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Surveying the scene

Employers have become more aware of the importance of a good work-life balance, according to the 2004 DTI Workplace Employment Relations Survey. The report, which is the fifth in a series that started in 1980, also shows that:

- fewer workplaces are reporting grievances
- union representatives are working more closely with management on changes in the workplace
- more representatives say that managers value their opinions
- managers are more positive about the climate of employment relations
- the decline in union recognition has halted in larger workplaces
- employers have increased their provision of flexible working arrangements, and
- there is greater provision of leave arrangements for parents.

The information for the report was collected from more than 3,000 managers, nearly 1,000 employee representatives, and over 22,000 employees. Go to: www.dti.gov.uk/er/inform.htm to download a copy of the report.

Commission reports

The three statutory Commissions – the Equal Opportunities Commission, Disability Rights Commission and the Commission for Racial Equality - have recently published their annual reports.

The Commission for Equality and Human Rights, to be set up in October 2007, will mean the end of the EOC and DRC in their current forms. The CRE is scheduled to be absorbed into the new Commission in 2009.

Go to: www.eoc.org.uk for the full report from the Equal Opportunities Commission
Go to: www.drc.gov.uk for the full report from the Disability Rights Commission
Go to: www.cre.gov.uk for the full report from the Commission for Racial Equality

Ready, willing and able

Over one million 50 - 65 year olds who want to work can't get a job because employers won't recruit older workers or retain the ones they already employ, according to a recent TUC report.

The report, *Ready Willing and Able*, rubbishes the myth of luxury early retirement for the "baby boom" generation. Of the 2.6 million 50 - 65 year olds who are currently unemployed or economically inactive, over a third want a job, with 250,000 actively looking and 750,000 who say they want work.

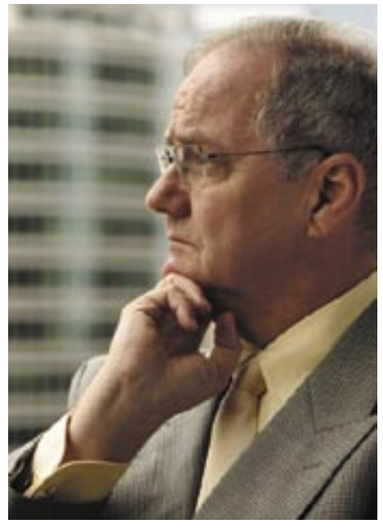
Over the next ten years the number of people under 50 will fall by two per cent while the number aged 50 - 69 will rise by 17 per cent, massively increasing the ratio of pensioners to working people.

The TUC estimates that without an extra one million people in work by 2015 workers will face higher taxes, later retirement or old-age poverty.

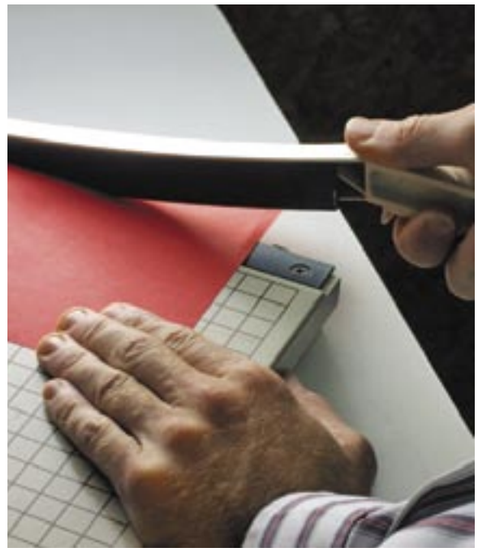
The TUC is calling on employers to carry out age audits of their staff to establish an age profile of their workforce and negotiate an "age management" policy with trade unions and employees to eliminate age discrimination and retain older workers.

It says this should include identifying and supporting training needs and offering older staff flexible working to downshift towards retirement. To underpin such measures the Government should extend to over-fifties the right to request to work flexibly and the right to training with paid time off.

Go to: www.tuc.org.uk/extras/over-fifties-unemployment.pdf to download a copy of the report.



One in ten injured at work



Insurance company AXA recently published research that shows that as many as one in ten people has sustained an injury in the workplace in the past five years.

Responding to the findings, Tom Jones, a partner with Thompsons Solicitors said: "The insurance industry has been complaining for years about the costs of paying compensation to injured people. Thompsons and the trade unions have always said that one sure way to reduce costs is to reduce workplace accidents.

"AXA says that it is shocked at the number of work-related injuries sustained by employees which are the result of physical assault by customers and colleagues. We see thousands of claims every year where workers have been injured at work through a criminal act. Employers have statutory duties and yet pay lip service to it and leave frontline staff to fend for themselves."

Thompsons Solicitors are experts in all personal injury matters. Go to: www.thompsons.law.co.uk for accurate claims advice.

TUPE 2006

Following the introduction of the Transfer of Undertakings (Protection of Employment Regulations) 2006, the DTI has now issued guidance relating to payments made by the Secretary of State to employees on insolvency and redundancy.

Although the guidance makes clear that it is not an authoritative interpretation of the regulations, it sets out the approach that the Secretary of State will take in deciding liability for making payments under the provisions of:

- Part XI of the Employment Rights Act 1996 (redundancy payments) and
- Part XII of the 1996 Act (payments on insolvency of the employer).

This guidance replaces earlier advice in relation to the 2006 TUPE regulations and insolvency. Go to: www.dti.gov.uk/files/file30031.pdf for a copy.

