THOMPSONS SOLICITORS

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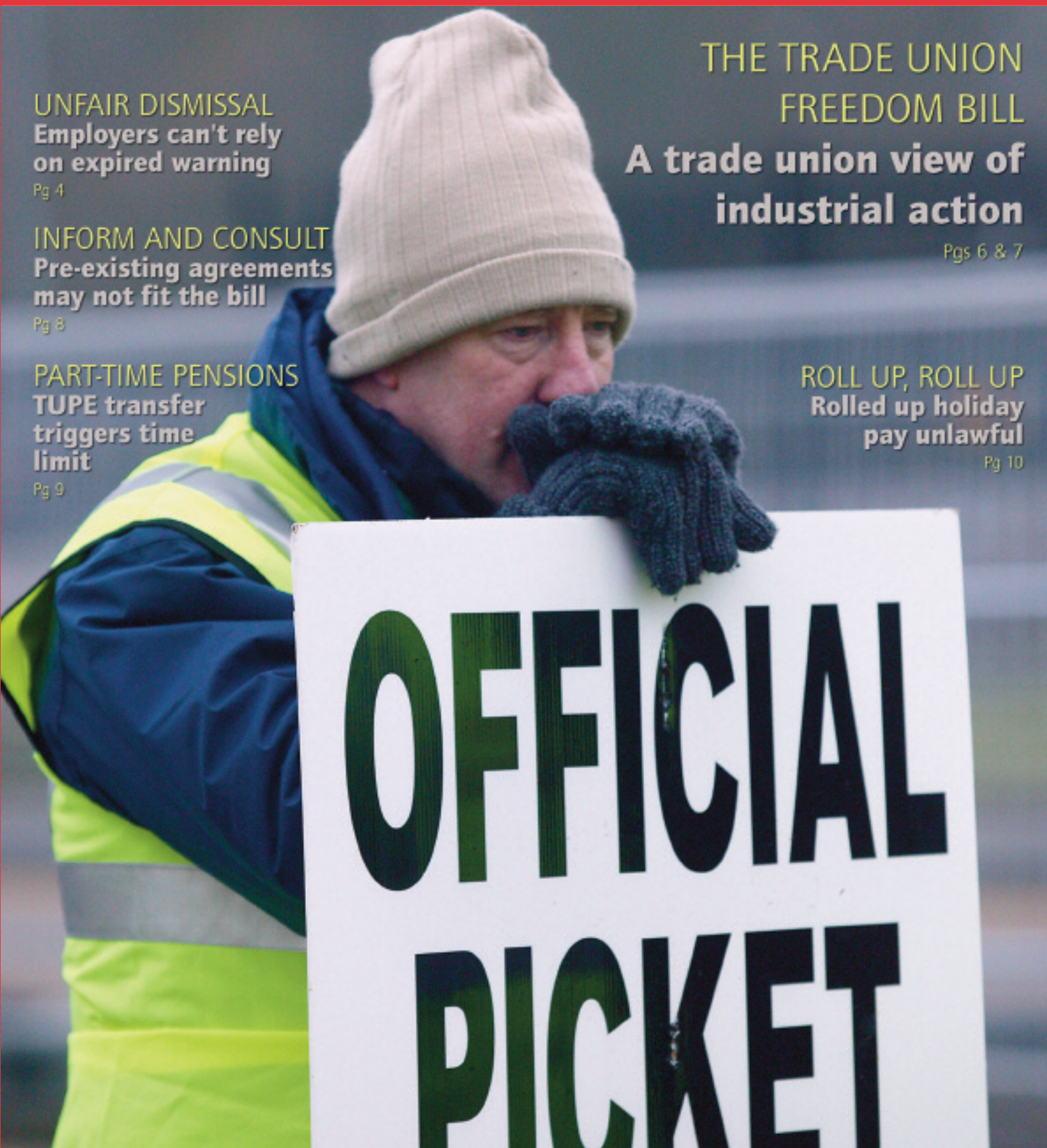

TELL ALL

Following the introduction of new laws in 2005, far more employees now have the right to be informed and consulted on issues that matter to them in the companies they work for.

