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UK Government could face Euro fines over Consultation Regulations

The European Commission has thrown its weight behind union complaints that the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 1995 do not properly implement European Directives. A formal notice has been issued under Article 171 of the EC Treaty and the United Kingdom government could face cash fines from the European Court of Justice.

The Commission says the procedure for designating employee representatives is wrong and is not properly enforceable. UNISON, GMB and NASUWT used the same arguments in an unsuccessful judicial review challenge to the Regulations, as reported in LELR Issue 1. The unions' appeal to the Court of Appeal will be heard in June 1997.

The Commission apparently shares the arguments put forward by the unions in the judicial review that the procedure for designating employee representatives is defective and that the Regulations do not provide effective sanctions where an employer fails to inform or consult the employees' representatives.

On 26 June 1996 the Commission gave the UK formal notice of its view that the Regulations did not correctly implement the Collective Redundancies and Acquired Rights Directives, as interpreted by the European Court in June 1994 when giving judgment against the UK.

The procedure now is for the UK Government to respond to the formal notice by submitting its observations. The Commission may then issue a reasoned opinion concerning the alleged non-compliance and, if the UK does not act, may complain to the European Court, specifying a lump sum or penalty payment. Ultimately it is for the European Court to decide whether there has been non-compliance and, if so, what the sanction should be.

EAT slashes compensation payments

Digital Equipment Co Ltd v Clements [1996] IRLR 513

The Employment Appeal Tribunal has opted for a method of calculating compensation which, in some cases, will slash the amount employers have to pay. In Clements the difference amounted to more than £10,000.

Using the original Industrial Tribunal calculation and applying the statutory maximum then in force Mr Clements' compensation should have been £11,000. But the EAT's approach cut it to £837.

The EAT's look at the method for calculating compensation for unfair dismissal for redundancy concerned a contractual severance payment where the IT had concluded there was a 50% chance that the Applicant would not have been selected for redundancy.

The approach taken by the IT in Clements was 1) to calculate the total loss; 2) deduct the contractual severance payment; 3) halve the sum because they found there was a 50% chance that he might have remained employed had a fair procedure and proper consultation taken place. Finally they applied the statutory maximum award to the

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figure reached at stage 3. The EAT said this method of calculation was wrong. By switching stages 2) and 3) around they slashed the compensation award. In reaching their conclusion they considered S.74(7) of the Employment Protection (Consolidation) Act 1978 (now S. 123 (7) Employment Rights Act 1996).

This provides that "If the amount of any payment made by the employers to the employee on the grounds that the dismissal was by reason of redundancy, ...exceeds the amount of the basic award which would be payable ....that excess shall go to reduce the amount of the compensatory award".

The EAT found that the object of this provision was to award compensation for loss, not to penalise an employer for fault on his part in failing to follow a fair procedure for dismissal. The EAT's decision in Clements was made without considering its earlier decision in Cox v London Borough of Camden [1996] IRLR 389.

In Cox a differently constituted EAT held that a termination payment should be deducted from the employee's loss first, and then the percentage applied.In Cox the EAT rejected the argument that the employer should be given full credit for a termination payment, an argument implicitly accepted in Clements.

Whilst Cox dealt with a "termination payment" to be included in the calculation of loss under S.123 (1) ERA 1996 and Clements a "contractual severance payment" coming within S.123 (7) it is difficult to see how the two contradictory approaches of the EAT can in practice be reconciled.

Redundancy payable after fixed term ends

Pfaffinger v City of Liverpool Community College Muller v Amersham & Wycombe College [1996] IRLR 508

Two further education college lecturers employed on a succession of fixed term contracts were dismissed and entitled to redundancy when their contracts were not renewed. Both lecturers were employed for over 10 years on term time only contracts.

It is established law, from the House of Lords decision in Ford v Warwickshire County Council [1983] IRLR 126, that teachers employed in successive years under fixed-term contracts with periods of unemployment during holidays, have continuous employment for the purposes of claiming unfair dismissal and redundancy payments.