It's not personal

In a recent decision – Martins v Castlehill and Bisset - the Employment Appeal Tribunal (EAT) held that time limits cannot be extended for bringing a tribunal claim under the statutory dispute resolution procedures if the discrimination claim is against another employee.

Ms Martins lodged discrimination claims against both her employer and Mrs Bisset more than three months after the last incident allegedly took place. However, as she had submitted her step one grievance letter, the normal time limit was extended to six months.

But as the statutory grievance procedure rules only applied to claims brought against the claimant's employer, she could not bring the claim against her colleague as she was out of time.

In coming to this conclusion, the EAT relied on section 30 of the Employment Act 2002, which states that the grievance procedure requirements are "statutorily inserted into every contract of employment". As she did not have a contract with Mrs Bisset, the EAT reasoned that the procedure did not apply. However, as section 30 has not yet come into force, the decision may be appealed.

All in a day

The EAT, in Rainbow International v Taylor, has clarified that the extension of time under regulation 15 of the dispute resolution regulations provides for three months, not three months less one day.

In this case Mr Taylor resigned on 20 June 2005, making 19 September the date by which he needed to lodge his claim. However, this was extended under the regulations by three months. As the extension began on 20 September, he had to lodge his claim by 20 December, which he did.

Share and share alike

The EAT has confirmed in The Print Factory (London) 1991 Ltd v Millam that tribunals cannot "lift the corporate veil" when trying to decide whether a TUPE transfer has taken place in the absence of evidence of a sham.

In this case, Mr Millam worked for Fencourt Printers, which was sold to McCorquodale in 1999 as part of a share sale agreement. He was given conflicting information as to the identity of his employer, although he was paid by McCorquodale who also administered his pension.

The two companies subsequently went into administration in 2005 and Mr Millam lost his job. The following day McCorquodale was bought by The Print Factory, and Mr Millam made a number of claims, including that there had been a transfer of his employment to McCorquodale.

Although the Employment Tribunal agreed with him, the EAT held that the effect of the tribunal's decision was to "lift the corporate veil". It said that it is well established law that this can only be "pierced" where "special circumstances exist indicating that it is a mere façade concealing the true facts".

Mutually obliged

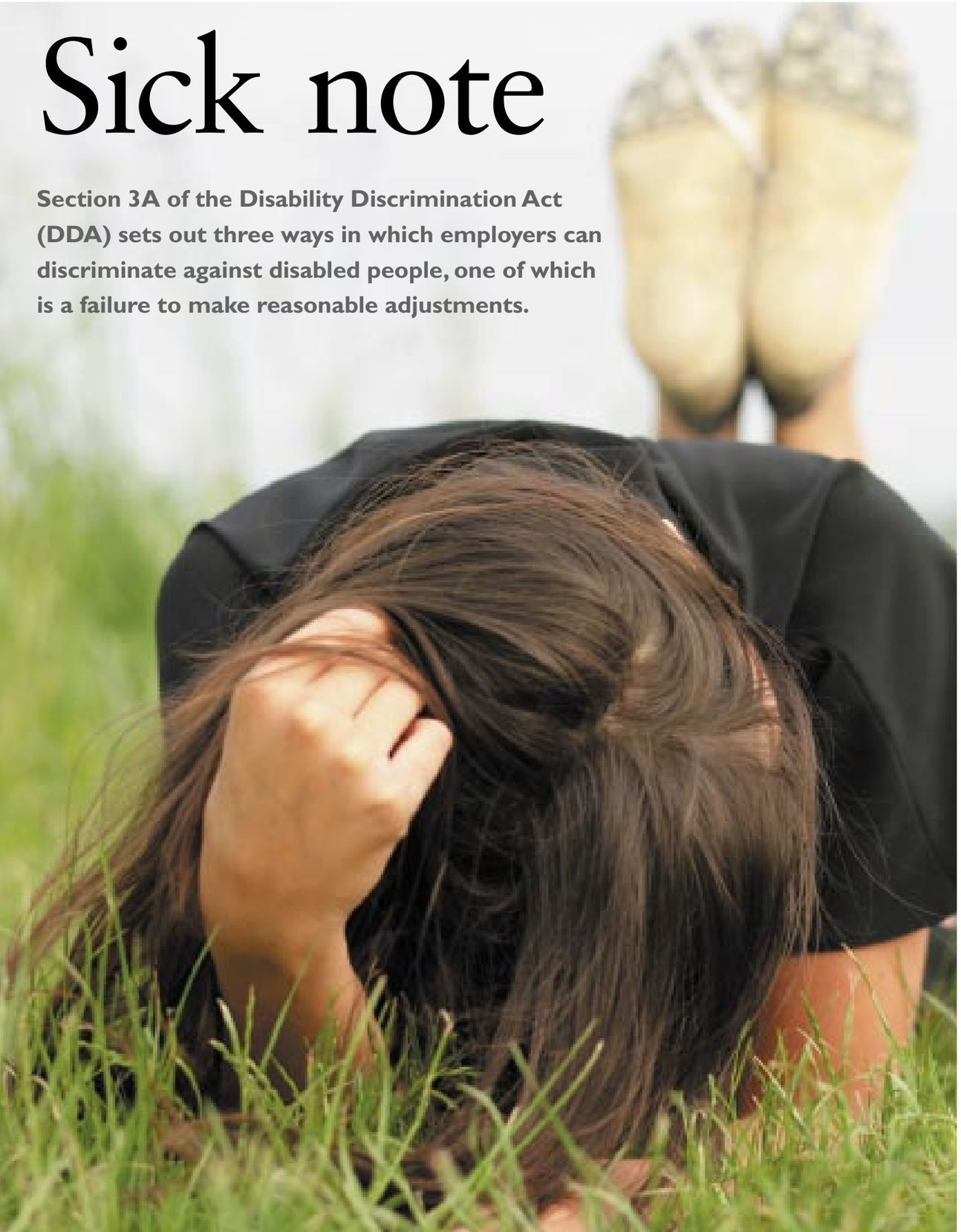
One of the essentials of a contract of employment is what the courts call "mutuality of obligation". In other words, that one party is obliged to offer work and the other to accept it.