So the DTI has launched a company visits scheme for HR professionals and managers to see first-hand how some companies have already benefited from implementing systems to inform and consult their employees.

The campaign offers employers a range of practical tools, such as Acas training workshops, to help them re-assess their current practices towards two-way communication.

It is directed at organisations with 150 or more employees – that is businesses that are currently covered by the Information and Consultation of Employees Regulations 2004.

For further information see *www.iandc.dti.gov.uk*

OUT AT WORK

Following changes to the law on discrimination at work and the introduction of civil partnerships, the TUC has produced a guide to review workplace policies and practices on lesbian, gay, bi-sexual and trans issues.

The idea is to help workplace reps to negotiate appropriate changes with their employers.

The guide explains the legal rights available to LGBT workers, but also looks at workplace negotiating issues including pensions and other benefits, time off, bullying and harassment and domestic violence. It devotes an entire section to whether employers should monitor sexuality and gender identity and provides some outline principles. The guide can be found at: *www.tuc.org.uk/equality/tuc-11663-f1.cfm#tuc-11663-1*

FLEXIBLE FATHERS

Two new pieces of research – from the TUC and DTI – show that more and more fathers are asking to work flexibly.

The DTI says, in its 2005 Maternity and Paternity Rights Survey, that almost triple the number of new dads now work flexi-time (31 per cent) up from 11 per cent in 2002, as a result of the right to ask to work flexibly.

The TUC report *Out of Time* agrees that more men are asking to work flexibly, but points out they are also far more likely to have their requests turned down than women. It calls for a new approach to the way that work is organised, arguing that greater flexibility at work should be available to everyone, not just parents and carers.

Go to: *www.dti.gov.uk/er/emar/maternity_paternity_errs50.pdf* for the DTI report.

For the TUC report, go to: *www.tuc.org.uk/extras/outoftime.pdf*

DTI CONSULTS

The DTI is currently consulting on ending discrimination by businesses and organisations that provide goods, facilities and services to lesbian and gay customers.

The consultation closes on 5 June, and the regulations should be in force by October. For a copy of the consultation document, go to: *www.womenandequalityunit.gov.uk*

It is also consulting on new rules to extend paternity leave to allow fathers to take up to 26 weeks, some of which could be paid.

The consultation closes on 31 May and the new rules are due to come into force in April 2007. For a copy of the consultation document, go to: *www.dti.gov.uk/er/workandfamilies.htm*

THE LATEST TRADE UNION STATISTICS

Every year, the DTI publishes its annual statistical report on trade union membership in the UK. Based on labour force survey data for autumn last year, the key findings of *Trade Union Membership 2005* show that:

- Almost six and a half million employees are trade union members, a fall of almost two per cent on the year before.
- Less than one in five private sector employees are union members.
- Almost three in five public sector employees are union members.
- The number of male trade union members fell by approximately 121,000 in 2005, while female employees in trade unions rose by approximately 3,000.
- Union members averaged £11.98 per hour in autumn 2005, 17.6 per cent more than the earnings of non-union employees.

Go to: *www.dti.gov.uk/er/emar/trade.htm*

Success at work

Protecting vulnerable workers, cracking down on rogue employers and lightening the load for legitimate business will be the focus of the Government's employment relations policy for this Parliament, according to a recent report by the DTI.

In its strategy paper; 'Success at Work - protecting vulnerable workers, supporting good employers' the Government has said it will:

- end the loophole that allows UK employers to include bank holidays as part of employees' minimum paid holiday entitlement
- provide a comprehensive approach to identifying and helping vulnerable workers, as well as cracking down on employers operating illegally
- ensure targeted enforcement clamps on rogue employers
- ensure employees have better awareness of their employment rights.

Go to: *www.dti.gov.uk/er/successatwork.htm* for a copy of the document.

Possible breach of working time

In the case of Commission -v- United Kingdom**, the Advocate General of the European Court of Justice (ECJ) has said that the UK Government is in breach of the working time regulations. Although the ECJ does not always follow his opinion, it does so more often than not.**

There were two aspects to the case, the first of which (about "partly unmeasured working time") has already been resolved by the Government, and arose out of a complaint from Amicus.