In the Pfaffinger and Muller cases the EAT considered the legal position of a part time lecturer whose contract for a college term expires without being renewed for the next term. Is the lecturer dismissed and if so, what is the reason for the dismissal? Does the lecturer have a claim for a redundancy payment?

The EAT found that the lecturers were dismissed and made redundant on the expiry of their fixed term contracts. The need for part time lecturers stopped or diminished from the beginning of the holiday until the start of term in September. This is a redundancy situation within the meaning of the legislation. Mrs Pfaffinger was therefore entitled to a redundancy payment but not compensation for unfair dismissal. Mr Muller's case was remitted back to the Industrial Tribunal to determine the amount of the redundancy payment to which he was entitled.

> Redundancy payment does break continuity of employment

Mr Muller was offered and accepted a further fixed term contract and returned to work on less favourable terms. The EAT found that this did not mean that he lost his entitlement to a statutory redundancy payment.

His right to a statutory redundancy payment arose because of his dismissal by reason of redundancy and the failure to renew the contract before the expiry of the original contract or within four weeks of the termination date.

The case means that once employees on a series of fixed term contracts have the necessary two years' service they will be entitled to a statutory redundancy payment on the expiry of their fixed term contract. However, a redundancy payment will break the employee's continuity of employment.

Despite the Pfaffinger decision, unless a new contract is offered on less favourable terms than the existing one, employees and those advising them will opt to preserve continuity of employment and the rights that brings rather than press for a redundancy payment and start the two year period running again.

Bullying can be sex harassment

Pethrick and Dobbin v Denholm Ship Management (UK) Limited and McNiven (unreported, Industrial Tribunal, Glasgow 16 September 1996)

A man who bullied a female colleague was guilty of sex harassment an Industrial Tribunal has found. The woman suffered persistent ridicule, abuse, was deliberately bumped into and stared at.

The tribunal concluded this was unwanted conduct which affected her dignity at work and amounted to sex harassment. The fact that there was no sexual motive did not prevent this conclusion.

The tribunal identified the employee's gender as the important critical factor in the treatment she received. It relied on a pattern of behaviour in relation to other female employees and that the nature of the treatment was of a type to which a woman was more vulnerable than a man.

The sex discrimination test is whether the less favourable treatment is on grounds of gender.

The case, in which Thompsons were instructed by the Equal Opportunities Commission, demonstrates that there are remedies available to deal with bullying in the workplace.

> Employers failed to treat bullying as a sex harassment issue

The employers were criticised for failing to treat the allegations sufficiently seriously, or to treat the allegations as an issue of sex harassment. The employers were also criticised for failing to follow the principles of the European Commission Code of Practice on Measures to Combat Sexual Harassment.

The employer had failed to do enough to protect the employee and stop the offending behaviour. The employer was held liable to pay two-thirds of the compensation, with the remaining third being paid by the man.

The case should serve as a general warning to employers. They face proceedings unless they adopt and operate proper equal opportunities procedures and treat allegations of sex harassment seriously.

The outcome is an important reminder that sex harassment does not mean harassment with a sexual motive. Bullying, intimidation, abuse, ridicule or unwanted physical contact directed at those of one gender, may all amount to unlawful sex discrimination if similar treatment would not have been meted out to those of the other gender, whatever the sex of the person responsible for the unlawful behaviour. It remains illogical that an employer who treats all employees equally badly may escape liability.

Industrial pressure or industrial action?

Knowles v FBU (unreported, Court of Appeal 31 July 1996)

The Fire Brigade's Union policy of opposing full-time firefighters enroling for additional duties as retained firefighters does not amount to industrial action, the Court of Appeal has held. The appeal court stopped short of giving a definition of industrial action, but gave a helpful pointer on the dividing line between industrial pressure and industrial action.