The EAT has put a new gloss on this requirement in **ABC News Intercontinental v Gizbert** by ruling that Mr Gizbert (a TV reporter), was obliged to decide whether to accept or refuse assignments "in good faith". For its part, ABC News had to provide him with a minimum of 100 days' work per year.

It argued, therefore, that there was mutuality in the arrangements and that Mr Gizbert could pursue his claim of unfair dismissal.

Sick note

Section 3A of the Disability Discrimination Act (DDA) sets out three ways in which employers can discriminate against disabled people, one of which is a failure to make reasonable adjustments.



Disability discrimination

In **O'Hanlon v HM Revenue & Customs**, the Employment Appeal Tribunal (EAT) said that failing to pay a disabled person full pay while on sick leave did not amount to a failure to make a reasonable adjustment.

What were the basic facts?

Mrs O'Hanlon started work for HMRC in 1985. She was diagnosed with clinical depression in 1988, after which she was off for long periods of sick leave.

> The real reason for her treatment was because she had been off work for 26 weeks.

The Revenue's sick pay scheme provided for six months full pay and six months half pay, subject to a maximum of 12 months paid sick leave in any four years. After that employees were only entitled to their equivalent pension rate of pay, or half pay, whichever was less.

Mrs O'Hanlon lodged a tribunal claim, stating that her employers should have paid her in full by making one of the following two adjustments:

- by disregarding her disability related absence for the purposes of the sick pay rules, or
- by disregarding her disability related absence for the purposes of the sick pay rules so that it did not trigger the points at which half pay and pensionable pay became payable. Her sick leave would then have totalled less than six months.

What did the tribunal decide?

The tribunal said that the rules on sick pay constituted a "provision, criteria or practice" which placed Mrs O'Hanlon at a substantial disadvantage in comparison with people who were not disabled. As such, the Revenue were under a duty to make reasonable adjustments. The tribunal decided that the first adjustment was not reasonable, however, mainly because of cost considerations. Although the Revenue could afford to pay sick pay to Mrs O'Hanlon indefinitely, it could not sustain that approach for all its disabled employees.

The tribunal also said she was not discriminated against for a reason related to her disability, given that she was treated in exactly the same way as a non-disabled person. However, it went on to say that even if it did amount to unlawful discrimination, the Revenue's treatment of her was justified because of the costs involved.

What did the EAT decide?

The EAT agreed with the tribunal that Mrs O'Hanlon had been disadvantaged by the sick pay scheme rules. However, it said that it would be "a very rare case indeed" where giving higher sick pay to a disabled employee would be considered a reasonable adjustment.

First of all, it pointed out that tribunals would end up "entering into a form of wage fixing for the disabled sick". Secondly, that the point of the Act was not to treat disabled people "as objects of charity", but to require modifications to help disabled people play a full part in the "world of work".

As for the question of disability discrimination, it said that the correct comparator was someone who had not been off work at all, as opposed to someone who had been off work for non-disability related sickness.

The employer was wrong to argue that it was the policy, and not the disability, that caused the difference in treatment. The real reason for her treatment was because she had been off work for 26 weeks. And the underlying reason for that absence was her disability. The Revenue had, therefore, discriminated against her.

But was it justified? The tribunal was right to decide that there was no reasonable adjustment which could be made to the level of sick pay. It also found that there were powerful economic reasons for the rule adopted, which were "material and substantial".

In any event, it said that "justification could simply be the fact that the employer considered it appropriate to pay those who attend work and contribute to the operation more than those whose absence prevents that".

Reasonably Adjusted

The Disability Discrimination Act (DDA) says that employers have to make "reasonable adjustments" in certain circumstances if a disabled person is placed at a substantial disadvantage in comparison with a non disabled person.

In **Tarbuck v Sainsbury Supermarkets Ltd (2006, IRLR 664; IDS 811)**, the Employment Appeal Tribunal (EAT) said that employers do not have to consult with employees before making the adjustments.

The company was not required to artificially create a job for a disabled person.

What were the basic facts?

Mrs Tarbuck worked as a business analyst and IT project manager for Sainsbury. In March 2003, it was agreed after she had been off work with depression, that she should return on a part time basis to a fixed term assignment with support from the occupational health department.

In June that year she was told that she was "at risk" of redundancy, which entitled her to priority status in applying for vacant posts. She argued that the stress of being in the "at risk" category would affect her return to work, and as a result she was removed from the list.

She then applied unsuccessfully for a finance systems job and complained that she had not been given priority status for the application. In October, she was offered a three month assignment but rejected it. Shortly afterwards, she was placed in the "at risk" category again, and was given formal notice of redundancy in November. Her employment ended in February 2004.

Mrs Tarbuck complained of disability discrimination and unfair dismissal.

What did the tribunal decide?

The tribunal said that Sainsbury had failed, among other things, to consult with Mrs Tarbuck, following her objection to being put in the "at risk" category in early July 2003.

Following the decision in Mid-Staffordshire General Hospitals NHS Trust v Cambridge, the tribunal said the company should have done this "to agree the particular steps to be taken to eliminate her disadvantage in the competition for jobs".