This affected people who have some of their working time pre-determined by their employer, but who voluntarily work longer hours. Those voluntary hours were not included in the protection originally provided by the regulations. This regulation has now been removed, with effect from 6 April.

The second complaint centred on the UK Government's failure to "require" employers to make sure that workers took their minimum daily and weekly rest periods, as opposed to "making sure" they could take them.

Secret agent

Following the decision in Dacas -v- Brook Street Bureau (LELR 88), the Court of Appeal in Cable & Wireless -v- Muscat **has confirmed that an agency worker can be an implied employee of the end user.**

This decision does not mean, however, that tribunals will now find that all agency workers are implied employees. Their status will depend on the facts of each case.

Having said that, the court could not imagine a case in which a worker was found to have no recognised status, either as an employee or as a self-employed independent contractor.

Just junk it

Following the decision by the European Court of Justice in Junk -v- Kuhnel **(LELR 98), the Government has launched a 12 week consultation on proposals to make a minor change to the law on collective redundancies.**

The amendment makes clear that employers must inform the Secretary of State about any proposed redundancies before they issue any dismissal notices. Otherwise the notification would relate to actual rather than proposed redundancies.

Employers also have to consult with appropriate representatives of the affected employees "in good time", and again before any dismissal notices have been handed out.

The consultation closes on 9 June. To download a copy, go to: *www.dti.gov.uk/er/collective_redundancies.pdf*

Minimum wage

About 1.3 million workers will be guaranteed higher pay when the minimum wage rises in October.

The adult hourly rate will rise from £5.05 to £5.35; the rate for workers aged 18 to 21 from £4.25 to £4.45; and the rate for workers aged 16 to 17 from £3.00 to £3.30.

The Government has also announced it will:

- accept the recommendation of the Low Pay Commission that salary sacrifice schemes, including those for childcare vouchers, should not count towards the minimum wage
- consider the recommendation that the Commission reviews the apprenticeship exemptions in 2008
- take into account the recommendation that enforcement should be stepped up in sectors that employ migrant workers.

EXPIRY DATE

Section 98 of the Employment Rights Act 1996 gives employers five potentially fair reasons for dismissing someone. If that decision is challenged, it is up to tribunals to decide whether it was reasonable for the employer to dismiss, and then whether the dismissal was fair.

In Diosynth Ltd -v- Thomson (IDS Brief 800), the Court of Session said that, when dismissing someone, it was not reasonable for employers to rely on a written warning that had expired.

WHAT WAS THE BACKGROUND TO THE CASE?

Morris Thomson was employed by Diosynth from January 1996 to December 2001 as an operator in their factory in Fife, producing chemicals for big pharmaceutical companies.

The factory produced mainly raw chemicals and had an extensive safety training programme, which Mr Thomson had attended. He was taught, among other things, the safety risks of a process known as "inerting". The company made clear that failure to follow the process was an act of gross misconduct.

Following an accident in November 1998, caused by an employee failing to inert a vessel, Mr Thomson gave a specific commitment to comply with the procedure at all times in the future.

In July 2000, however, he was disciplined for failing to inert a vessel and received a 12-month written warning. He was told that any further failure to inert would result in disciplinary action.

Following a fatal explosion at the plant in November 2001, it transpired that Mr Thomson had breached the procedure three more times in October and November 2001, and had falsified some documentation.

Although the warning had expired by then, the company said it had lost confidence in him and that he obviously could not be trusted to follow the safety rules. He was dismissed in December and subsequently complained of unfair dismissal.

WHAT DID THE TRIBUNALS DECIDE?

A majority of the tribunal said that, given the need for safety in the plant, dismissal was within the range of reasonable responses available to the company, and was therefore fair.

One tribunal member, however, said that the company had not been entitled to take the expired warning into account. And as it had not given Mr Thomson a final written warning, they said that the employer had failed to get across to him the seriousness with which it viewed the breaches of safety.

Mr Thomson appealed to the EAT which agreed that he had been unfairly dismissed, given that the warning had expired. The company appealed to the Court of Session.

WHAT DID THE PARTIES ARGUE?

The company argued that the key question was not whether the warning had expired but whether it had acted reasonably in all the circumstances.