The case was brought by two members disciplined for breaking the FBU policy which, they argued, amounted to unlawful industrial action because there had been no ballot. The appeal court, backing an earlier Employment Appeal Tribunal decision, reported in LELR issue 1, held that although the policy required workers not to undertake additional work under new contracts, it did not involve workers breaking their contracts of employment.

Employers may have felt under pressure as a result of the policy, and inhibited in their actions as a result, but pressure plus inhibition is not enough to constitute industrial action. It did not even amount to a threat of industrial action.

Part time pensions appeal fast tracked

The Court of Appeal has agreed to fast track the part-time workers' pension rights appeal case, Preston and others v Wolverhampton Health Care NHS Trust, Secretary of State for Health and others [1996] IRLR 484, reported in LELR issue 2. The appeal will now be heard this autumn when the court will consider whether to refer the issue directly to the European Court of Justice - a possibility made more likely by the Employment Appeal Tribunal's decision in Levez (reported in LELR issue 3).

Disability Discrimination

The Disability Discrimination (Meaning of Disability) Regulations 1996
The Disability Discrimination (Employment) Regulations 1996
Code of Practice for the elimination of disability discrimination
Guidance on matters to be taken into account in determining questions relating to the definition of disability

The employment law provisions of the Disability Discrimination Act come into force on 2 December 1996. It will be unlawful for an employer to discriminate against a disabled person in selection procedures, terms of employment, or by not offering a job because of a disability. It will also be unlawful to discriminate in opportunities for training, promotion, transfer or receiving any other benefit; by dismissing or subjecting the disabled person to any other disadvantage.

Discrimination means treating the disabled person less favourably because of disability unless the employer can show that the treatment is justified. Less favourable treatment can only be justified if the reason is material to the circumstances of the case and substantial. It is also discrimination for an employer to fail to make "reasonable adjustments", unless the failure can be justified by a reason which is material and substantial.

The Act does not apply to employers with less than 20 staff. Claims for breaches of the Act are brought to the Industrial Tribunal which has a similar range of remedies to sex and race discrimination cases.

Many features of the Act were left open to further definition and clarification by Regulations, Codes of Practice and Guidelines. These have now been published and give more detail on parts of the legislation which are likely to prove controversial in practice.

Reasonable adjustments

Employers are under a duty to make reasonable adjustments where arrangements made by or for the employer, or any physical features of premises, place the disabled person at a substantial disadvantage. The Act lists examples of steps employers may have to take, including adjusting premises, reallocating duties, transferring jobs or sites, altering hours, giving training, allowing time off, providing equipment, providing a reader or interpreter or supervision. The Regulations expand on the extent of the employer's duty.

Physical features are defined by the Employment Regulations as features arising from design or construction of buildings; on exits or access to buildings on the premises; fixtures, fittings, furnishings, equipment or materials and any other physical element or quality of land on the premises.

Meaning of Disability: Regulations and Guidance

Disability is defined as 'physical or mental impairment which has substantial and long-term adverse effect on [a person's] ability to carry out normal day to day activities'. The Act also applies to people who had a disability in the past.

The Disability Discrimination (Meaning of Disability) Regulations 1996 list conditions which will not be treated as amounting to impairments. These include addictions to alcohol, nicotine or any other substance unless originally caused by taking prescribed drugs.

Tendencies to set fires, steal, abuse others, exhibitionism and voyeurism fall outside the protection of the legislation. Severe disfigurement may amount to a disability but not if caused by tattoos or body piercing. Hay fever is not specifically covered by the Act.

The legislation is supplemented by Guidance on the definition of disability. The Guidance does not have the force of law, but an IT must take it into account when deciding if a person's impairment has a "substantial and long-term adverse effect on her or his ability to carry out normal day-to-day activities."

The Guidance expands on the definition of mental impairment, which does not include any impairment resulting from a mental illness unless that illness is "clinically well-recognised." The Guidance says this means recognised by a respected body of medical opinion and would include conditions within the WHO's International Classification of Diseases.