Mrs Tarbuck appealed parts of the tribunal decision, arguing that her employer should have given her priority status when she applied for the finance systems job. The employers cross-appealed.

What did the EAT decide about Mrs Tarbuck's appeal?

The EAT decided that the tribunal had not been clear in its reasoning when it held that it was not a reasonable adjustment for Sainsbury to give Mrs Tarbuck priority status again when applying for the finance system job. It

therefore allowed her appeal on this point and remitted it to the tribunal for further consideration.

However, it said that the tribunal had correctly applied the shifting burden of proof under the DDA, and that it was not necessary to ask Sainsbury to explain why they had failed to interview Mrs Tarbuck for another post that it ultimately did not fill.

The company was not required to artificially create a job for a disabled person. She had not, therefore, been treated less favourably and the company had not failed to make a relevant adjustment in this regard.

What did the EAT decide about Sainsbury's appeal?

The EAT then considered Sainsbury's appeal. It said the tribunal had been wrong to conclude that they had failed to make a reasonable adjustment when they did not consult with her over what help she might need in finding alternative work. This issue had not been raised by either of the parties and so the tribunal could not raise this point unilaterally. The EAT said that there is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments they should make (although it would be good practice to do so). The only relevant question was whether the employer had complied with their obligations or not. That being so, Mid-Staffordshire General Hospitals NHS Trust v Cambridge had been incorrectly decided.

You're how old?

Now that the age discrimination regulations have come into effect (see LELR 114 for an outline), employees have the right to request to work beyond their retirement date.

Richard Arthur, a solicitor from Thompsons Employment Rights Unit in London, looks at two specific aspects of the regulations –transitional provisions and retirement dismissals.

What are the standard rules?

For people retiring with "expiry dates" on or after 1 April 2007, the standard rules will apply.

The regulations impose two notification duties on employers:

(i) an employer intending to "retire" an employee must notify the employee in writing of the employee's right to make a request and the date on which they intend to retire the employee between six months and one year before the intended date of retirement (the "Paragraph 2 Duty")

(ii) where an employer fails to comply with their Paragraph 2 Duty, they have a continuing duty to notify the employee as in (i) until the fourteenth day before the operative date of termination (the "Paragraph 4 Duty").

Details about the employee's procedure for making a request to stay on, the right to a meeting to discuss the request, the right to be accompanied and the right of appeal can be found in LELR 114.

What are the transitional provisions?

If the "expiry date" is on or after 1 October 2006, but before 1 April 2007, the regulations set out transitional arrangements which apply in four different circumstances.

> For people retiring with "expiry dates" on or after 1 April 2007, the standard rules will apply.

What happens if four weeks' notice is given before 1 October?

If the employer gives notice before 1 October of at least the period required by the contract of employment (or at least four weeks) to expire before 1 April 2007; the employer has made the employee aware before 1 October 2006 that they consider that the employee is being retired on the expiry date; and on or as soon as is practicable after 1 October, the employee notifies the employer in writing of their right to make a request, the employer is treated as complying with their Paragraph 2 Duty.

An employee's request to stay on, which otherwise complies with the requirements described in LELR 114, will be valid if made:

- where practicable, at least four weeks before the expiry date or
- where this is not practicable, as soon as reasonably practicable (either before or after the expiry date), but not more than four weeks after the expiry date.

If the employer fails to notify the employee on or as soon as reasonably practicable after 1 October of their right to make a request to stay on, the Paragraph 2 Duty does not apply and the Paragraph 4 Duty applies up to the expiry date.

The employee can make a request to stay on either before or after notification.

What happens if less than four weeks notice is given before 1 October?

If the employer gives notice before 1 October which will expire before 1 April 2007, but the period of notice given is less than four weeks (irrespective of what is provided for in the contract: or the employer has not made the employee aware before 1 October that they consider the employee is being retired on the expiry date; and on or as soon as reasonably practicable after 1 October, the employer notifies the employee in writing of their right to make a request, the employer is treated as complying with their Paragraph 2 Duty.

The employee has the right to make a request to stay on. If the employer fails to notify the employee on or as soon as reasonably practicable after 1 October of their right to make a request, the Paragraph 2 Duty does not apply and the Paragraph 4 Duty applies up to the expiry date.

What happens if notice is given on or after 1 October?

If the employer gives notice on or after 1 October as required by the contract (or statutory, if longer) to expire before 1 April 2007; and before, or the same day as giving notice of dismissal, the employer notifies the employee in writing of their right to make a request, the employer is treated as complying with their Paragraph 2 Duty.

The employee has the right to make a request to stay on. If the employer fails to notify the employee before, or on the same day as, giving notice of dismissal of their right to make a request, the Paragraph 2 Duty does not apply and the Paragraph 4 Duty applies up to the expiry date.

If the employer gives notice on or after 1 October which is shorter than the contractual notice (or the statutory notice, if longer) to expire before 1 April 2007, then the Paragraph 2 Duty does not apply and the Paragraph 4 Duty applies up to the expiry date. The employee can make a request to stay on.

What are retirement dismissals?

The age regulations have also introduced a new potentially fair reason for dismissal - retirement. Although employees over the age of 65 now have the right to claim unfair dismissal, retirement dismissals over age 65 will almost always be fair if the employer complies with their notification obligations.

However, it is clear that some employers have already dismissed older workers before 1 October to prevent the over 65s from acquiring the right to claim unfair dismissal. Unions will need to be astute to identify the real reason for dismissal.