The EAT had not taken all the relevant factors into account, including the fact that Mr Thomson had given an explicit undertaking to follow the procedure for inerting before he was disciplined.

Mr Thomson, on the other hand, argued that it was unfair for the company to rely on the previous written warning to take more severe disciplinary action than it would otherwise have taken.

He was entitled to believe that the company was genuine when it said that the warning would expire in 12 months. The EAT was, therefore, right and the tribunal's decision had been perverse.

WHAT DID THE COURT OF SESSION DECIDE?

The Court of Session agreed with Mr Thomson. It pointed to para 15 of the Acas code of practice which stated that a warning that was not subject to a time limit would normally be inconsistent with good industrial relations practice.

Although this warning was for a fixed period, the company had acted as though it was still in force at his second disciplinary hearing.

Mr Thomson had been entitled to assume that it would expire after 12 months. The company had acted unreasonably when it tried to extend the effect of the warning beyond that period.

CONTEMPLATING DISMISSAL

To facilitate the smooth implementation of the dispute resolution rules in October 2004, the Government introduced transitional provisions to deal with cases that had already started by that date, or cases in which the employer had already "contemplated dismissal."

In Madhewoo -v- NHS Direct, the employment appeal tribunal (EAT) said that the test for the word "contemplates" was a subjective one, and meant something that was in the employer's mind.

It did not have to have been communicated to the employee.

WHAT WERE THE BASIC FACTS?

Mr Madhewoo had worked for the NHS for 30 years when he got a job at the Southall call centre of NHS Direct in November 1998.

There was some concern about advice he gave to a member of the public in 2003, but he was not disciplined. In June 2004, a GP made a formal complaint about him after he gave incorrect advice to a patient.

He was suspended in July and was finally told by letter on 24 September that he would have to attend a disciplinary meeting. He received another letter on 25 October, giving him the date of the hearing in November and telling him that the ultimate penalty could be dismissal.

That was the outcome and he then claimed, among other things, that he had been unfairly dismissed.

WHAT IS THE RELEVANT LEGISLATION?

The time limit for an unfair dismissal claim under Section 111(2) of the Employment Rights Act 1996 is three months. Tribunals can only extend that if the claimant can show it was not "reasonably practicable" to lodge the claim earlier. In this case the tribunal chair was not convinced by Mr Madhewoo's arguments.

Mr Madhewoo did not appeal against that decision, but argued instead that he was entitled to a three-month extension of time under the dispute resolution rules that had come into force on 1 October 2004.

These, however, were subject to transitional provisions. Regulation 18(a) said that the new rules would only apply in relation to dismissal claims *"where the employer first contemplates dismissing...the employee after these regulations come into force*".

WHAT IS THE MEANING OF "CONTEMPLATE DISMISSAL"?

The tribunal chair decided that the test for the word "contemplates" is a subjective one. In other words, that it is an *"interior thought process and does not, of itself, imply any communication of the subject matter of that thought process to any other person."*

That meant that, in this case, the investigating manager (the employer for the purposes of the regulations) had "contemplated dismissal" as early as 24 September. It was just that Mr Madhewoo was not aware of that possibility until he received the letter dated 25 October.

He could not, therefore, rely on the regulations to extend the time for lodging his claim. Mr Madhewoo appealed.

WHAT DID THE EAT DECIDE?

Unfortunately, the EAT disagreed with him. It confirmed the view of the tribunal, saying that *"what is contemplated by the employer is what is in his mind"* and does not have to involve any communication to the employee about when they first "contemplate dismissal".

It therefore rejected Mr Madhewoo's argument that the relevant date was the date on which he received the letter of 25 October.

It also rejected the argument that it could be the date *"when a reasonable employee would have concluded that the employer had first contemplated dismissal .... To find otherwise would, in my judgment, be a bridge too far in the so-called purposive approach to this legislation."*

COMMENT

The EAT's interpretation of the word "contemplates" is helpful. It means that as soon as an employer thinks that disciplinary action might result in dismissal, they must trigger the procedures, if they have not already done so.

TOWARDS A TRADE

Tony Blair was right when he said that British labour law is "the most restrictive on trade unions in the western world."