Substantial Adverse Effect

The Guidance identifies as indicators of potentially substantial effects: the time taken to carry out tasks; the way in which tasks are carried out; and stresses the need to take into account the cumulative effects of impairments which may not in themselves

be substantial if taken individually. The effect of environmental conditions on the employee's disability will be relevant, for example adverse effects of temperature, humidity or fatigue caused by the time of day. The extent to which an employee can reduce the effects of his condition by modifying his behaviour will be taken into account.

But beneficial effects of treatment will be disregarded in assessing the severity of effects: so the degree of impairment for someone with a hearing aid will be assessed by the level of hearing without the aid. This also applies to prostheses, but not to glasses or contact lenses.

Normal Day to Day Activities

These include mobility, manual dexterity, physical co-ordination, senses, lifting ability and mental faculties. Impairment would include a situation where these activities must be curtailed or avoided on medical advice (someone with a vulnerable back who has been told to avoid lifting for example). An activity which can only be carried out by causing pain or severe fatigue may amount to an impairment.

The Guidance lists a series of examples of effects which would amount to an impairment and those which would not. Although it is claimed that these are indicators and not tests, there must be a substantial risk that tribunals will adopt these as authoritative statements.

This would mean, for example, that someone who can walk no more than a mile without discomfort will have difficulty establishing this as an impairment. On ability to lift, the Guidance suggests inability to pick up objects of moderate weight with one hand would be a substantial adverse effect. But inability to move heavy objects without a mechanical aid would not. This is likely to prove controversial in both employment cases and personal injury cases following workplace injury where a person's employment prospects may be blighted by the injury but do not fall within the definition of disabled.

Long Term

This means at least 12 months, or the remainder of the person's life (if less than 12 months). Where a condition is recurrent, it is treated as continuing if the substantial adverse effect has stopped but is likely to recur. This would apply to conditions such as epilepsy.

Code of Practice

The Code does not impose legal obligations, but it can be put in evidence before tribunals and must be taken into account. Once again its main impact is likely to be through the numerous examples given in the code.

To take one instance, tribunals are likely to be influenced by the view expressed on page 42 that a disabled person whose disability leads to a lower output of work, even after reasonable adjustments, may be paid less than colleagues with a higher output.

Disability Discrimination (Employment) Regulations 1996

A similar issue arises under the Employment Regulations which permit performance related pay. Performance related pay is not to be treated as an arrangement which places disabled people at a substantial disadvantage.

But there is still an obligation on an employer to make reasonable adjustments to aspects of the premises or work arrangements which would otherwise reduce the employee's performance with adverse effects on pay.

The Employment Regulations deal with a number of situations where the legislation says discrimination is justified. These include eligibility for benefits under occupational pension schemes and where building works complied with the building regulations in force when the works were carried out. There are also specific provisions dealing with the situation where the premises are leased from a landlord.

■ Thompsons has produced a briefing on the Act which is available free from the Employment Rights Unit at Congress House.

Heaven knows, anything (doesn't) go

By Professor Brian Bercusson
Director of the European Law Unit, Thompsons, Solicitors

As of 22 September 1996, the European Works Councils (EWC) Directive requires multinational companies in Europe to establish European-wide works councils. The councils should be representative of their employees "for the purposes of informing and consulting" them over a whole range of issues affecting the business, and particularly where employees' interests are affected.

At first sight Article 13 of the Directive seems to allow companies to opt out of the Directive if they had voluntarily set up works councils before 22 September. The crucial part of Article 13 reads:

"... the obligations arising from this Directive shall not apply to... undertakings... in which, on the date laid down in Article 14(1) for the implementation of the Directive (22 September 1996) ...there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees".

The attraction of voluntary agreements for multinational companies is the hope that they would free them from some of the requirements of the Directive. Voluntary agreements, they hope, give them more room to manoeuvre in information and consultation.