It is clear that some employers have already dismissed older workers before 1 October to prevent the over 65s from acquiring the right to claim unfair dismissal.

How do unions work out the reason for dismissal?

The reason for dismissal can be worked out using the following table (remembering that any retirement age below age 65 needs objective justification):

	Normal retirement age ("NRA")	Date of termination	Employer's compliance with notification requirements	Reason for dismissal
1	None	Before age 65		Not retirement
2	None	At or after age 65	Employer complies with Paragraph 2 Duty; contract terminates on "intended date"	Retirement
3	None	At or after age 65	Employer complies with Paragraph 2 Duty; contract terminates before "intended date"	Not retirement
4	None	At or after age 65	Employer fails to comply with Paragraph 2 Duty; contract terminates before "intended date"	Not retirement
5	None	At or after age 65	Any other case where employer fails to comply with Paragraph 2 Duty	Could be retirement
6	Yes	Before NRA		Not retirement
7	65 or higher	On or after NRA	Employer complies with Paragraph 2 Duty; contract terminates on "intended date"	Retirement
8	65 or higher	On or after NRA	Employer complies with Paragraph 2 Duty; contract terminates before "intended date"	Not retirement
9	65 or higher	On or after NRA	Employer fails to comply with Paragraph 2 Duty; contract terminates before "intended date"	Not retirement
10	65 or higher	On or after NRA	Any other case where employer fails to comply with Paragraph 2 Duty	Could be retirement
11	Below 65	On or after NRA	If the retirement age can not be objectively justified, not retirement	If the retirement age can not be objectively justified, not retirement
12	Below 65	On or after NRA	Employer complies with Paragraph 2 Duty; contract terminates on "intended date"	If the retirement age can be objectively justified, retirement
13	Below 65	On or after NRA	Employer complies with Paragraph 2 Duty; contract terminates before "intended date"	Even if the retirement age can be objectively justified, not retirement
14	Below 65	On or after NRA	Any other case where employer fails to comply with Paragraph 2 Duty	Could be retirement

What if the reason "could be" retirement?

If the reason for the dismissal "could be" retirement, a tribunal will have "particular regard" to the following criteria, to determine if the reason is actually retirement or not:

- whether or not the employer complied with their Paragraph 4 Duty
- if so, when and
- whether or not the employer followed or sought to follow the procedures for holding a meeting to consider a request.

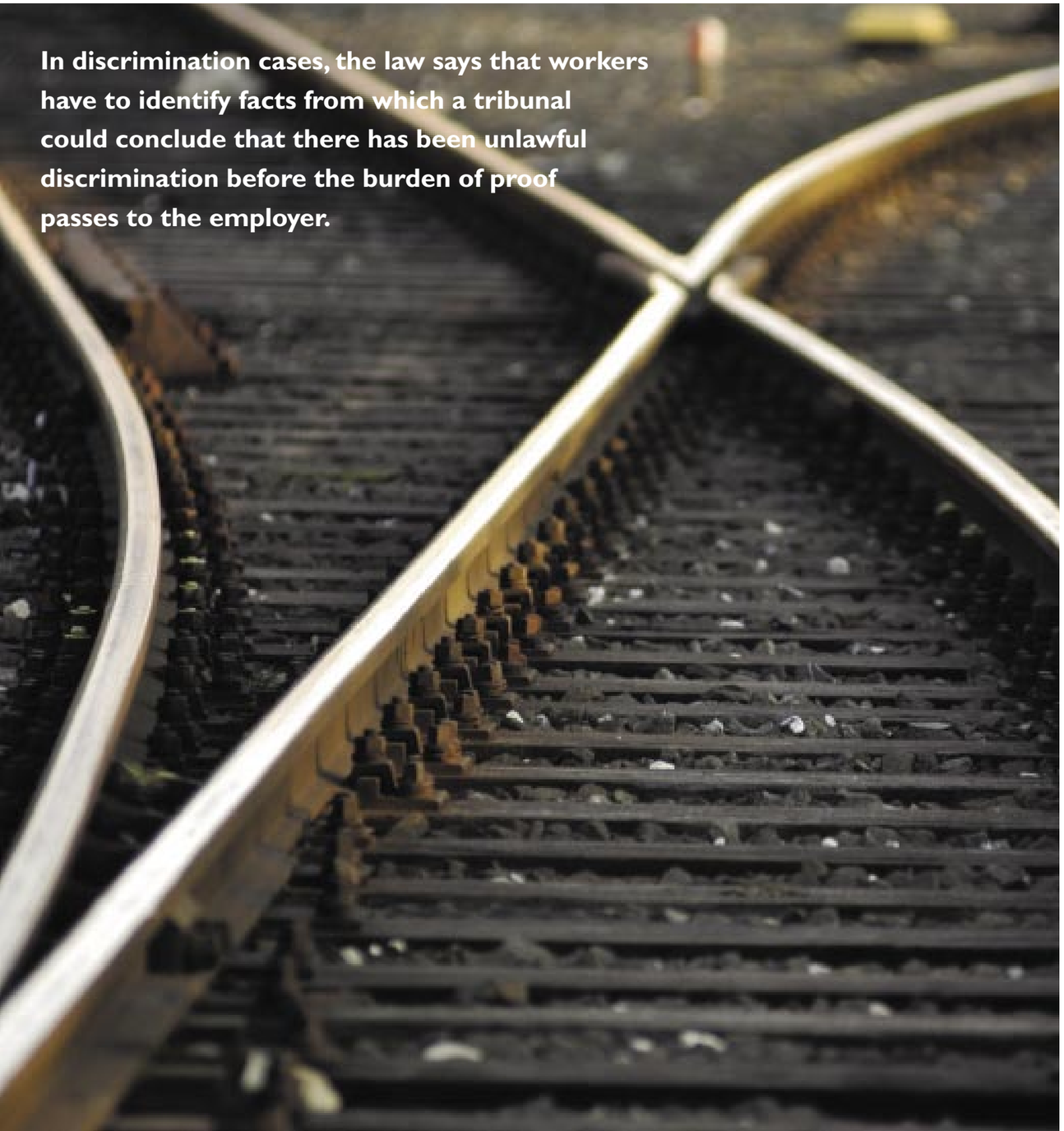
Where the reason (or principal reason) for the dismissal is retirement, the employee is regarded as unfairly dismissed if, and only if, the employer has failed to comply with