Workers and trade unions in the United Kingdom have fewer rights in relation to industrial action than elsewhere in Europe.

In fact they have less protection than they had 100 years ago at the time of the Trade Disputes Act 1906.

John Usher, legal officer for the United Campaign for the Repeal of Anti-Trade Union Laws, explains why the trade union movement is proposing a Trade Union Freedom Bill.

WHAT DOES THE BILL SAY?

The Bill takes the first tentative steps towards complying with international law and sets out to:

- protect workers taking lawful industrial action
- prevent employers from hiring replacement workers
- make it harder for employers to obtain injunctions
- allow solidarity action
- make industrial action ballots less complex
- simplify industrial action notices.

WHY DO WORKERS NEED MORE PROTECTION?

The UN says that: *"the common law approach [in UK law] recognising only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike."*

It also criticised the limited protection that workers have if they are sacked for going on strike. They can claim unfair dismissal, but that's all.

The Trade Union Freedom Bill does not go as far as the international laws ratified by the UK, but would at least stop people from being sued and sacked by their employer for exercising a legal right.

It says that employers should not be able to sack workers for taking industrial action. And nor should they be able to disadvantage them in any other way.

Additionally, the Bill would strengthen unfair dismissal on union grounds to provide automatic reinstatement for workers sacked for having taken lawful industrial action.

Picture: Justin Tallis/Report Digital

CAN EMPLOYERS HIRE STRIKE BREAKING LABOUR?

In 1996 the International Labour Organisation (ILO) said: *"The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, constitutes a serious violation of freedom of association."*

Hiring strike breakers is therefore a violation of Convention 87, which the UK has signed up to.

Other regulations in the UK say that agencies should not supply strike breakers. This does not apply if the agency does not (and could not) know that the original worker was on

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strike. The proposed Bill would extend those regulations by making it unlawful for employers to hire workers to break a strike.

WHY ARE INJUNCTIONS SO EASY TO OBTAIN HERE?

Both the ILO and the Council of Europe have condemned the ease with which the courts here grant interim injunctions to employers. The problem is that the law says employers only have to show that there is a "serious issue to be tried" later. The Bill will change that so the employer has to show they are more likely to win at trial than the union.

The law also says that judges have to "weigh the balance of convenience". Needless to say, the "balance" is heavily weighted in favour of employers who can argue that their business would be damaged if they don't obtain the interim injunction.

The Bill does not address this specific issue, but does provide some limit on the operation of the "balance of convenience" by denying employers an injunction if they don't supply specific information within a time frame.

WILL SOLIDARITY ACTION NOT RESULT IN WILDCAT STRIKES?

Whatever the Government says, the answer is no. The ILO says that sympathetic strikes should be lawful as long as the primary strike is lawful.

The ILO has noted that sympathy strikes *"are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalisation of the economy and the delocalisation of work centres."* And, it could have added, contracting out and privatisation.

But, in the UK, all forms of solidarity action are unlawful. So the Bill proposes that a group of workers should have the freedom to take industrial action in support of another group who are on strike, but only in situations where there is a substantial connection between them.

One situation would be where the employer in the primary dispute and the employer subject to solidarity action are associated employers. A second is where a second employer is covering the work of the strikers. And the third is directed at the Gate Gourmet situation where a particular customer (or supplier) dominates the employer's trade to such an extent that it can interfere in the employer's relations with their employees, perhaps by actions resulting in a pay cut.

HOW CAN INDUSTRIAL ACTION BALLOTS BE SIMPLIFIED?

International bodies also attack the UK's industrial action balloting rules for being overly restrictive and complex.

The Bill proposes a modest but highly significant change in preventing legal action for trivial, technical or accidental breaches of the balloting provisions, which could have no effect on the outcome of the ballot.

In addition, the Bill proposes to remove the "bar" on industrial action where there has been a "prior call", highlighted by the case of *RMT -v- Midland Mainline* in 2001. The union was told it could not rectify a prior unofficial call to take industrial action by repudiating the call and then conducting a proper ballot and serving the requisite notices.