But how far can you go to avoid the Directive by using voluntary agreements under Article 13? Certainly some think a great deal - an estimated 200 Article 13 agreements were concluded by the 22 September deadline. Some of these may have gone too far and may not survive as valid "opt outs" from the requirements of the Directive. There are a number of questions that could be raised about the validity of an agreement reached under Article 13.

Who negotiated the agreement? Article 13 agreements may be at risk if all employees were not represented. For example, of 51 agreements recently analysed, employee representatives from only one country signed the agreement in a third of them. An agreement at Cement Roadstone Holdings excludes representation for the company's 3,000 UK employees. If successfully challenged, the company will have to start the procedure again to establish an EWC as laid down in the Directive.

How far can you avoid the Directive by using Article 13 agreements?

Member States' transposition law - the national legislation putting the Directive into practice in each country - may expressly require representation of employees in their country (as the relevant Belgian law requires). The European Trade Union Confederation, which includes central confederations in all Member States, finalised in February 1996 a Protocol of procedures on negotiations for the creation of EWCs. This made mandatory the involvement of the trade unions from the country where the company's European headquarters is located (Article 1). It made it a prerequisite that (Article 3): "where negotiations are opened in multinational companies with undertakings in the UK..., trade unions from (the UK) should become involved from the beginning in the process to set up an EWC".

Who is covered? Article 13 states it must cover "the entire workforce". An agreement which does not include the workforce employed in the UK may not qualify as exempt from the Directive. An agreement signed on 6 March 1996 establishing an "EU works council" for the ING Group was the first not to include significant UK operations (Barings Bank).

What is the legal status of an Article 13 agreement? Member States have different definitions of a (collective) "agreement": who may be parties to it, what formalities must be observed, what contents may be required, whether and how it can be enforced. Conflicts between different national laws may lead to the European Court defining what constitutes an "agreement" for the purposes of Article 13. Present Article 13 agreements may find themselves outside that definition.

Which law governs the agreement? An Article 13 agreement binds enterprises and workers' representatives in more than one country.

Again, different national laws create difficulties and may lead the European Court to strike down agreements negotiated. For example, the Court may question what type of employee representatives negotiated the Article 13 agreement or will participate in the body established. If "inappropriate", the agreement may not survive.

Can the parties choose which national law can govern the agreement? Is "forum shopping" allowed?

For example, it would be strange if the parties to an Article 13 agreement could choose the law of a non-Member State to govern the agreement. In such a case, but also if UK law was chosen, there would be no Member State law applicable which transposes the Directive. Some Member States' transposition laws already lay down requirements for any Article 13 agreements which affect enterprises on their territory. These would be in addition to the law chosen for the agreement. It is most likely that EC law will emerge to ensure that the Directive's requirements are maintained, whatever law the parties designate to govern their agreement.

Is an Article 13 agreement a "collective agreement" in UK law? As defined by TULRCA s. 178, the parties must be trade unions and employers. The definition of "trade union" in TULRCA, s. 1 might cover almost any group of workers claiming representative status and such a "trade union" has the capacity to enter into contracts (TULRCA s. 10).

But an ad hoc group of representatives negotiating an Article 13 agreement is problematic. The members of the group, or "trade union", may already be union members, with possible conflicts of membership.

The "trade union" would need, at least, officers, a constitution, internal meetings, voting procedures, records and property or funds.

It must comply with requirements under TULRCA, including the holding of property by trustees, registers of members, accounts and rights of access to them, members' superannuation schemes, elections to trade union office and independent scrutiny, investigation by the Certification Officer (and CROTUM), a right to membership of, and protection against exclusion from or discipline by the union, procedures for industrial action and liability resulting from it, and so on.

The employer will not get off easily either. Such a "trade union" might be considered as "recognised" and hence entitled to other labour law rights. This might mean automatic recognition of any minority unions or staff associations to which individual members of the group are affiliated. There could be problems of "confidentiality" of information supplied to individual members of the "trade union", as well as the union itself. The agreement might be enforceable by the "trade union" and/or by individual representatives.