- their Paragraph 4 Duty (assuming they didn't comply with their Paragraph 2 Duty)
- their duties to consider a request and arrange a meeting or
- their duty to consider an appeal.

Stop Press: Pensions provision delayed

The Government has announced that it is to delay the implementation of the pensions provisions, apparently to allow more time for employers to "get to grips with them". These are now expected to be implemented on 1 December, following an additional mini-consultation.

Religious regulation



In discrimination cases, the law says that workers have to identify facts from which a tribunal could conclude that there has been unlawful discrimination before the burden of proof passes to the employer.

Religion and belief

In **Mohmed v West Coast Trains Ltd** (the first decision on religious discrimination), the Employment Appeal Tribunal (EAT) said that tribunals could, at that first stage, also take into account facts put forward by the employer that disproved what the worker was alleging.

What were the basic facts?

Mr Mohmed worked for West Coast Trains Ltd as a customer services assistant from June 2003 to February 2004. A Muslim of Indian origin, his religion dictated that his beard should be about four inches in length.

The company gave Mr Mohmed a copy of its uniforms policy at the start of his probationary period, which made clear that his beard should be kept neat and tidy. Towards the end of his training period in August, he was asked to trim his beard and according to the company, the issue was resolved by September.

According to Mr Mohmed, however, his manager continued to complain about his beard until early December, shortly after the religion and belief regulations (RBR) came into force on 2 December 2003.

Mr Mohmed was dismissed in February "for lack of enthusiasm". He claimed direct and indirect racial and religious discrimination, harassment and victimisation.

What did the tribunal decide?

The tribunal decided, on the facts before it, that the issue of Mr Mohmed's beard had been resolved by about September. That meant that his case did not fall within the RBR.

In any event, it said that Mr Mohmed had not satisfied stage one of the test set down by the Court of Appeal in Igen v Wong Ltd (LELR 99). In other words, that he had not proven, on the balance of probabilities, facts from which the tribunal could conclude that the company had committed an unlawful act of discrimination.

> The tribunal had to follow the Court of Appeal's guidance in Igen.

What did the parties argue on appeal?

Mr Mohmed argued that regulation 29 of the RBR required the tribunal to apply the two stage test in Igen. At the first stage, it must only look at the facts put forward by the claimant, and must disregard any non-discriminatory explanation put forward by the respondent.

The company, on the other hand, said that there was no requirement on tribunals just to look at the facts put forward by the claimant. It argued that the onus was on the claimant to prove those facts at that stage. If the company was able to produce evidence that the tribunal preferred, then the fact would not be proved.

What did the EAT decide?

And the EAT agreed with the company. It said that Mr Mohmed had to prove facts from which a tribunal could infer that the company had treated him less favourably than a hypothetical non-Muslim comparator on grounds of his religion or belief.

To ascertain those facts, the tribunal had to follow the Court of Appeal's guidance in Igen. This stated that tribunals could not take the employer's explanation for his dismissal (in other words, his lack of enthusiasm) into account at stage one.

However, if tribunals could only take account of facts relied on by the claimant, it would have to ignore all the facts put forward by the company. In this case, facts about its uniforms policy that required beards to be kept neat and tidy; and the fact that it had a Sikh employee who conformed with that policy.

The EAT concluded the tribunal was right to decide that the issue of his beard had nothing "to do with his religion and everything to do with the company's concern to enforce its uniform standard".

Mr Mohmed had not satisfied the first stage of the Igen test and there had not, therefore, been any unlawful discrimination.

Caught by COT3

Under section 18 of the Employment Tribunals Act (ETA), ACAS officers have a duty "to endeavour to promote a settlement".

In **Clarke and ors v Redcar and Cleveland Borough Council; Wilson and ors v Stockton on Tees Borough Council (2006, IRLR 324; IDS 811),** the Employment Appeal Tribunal (EAT) has said that that duty does not require officers to give advice as to the merits of a claim.

What were the facts?

In May 2003, Redcar Council agreed with the recognized unions to implement the 1997 single status (or Green Book) agreement introducing a new pay structure with effect from 1 April 2004.

It also started negotiations with ACAS and the unions to settle the potential claims of employees up to the date of implementation, based on their length of service and hours of work.

At around the same time, a number of women employees lodged equal pay claims, comparing themselves with men in predominantly male-dominated jobs. The Council admitted it was in breach of the Equal Pay Act.

The negotiations with the unions continued and in January 2004, ACAS produced a COT3 (or conciliated agreement), in "full and final settlement" of all claims in connection with the terms of the women's contracts. A covering letter from the Council made clear that employees who accepted the offer would forfeit their statutory rights to bring equal pay claims.

A large number of women accepted the negotiated deal, but then lodged equal pay claims, as did women working for Stockton Borough Council where similar facts applied.

What did the tribunal decide?