In reality, notices of ballots are of little value to employers except for obtaining court injunctions to stop the industrial action. Employers know when there's a dispute and a ballot in the offing. The Bill would scrap them.

HOW CAN INDUSTRIAL ACTION NOTICES BE SIMPLIFIED?

The Bill also says that all the onerous formalities for giving notice of industrial action should be replaced by an obligation to give seven days notice to employers of when the industrial action will start, and reasonable information about those expected to take part.

WHAT HAPPENS NEXT?

Trade unionists and the politically active can help by sending motions to their union, political party branches and conferences. Ask your MP to sign up to an early day motion that supports the Bill.

Watch out for the lobby of Parliament in the autumn coinciding with the centenary of the Trade Disputes Act 1906. Let's send out the message that we want our Government to stop flouting international law and let's demand our human rights and freedoms for the 21st century.

TALK UP

Last year, new information and consultation rules applying to businesses and organisations with 150 or more staff were introduced in the UK.

In its first reported decision, the Central Arbitration Committee (CAC) decided in Stewart -v- Moray Council (2006, IRLR 168) that a pre-existing agreement was not detailed enough to satisfy the requirements of the regulations.

WHAT DOES THE LAW SAY?

The Information and Consultation of Employees Regulations 2004, which came into force in April 2005, state that employers have to negotiate an information and consultation agreement with employee reps, if they receive a "valid employee request" from 10 per cent of the workforce.

However, if there are pre-existing agreements (PEAs) that have already been approved covering all employees, the employer only has to negotiate a new agreement if 40 per cent of the workforce makes the request.

If only 10 to 40 per cent ask for the agreement, the employer can hold a ballot to gauge the level of support. The obligation to negotiate then arises if at least 40 per cent of the workforce and a majority of those voting endorse the request.

WHAT WAS THE BACKGROUND TO THE CASE?

In August 2005, Mr Stewart, an employee of Moray Council, presented the council with a petition signed by over 500 employees (between 10 and 40 per cent of the workforce) asking the council to negotiate an information and consultation agreement.

The council said its three existing collective agreements with the recognised trade unions amounted to a valid PEA and decided to ballot the workforce. Mr Stewart (a non union member) disagreed and complained to the CAC that the council should have started negotiations.

WHAT DID THE TWO PARTIES ARGUE?

Mr Stewart argued that the existing agreements only provided for consultation with trade unions, and that there was no mechanism for informing and consulting with non trade union members.

They could not, therefore, be said to "cover all employees of the undertaking" as required by the regulations, nor had they been approved by them as non trade union members had not been consulted.

The council argued that the three existing agreements contained specific obligations in relation to information and consultation; that they contained an obligation to discuss issues directly with employees; and that the existing agreements were incorporated into the contracts of employment of all employees whether they were trade union members or not.

In any event, it argued that the agreements had been approved by employees through the auspices of their trade union reps who represented all employees, a majority of whom were union members.

WHAT DID THE CAC DECIDE?

The CAC panel said that the three agreements covered all employees within the meaning of the regulations, despite the fact that the consultation mechanism within them was limited to trade union representatives.

Employees who were not members of the recognised unions were covered by them because the agreements did not differentiate between union members and non members.

It also agreed with the council that the agreements had been "approved by the employees", because everyone was covered by one or more of the agreements, and the trade union reps represented all employees.

But it said that one of the three agreements did not *"set out how the employer is to give information to the employees or their representatives and seek their views on such information"*.

The statement in the agreement that the joint negotiating committee was "a forum for discussion and/or consultation" was not detailed enough. It therefore upheld Mr Stewart's complaint and the council had to start negotiations, as required by the regulations.

PART-TIME PENSIONS

In 1995, a group of part-time workers claimed they had been discriminated against under the Equal Pay Act when their employers denied them access to their pension schemes. To succeed, they had to have lodged their claims within six months of the end of their employment.

Unfortunately, the House of Lords has said in Preston & others -v- Wolverhampton Healthcare NHS Trust & Others no.3 (IDS Brief 802) that a TUPE transfer triggers the time limit, with the result that claims brought more than six months after TUPE are time barred.

WHAT WAS THE BACKGROUND?