Does the Article 13 agreement have adequate means of enforcement? Article 11(3) requires Member States to "ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced".

A special problem for agreements made under UK law, is that a collective agreement is conclusively presumed not to be legally binding unless certain conditions are fulfilled (TULRCA s. 179(1)). It is very unlikely that the European Court would accept as a substitute for the binding requirements of the Directive an Article 13 agreement which was binding on nobody and which could not be enforced. So the agreement must be legally enforceable to be valid - which poses many risks to the parties to it.

What does the Article 13 agreement provide for workers? When the transnational enterprise has establishments in more than one Member State, each Member State's law and industrial relations practice may envisage a different kind of "transnational information and consultation". Will the legal definition prescribed in the Directive itself prevail?

Conclusion. The view that, under Article 13 agreements, anything goes, is unlikely to survive scrutiny by the courts. More likely, EC law based on the Directive will develop to regulate Article 13 agreements.

This result cannot be avoided by the parties to the agreement declaring that they can choose whichever national law they want to apply. Sooner or later, Article 13 agreements will be challenged before the European Court of Justice.

Until then, agreements based on non-Member State law (including the UK) are very insecure. Those based on national transposition laws which reflect the Directive are more secure; but the safest route is compliance with the Directive.

Council's attempt to cut pay was unlawful

Lord & Others v Knowsley Metropolitan Borough Council (Industrial Tribunal August 1996, unreported)

An employer cannot impose agreements on employees to exclude their statutory employment rights an Industrial Tribunal in Liverpool has reaffirmed. Knowsley council's attempts to cut the pay of female staff was an unlawful breach of the Equal Pay Act which over-rode the agreement of the majority of staff to the cuts.

A number of councils were eagerly awaiting the outcome of this case in the hope that they could follow Knowsley's wage cutting path. UNISON's success in this case is a shot across their bows.

IT adopted the approach of the House of Lords in Ratcliffe v North Yorkshire County Council in deciding that a local authority employer could not reduce the terms and conditions of part of its workforce to match the private sector when these worse conditions were due to sex discrimination and job segregation in the labour market.

In Lord, Knowsley council wanted to cut overtime rates to the home carers for evening, weekend and bank holiday work. When the staff would not agree the council said it would terminate the home carers' existing contracts and re-employ them on the new terms. Faced with this threat the majority voted at a mass meeting to accept the changes. This was confirmed in writing by the union.

Thompsons were instructed by UNISON and 54 out of approximately 180 home carers took IT cases complaining that the equality clause in their contracts (implied in all employment contracts by the Equal Pay Act 1970) had been breached.

A job evaluation scheme carried out in the mid-1980's placed home carers on Grade 5 with several other local authority jobs including refuse drivers and school caretaker level 1.

The council conceded that the (predominantly female) home carers no longer enjoyed the same overtime rates as the (predominantly male) refuse drivers and caretakers. The legal burden was on the council to show that the reason for this new difference was not due to a difference of sex between the home carers and the male comparators (the so-called "material factor" defence).

The council argued that the service had to be re-organised and staff paid rates of pay comparable to the private sector. The IT rejected this argument.

The tribunal held that: "In the world outside the respondent's organisation, such is the vulnerability in the labour market of the women who do the work of carers that it is paid less than the respondents agreed the work was worth; that was why they, too, decided to pay less for it. We could not regard that reason as reflecting a factor which is not the difference of sex. The women were paid less than the men because their equivalent work attracts lower pay for the women who do it elsewhere".

The IT concluded that the council could not rely upon the home carers' agreement at the mass meeting to vary their contracts. "The applicants agreed the changes to their contracts,individually and by their representative acting for all. They did so because they were told that they would be dismissed if they did not. They are low-paid women in a market unsympathetic to them. Their agreement to the new arrangements did not amount to a genuine material factor which was not the difference of sex. They agreed to what was impermissible; the provisions of the Equal Pay Act supercede their agreement."

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