The tribunal struck out the women's claims on the ground that they had been validly settled up to the date when they signed and returned the COT3, although not up to 1 April 2004.

This was despite the fact that the claimants "were not aware of the possibility that they could receive a more substantial amount if the case was taken to a tribunal and they were successful".

Nor were the agreements void for "unconscionable conduct" by the employers, but even if there had been such conduct, the tribunal said that the claimants had endorsed the COT3 by receiving and cashing their settlement cheques.

The women appealed, arguing that the ACAS officer had not fulfilled her duties under section 18, as the agreement had not been made "with the assistance of a conciliation officer" as required under section 77 of the Sex Discrimination Act.

What did the EAT decide?

The EAT said that the COT3 was valid and that the claimants could not therefore bring equal pay claims.

It looked in particular at the duties of an ACAS conciliation officer under section 18 of the Employment Tribunals Act, and set out the following principles:

- ACAS officers have no responsibility to ensure that the terms of the settlement are fair on the employee
- the expression "promote a settlement" must be given a liberal construction, depending on the circumstances of the particular case
- ACAS officers must not give advice about the merits of a case
- Tribunals must not consider whether the ACAS officer correctly interpreted their duties; the officer just has to have intended to act as per section 18
- if the ACAS officer acted in bad faith or adopted unfair methods when promoting a settlement, the agreement might be set aside and might not operate as a bar to proceedings.

Contrary to what the claimants argued, therefore, officers were not under a duty to give advice, to evaluate the claims and to ensure that the claimants understood the nature and extent of all their potential claims.

Finally, the EAT said that the tribunal was wrong to hold that each COT3 only settled the claimants' equal pay claims up to the date on which they signed. Instead, it made an order that the agreements settled the claims up to 1 April 2004.

Blow your whistle

Section 47(B)(1) of the 1996 Employment Rights Act (ERA) states that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".

The Court of Appeal has decided in **Woodward v Abbey National plc (2006, IRLR 677)** that that protection applies to former employees, as well as existing ones.

What were the basic facts?

Mrs Woodward was head of financial institutions for Abbey National plc from 1991 until she was made redundant in 1994. She complained in 2003 that the company had subjected her to a detriment, contrary to section 47B of the ERA, because she had blown the whistle on various dubious financial practices while she was still an employee.

She alleged that, since leaving the company, it had failed to provide her with a number of references that she had requested and failed to try to find her any alternative employment.

What did the tribunals decide?

The tribunal decided that it could not hear her claim because it was bound by the 2001 Court of Appeal decision in the case of Fadipe v Reed Nursing Personnel, barring claims relating to events that take place after the person's employment has ended.

And it distinguished the decision of the House of Lords in Rhys-Harper v Relaxion Group Plc which said that workers could bring claims, post termination of employment, on the basis that "rights enshrined within the Employment Rights Act do not in general terms, apply to incidents occurring after the termination of employment, whereas the Discrimination Acts do".

The EAT also said it was bound by Fadipe and that it had not been overruled by Rhys-Harper, because the latter only related to discrimination complaints.

Should Fadipe be overturned?

The Court of Appeal said that the first question to answer was whether Fadipe should be overturned.

It looked at the relevant legislation – the ERA and the discrimination legislation – and concluded that although the language and framework were slightly different in each, they were all dealing with the same concept. In other words, to protect employees "from detriment in retaliation for his or her sex, race, disability or whistle-blowing….All four Acts are, therefore, dealing with victimisation in one form or another. If the common theme is victimisation, it would be odd indeed if the same sort of act could be victimisation for one purpose, but not for the other".

Secondly, it said that it was absurd to limit victimisation to acts during an employment contract, as opposed to events after termination. The Court said that it was difficult to believe that Parliament could have intended to let employers discriminate in giving or withholding references for existing employees but perfectly lawful in the case of ex-employees.

On that basis, the Court ruled that Fadipe was inconsistent with the wider application given by their Lordships in Rhys-Harper and could not stand.