Known as the *Preston* cases for short, they concerned about 60,000 women who brought a series of test cases under the Equal Pay Act 1970 and Article 141 of the EC Treaty.

The women said they wanted retrospective access to a variety of pension schemes going back as far as 8 April 1976. The trouble was that they had been transferred to another employer under the TUPE regulations (Transfer of Undertakings (Protection of Employment) Regulations 1981) in 1992.

The transfer did not affect their terms and conditions in any way, except for pensions, which are specifically excluded under the regulations. That meant the women had to bring their claim against their old employer (the transferor).

But the Equal Pay Act says that claimants have to lodge their claims within six months from the end of their employment. The courts had to decide, therefore, whether the TUPE transfer had triggered the time limit.

WHAT DID THE EARLY HEARINGS SAY?

The employment tribunal said that, because pensions were excluded from TUPE, time began to run from the date of the transfer, so that the women were hopelessly out of time.

The employment appeal tribunal (EAT), however, disagreed and said that the six month time limit for bringing a claim against the old employer did not start running until the date that the worker left her new employer (the transferee).

The EAT reasoned that *"the equality clause in relation to pensions, said to have been breached, remains actionable throughout the period of employment (with the transferee) plus six months."*

The Court of Appeal disagreed, saying that, although their contracts had transferred over to the new employer, the effect of TUPE was to remove the women's pension rights from them. The two contracts were separate, with separate equality clauses and separate pension rights.

WHAT DID THE HOUSE OF LORDS DECIDE?

The House of Lords agreed with the Court of Appeal.

It said that *"a statute cannot speak with two different voices at one and the same time."* The section dealing with the time limit was clear – a claim must be brought within six months of the end of the job to which it related. And the same rule had to be applied where there had been a TUPE transfer.

But which job did the claim relate to? The answer, said the House of Lords, *"where the claim is in relation to the operation of an equality clause relating to an occupational pension scheme before the date of the transfer, is that it relates to the woman's employment with the transferor."*

COMMENT

This is the end of the road, however unfair, for claims brought more than six months after the date of a transfer, despite the sustained efforts of the unions involved.

The only good news is that the ruling does not apply to the many re-organisations in the health service and local government in the 1990s.

Part-timers who have not yet submitted claims should, therefore, be made aware of the strict six-month time limit for lodging a claim with a tribunal from the date of leaving their employment.

Unlike the recently reported FBU case of retained fire-fighters (LELR 110), these claims had to rely upon the Equal Pay Act and not the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

'a statute cannot speak with two different voices at the same time'

Roll up, roll up

Under the working time regulations, workers are entitled to four weeks' paid annual leave. The regulations did not make clear, however, whether employers had to pay it during the time the worker was on holiday, or whether it could be "rolled up" into pay for work already done.

The European Court of Justice (ECJ) has now said in Caulfield -v- Hanson Clay Products Ltd; Clarke -v- Frank Staddon Ltd; and Robinson-Steele -v- RD Retail Services Ltd (IDS 802) that employers cannot include holiday pay in someone's monthly or weekly wage, and not pay them when they take annual leave.

WHAT WERE THE BASIC FACTS?

Mr Clarke worked for Frank Staddon Ltd from April to the end of June 2001 when he went on holiday for a month. He was not paid for the time off, because the company said his holiday pay was already included within his daily rate.

Mr Caulfield worked for Marshalls Clay, four days on and then four days off, but was only paid for the days he worked. His holiday pay was included in his hourly rate of pay so there was no accumulation of holiday pay.

Mr Robinson-Steele worked as a temporary shop fitter for Retail Services Ltd between April 2002 and December 2003. He took a week's leave at Christmas, for which he was not paid separately as he was told his leave was paid at the rate of 8.33 per cent of his hourly rate.

WHAT WAS THE OUTCOME?

The first two cases were heard jointly by the Court of Appeal, where the claimants argued that the legislation required payment to be made during the time the worker was actually on holiday. Otherwise it constituted a payment in lieu, which is only permitted when the contract comes to an end.

The employers said, however, that there was nothing in the directive to say that payment for annual leave should be made in a particular way or at a particular time.

