elections

EQUAL PAY

Who is the comparator?

British Coal v Smith, House of Lords, May 1996
Scullard v B.J. Knowles and Southern Regional Council for Education and Training (1996) IRLR

With whom is an Applicant in an equal pay case entitled to compare herself? Given the structure of the Equal Pay Act 1970, it is perhaps hardly surprising that there has been so much litigation on the scope of S. 1(6) of the Act which allows comparison between men and women "in the same employment".

"Men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes."

The House of Lords has been considering the meaning of common terms and conditions in the long running case of British Coal Corporation v Smith and Others. Industrial Tribunal proceedings were lodged over 10 years ago.

The women, who were cleaners and canteen workers, are seeking to make comparisons with clerical workers and surface mineworkers at over 47 BCC sites.

There was no dispute between the parties that the women could compare themselves to clerical workers and surface mineworkers at their own collieries, but cross colliery comparisons were challenged by BCC. The IT considered the pay and bargaining structures since nationalisation in 1947 and the terms and conditions of all the categories of worker cited in great detail.

They found as a preliminary issue that each of the four categories of worker were in the same employment as their colleagues of the same description at different mines even though there were some local variations resulting from differences in underground mineworkers' pay and differing concessionary fuel rates at each site.

BCC challenged the IT decision. The House of Lords has now upheld the Tribunal's decision applying and reaffirming the test set out in Leverton v Clwyd County Council [1989] A.C. 706 that a broad comparison should be made. It is "far too restrictive" a test to require identical terms and conditions subject to a *de minimis* test and the Tribunal was correct in establishing "a broad commonsense approach".

The House of Lords' judgment reinforces the importance of establishing facts at the Industrial Tribunal upon which findings can be made, and the difficulty in overturning tribunal decisions based on fact where the test applied is a broad comparison.

The cases will now be returned to the IT to assess whether the work of Mrs Smith and her colleagues was of equal value to their permitted male comparators.

Meanwhile the EAT in the case of Scullard has plugged a significant gap and extended the scope for comparison in the public sector.

In this case Mrs Scullard was employed by the Southern Regional Council for Education and Training, which was one of twelve such regional CETs. All 12 units are supported and funded by a branch of the Department of Employment and Education but could not be said to be "associated employers" because they are not "companies" within the definition of the Companies Act 1985.

The Industrial Tribunal therefore decided that Mrs Scullard could not compare her pay to that of her male counterparts in the other Regional CETs, all of whom were paid more than her.

The EAT ruled that the restriction of comparisons to "associated employers" in S.1(6) should be displaced and yield to the paramount force of Article 119 of the Treaty of Rome which allows a wider class of comparator between others employed "in the same establishment or service".

This decision could have profound consequences in the public sector, including where services have been contracted out.

Do your rights survive the transfer?

Wilson & others v St Helens Borough Council [1996] IRLR 320 (EAT)
Merckx v Ford Motor Company Belgium SA (Case 171/94) (ECJ)

For many years trade unions have recognised the benefits of the Transfer of Undertakings (Protection of Employment) Regulations 1981 – but also their limitations. For although TUPE protects terms and conditions at the point of transfer, those terms are not set in tablets of stone.

The new employer has the power to make changes to the contract through the traditional routes. These include agreement to changes – either individually by employees or collectively by unions – or acquiescence by continuing to work under new terms without an effective protest.

The employer's ability to make changes has now been substantially curbed by the EAT decision in Wilson v St Helens, in which Thompsons were instructed by Unison.

In October 1992 St Helens Borough Council took over a Community Home from Lancashire County Council providing education for boys with behavioural problems. At the time, neither employer accepted that TUPE applied.

Out of 169 staff, 102 applied for jobs and 76 were offered and accepted jobs in the new structure on less favourable terms.

In March 1993 the unions raised the issue of TUPE and started proceedings claiming entitlement to the old terms and conditions. The Industrial Tribunal rejected the claims but was overturned by the EAT.

The EAT said that if the reason for changes in terms was the transfer, then the changes were invalid and ineffective, even if they were agreed by the employees. The Directive and the Regulations prohibit even a variation by consent if the transfer is the reason for changes to terms and conditions.

This also meant that the employees were not stuck with the new terms simply because they carried on working under those terms following the transfer. Where the reason for changes to terms and conditions is the transfer, the changes cannot be validated either by accepting the new terms or by working under the new terms without protest.

The EAT rejected the argument that the reduced terms should be allowed because they were justified by an "economic, technical or organisational reason" – an "ETO" reason – because this defence only applied where the employees had been dismissed.

This decision has provoked a hostile response from employers. It is important to put it in context.