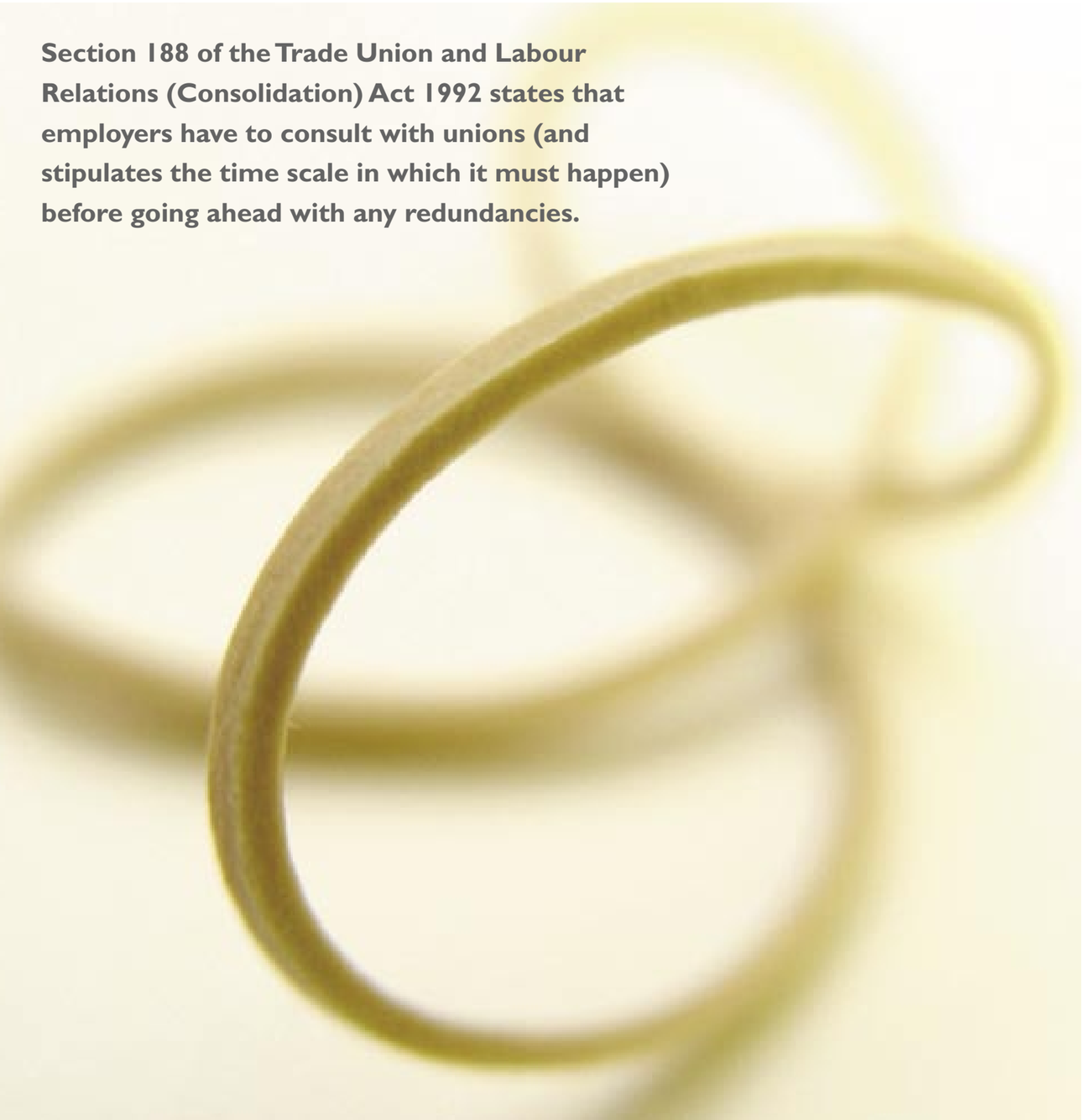
The Court concluded "It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted".

Comment

This is a sensible decision by the Court of Appeal and means that whistle blowers with claims of post employment victimisation receive the same protection as those with post employment claims of race, sex or disability. However, although the Court now recognises that such claims are possible in practice, it is notoriously difficult to prove the link between the negative reference and the protected conduct.

Giving notice

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 states that employers have to consult with unions (and stipulates the time scale in which it must happen) before going ahead with any redundancies.



Redundancy consultation

In **Vauxhall Motors Ltd v Transport and General Workers Union (2006, IRLR 674),** the Employment Appeal Tribunal (EAT) said that although section 188 does not have an unlimited shelf life, employers do not have to issue fresh notices if a subsequent consultation relates to the same employees and the same prospective redundancies.

What were the basic facts?

In 2002, the company hired hundreds of temporary workers on fixed term contracts. In January 2003, it notified the DTI that it would be making 400 of them redundant between 25 April and 5 September. It also sent the information required under TULRCA to the union.

Following consultations with the union, no one was made redundant in 2003, but in March 2004 the company, without informing the union, requested and received a six-month extension to the application registered with the DTI in January 2003.

In September, the company told the union there would be no compulsory redundancies, but lodged a new notification with the DTI of 345 potential redundancies between October 2004 and September 2005. It did not give the union a copy.

In October 2004, over 300 redundancies were announced at Ellesmere Port. The trade union side argued that the remaining temporary employees (of whom only about 46 remained) should be joined with the other employees affected by the proposed restructuring. The company argued that it could rely on the statutory information supplied to the union in January 2003, and dismissed the 46 temporary employees on 26 November 2004. The union argued that the company had breached its section 188 obligations.

What does the law say?

Section 188, TULRCA says:

(1) An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of the union about the dismissal in accordance with this section.

(2) The consultation must begin at the earliest opportunity, and in any event–
(a) where the employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of those dismissals takes effect;
(b) where the employer is proposing to dismiss as redundant at least 10 but less than 100 employees at one establishment within a period of 30 days or less, at least 30 days before the first of those dismissals takes effect.

What did the tribunal decide?

And the tribunal agreed. It said that "a redundancy situation cannot be an on-going piece of elastic as the respondent would wish it in this case. …We do not accept the submission of the respondents that Section 188 offers an "unlimited shelf-life".

The tribunal went on to find that the company had not consulted meaningfully with the union after 27 September 2004, nor had it sent the union the mandatory information required by section 188(4). It ordered the company to pay a 70-day protective award in favour of the 46 dismissed employees.

What did the EAT decide?

Although the EAT agreed with the tribunal that section 188 did not provide an unlimited shelf-life, it did not agree that it had been exhausted in this case. Instead it said that, provided the consultation deals with the same employees and the same prospective redundancies, the employer would not be in breach of section 188.

In this case, there had been an on-going dialogue about the status, extension and transfer of the temporary employees from February 2003 until the dismissals in November 2004. The entire consultation process had therefore continued seamlessly. The elastic did not break and a fresh section 188 process was not triggered.

It also said that the reference in section 188 to a period of 90 days did not mean that if the process of consultation extended beyond that period, it then had to restart. The 90-day period fixed the start of consultation, not the end.

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LELR aims to give news and views on employment law developments as they affect trade unions and their members.

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