The Court of Appeal decided, in both cases, that because article 7 of the directive did not say anything about the timing of holiday pay, that rolled-up holiday pay was lawful. However, because a Scottish court had already found in the employee's favour in another case, it referred both cases to the ECJ, where they were joined up with Mr Robinson-Steele's claim.

WHAT DID THE ECJ DECIDE?

The ECJ said that, as the whole point of the directive was to enable workers to take the leave to which they were entitled, the term "paid annual leave" meant they must be paid a comparable amount of money at holiday time as they would do if they were at work.

Employers could not, therefore, designate part of the pay that a worker received for work already done as holiday pay. It had to be additional to that.

Although the regulations did not stipulate when the payment had to be made, it said the whole point of it was to ensure that workers were paid a comparable amount of money at holiday time as they would do if they were at work. Staggering payments would be counter to that aim.

However, it also said that employers can make part payments staggered over the year along with payments for work already done, so long as it's obvious that that is what they are doing.

The sting in the tail is that, according to the ECJ, employers can then set off the extra money already paid against the payments for holiday leave actually taken by the worker. However, the burden of proof is on employers to show that these sums were additional to payment for work already done.

So while rolled up holiday pay is technically unlawful, as long as it is transparently set out and a genuine payment in respect of holidays then the payment can be set off against holiday pay entitlement.

Picture: Paul Carter/Report Digital

Pension pot

In assessing compensation for unfair dismissal, tribunals routinely include the loss of benefits such as pension rights and health insurance as part of the compensatory award.

In Knapton & ors -v- ECC Card Clothing Ltd, the employment appeal tribunal (EAT) said that even if employees draw their pension early, the value of those benefits should not be deducted from the compensatory award.

The claimants' union, Amicus, instructed Thompsons to act on their behalf.

WHAT WERE THE BASIC FACTS?

Mr Knapton and Mr Daniel – who had both worked for ECC for about 30 years – were dismissed in April 2004. Both had contributed to and were entitled to draw their pension early from the company's final salary pension scheme, and both enjoyed the benefit of life assurance cover (as did a third claimant, Mr Van Bellen).

Both men decided to take their pensions early and the three men agreed a figure with the company to compensate them for their future loss of the life cover. However, they could not agree compensation for the 70 weeks between the date they were dismissed and the tribunal hearing date.

The employment tribunal said that the company could set off its liability for the two men's pension benefits against the compensatory award. And because they had not arranged more life cover, refused the three of them compensation up to the date of the hearing.

WHAT WAS THE RELEVANT LEGISLATION?

Section 123 (1) of the Employment Rights Act 1996 says that the amount of the compensatory award should be *"just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

Section 123 (2) says that the "loss" includes the loss of any benefit *"which he might reasonably be expected to have had but for the dismissal."*

WHAT DID THE PARTIES ARGUE AT APPEAL?

Mr Knapton and Mr Daniel argued that the tribunal was wrong to say they had benefited from taking their pension early, since the amount they received was the same whether it was taken early or late.

As for the life assurance, they argued that they were entitled to be put in the same position as if they had not been dismissed. At the time of their dismissal, they were covered by life assurance, but had not received any payment to cover the 70 weeks leading up to the hearing.

The company, on the other hand, argued that, by taking their pension early, the men were in a similar situation to other claimants entitled to benefits such as incapacity benefit or job seekers allowance, which are then deducted from the compensatory award.

WHAT DID THE EAT DECIDE?

The EAT said that the decision by the men to take their pension early was a personal decision about how to manage their money now that they were out of work.

The overall pot of money they received was the same, whether they drew on it now or later. The EAT could see no reason, therefore, why the company should be allowed to reduce its liability.

It concluded, on the basis of previous cases, that occupational pensions were deferred wages for work done before the dismissal and could not be compared to state benefits. The tribunal was therefore wrong to compare these payments to incapacity and sickness benefits cases.

As a result, the two men will effectively receive double the amount that the tribunal originally awarded to them.

The EAT did, however agree with the tribunal that, since the men had survived for 70 weeks "without the insured event occurring", they could not claim any financial loss for the life assurance cover.

They had not gone out and bought a substitute policy for which they could have claimed compensation and they had not therefore, suffered any financial loss.

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