This decision has provoked a hostile response from employers

The new employer still has the same ability to secure agreed changes as did the old employer, but neither of them can do so if the transfer itself is the reason for the changes.

If there is some genuine business reason other than the transfer itself, then the employer can make changes if agreement is secured. If there is no reason other than using the transfer as an opportunity to cut costs by reducing pay and benefits, it is right that TUPE should prohibit this.

It is said that employers can get round the decision by dismissing employees at the time of transfer for an ETO reason. This will only protect employers who genuinely dismiss for an ETO reason, not merely because of the transfer (see Tuck v BSG [1996] IRLR 134), and will only protect employers if the reason entails a "change in the workforce".

This means that dismissals to impose less favourable terms on the existing workforce who are then re-employed on new terms would be automatically unfair (see Berriman v Delabole Slate 1985 IRLR 305).

In the Merckx case, the staff refused to transfer when a vehicle dealership was taken over because their new pay was linked to turnover and was not guaranteed. They claimed unfair dismissal and redundancy.

The Directive provides that if an employee resigns because the transfer involves a substantial change in working conditions, that is a dismissal related to the transfer. The European Court said that a change in remuneration will always be a "substantial change" for these purposes, so the employer will be responsible for the dismissal.

The Merckx case is also interesting because the Court said there was a transfer even though the operation was carried out under a different name, from different premises and with different facilities, with no transfer of assets and with only a minority of employees transferring. This is a wide definition of a TUPE transfer.

Merckx reinforces the approach taken by the High Court in Betts v Brintel Helicopters [1996] IRLR 45 in which Thompsons acted for members of GMB and MSF and is a welcome response to fears aroused by last year's Rygaard decision [1996] IRLR 51 in the European Court. Merckx suggests that the restrictive approach taken in Rygaard can be confined to the facts of that case. The EAT has said Rygaard only excludes from the Directive short, fixed term contracts for specific projects (see Tuck v BSG [1996] IRLR 134 where Thompsons acted for Unison members).

Brink of a breakthrough?

P v S and Cornwall County Council
[1996] IRLR 347 (ECJ)
Smith v Gardner Merchant Limited
[1996] IRLR 342 (EAT)

Rights for lesbians and gay men at work has been in the media spotlight. It is an area of hot controversy on both sides of the Atlantic and increasing action by union members. In the UK being out and proud does though have its pitfalls when it comes to discrimination at work.

Our employment law does not provide any express rights for lesbian and gay workers. There is no legislation prohibiting discrimination on grounds of sexuality and the courts have given little cause for optimism.

A recent decision in Europe may chart a more positive course, although it must still be contrasted with recent cases in our own jurisdiction.

In the case of Smith v Gardner Merchant the employee had been harassed at work because he was gay. In dismissing the case the EAT emphasised that in UK and European law, there was prohibition of discrimination on grounds of sex, but none on sexuality. The EAT relied on the case involving gay service personnel to say that the European Treaty and the Equal Treatment Directive did not cover discrimination on grounds of sexuality.

The EAT rejected Mr Smith's argument that he had been subjected to less favourable treatment and, as a man sexually attracted to men, his treatment should be compared to how a heterosexual woman would have been treated. The argument that a gay man is a gender specific category, meaning that to discriminate against a gay man is necessarily to discriminate on grounds of sex, was also rejected

The EAT went on to reject an analogy with pregnant workers -a gender specific category who can pursue claims if they are treated less favourably because of their pregnancy. In the EAT's view homosexuality can apply to either sex and is not "gender-specific".

Smith was decided before the European Court decision in the case of P v S and Cornwall County Council. where the Court said it was a breach of the Equal Treatment Directive to discriminate against a male to female transsexual for a reason related to the change of sex or gender reassignment.

The European Court said the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. Discrimination based on gender reassignment is based essentially on the sex of the person concerned and it is therefore unlawful to treat a male to female transsexual less favourably than a man.

In terms of UK law, this gender reassignment involves a comparison of treatment between two people who are legally "men".

Logically the European Court decision should also apply to discrimination on grounds of sexuality. This is likely to be the approach in Europe as the European Court went on to say that to tolerate discrimination on gender reassignment would be "a failure to respect the dignity and freedom to which [a worker] is entitled and which the Court has a duty to safeguard".

Opinion in Europe is hardening against discrimination on grounds of sexuality. The new Parental Leave Directive (see page two) contains a clause that when EU countries pass laws to implement the Directive they must "prohibit any discrimination based on race, sex, sexual orientation, colour, religion or nationality". The European Commission is keen to ensure a similar non-discrimination clause in all future employment law directives.

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