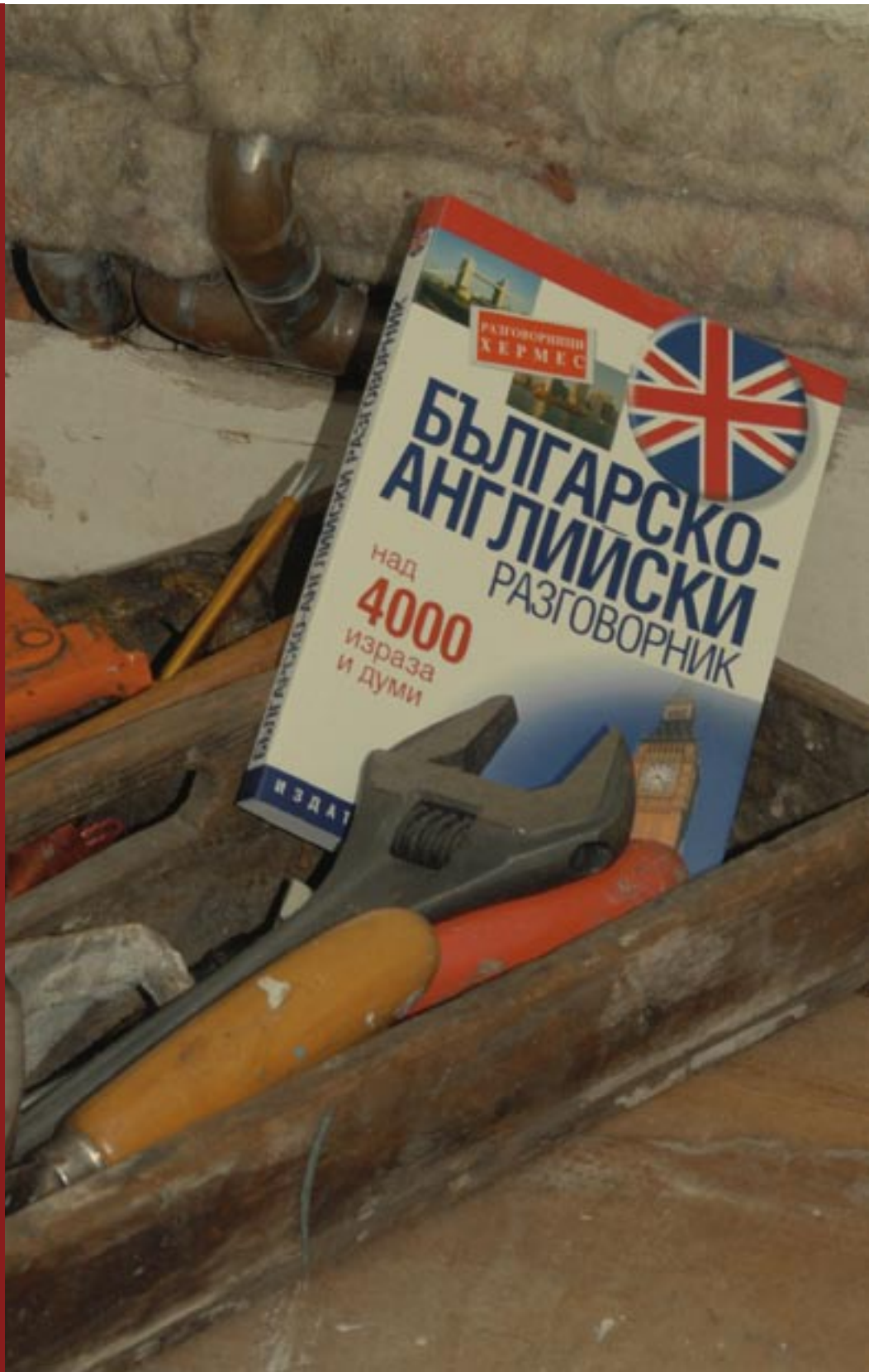
THOMPSONS
SOLICITORS

AUTUMN 2007
Issue 120

Labour & European Law Review



www.thompsons.law.co.uk

Migrant workers

An explanation of the employment law issues

Migrant workers from Eastern Europe as well as the more traditional countries like Africa and Asia work in a wide range of industries in the UK. These workers are often paid pitiful wages, living in poor accommodation and in fear of victimisation or dismissal if they complain.

Rakesh Patel, head of Thompsons' Migrant Workers' Unit, looks at the main employment law issues affecting these workers.

Right to Work

Although some migrant workers are legally entitled to work in the UK, many more are here on an unauthorised basis either because they do not have permission to be here or because they have no right to work here.

The employment rights of workers who do not have permission to work in the UK are severely restricted. Employees with illegal contracts may be prevented from asserting their contractual and statutory employment rights, and are barred from bringing claims such as unfair dismissal or unlawful deduction from wages.

It is easier for illegal migrant workers to bring discrimination claims because they do not depend on having a contract of employment.

The courts approach these cases by considering whether the claim is so closely linked with the illegal conduct of the claimant that the court could not allow them to recover compensation without appearing to condone what they have done.

The following two examples illustrate the principle

- Ms Hall alleged she was unfairly dismissed due to sex discrimination. Entirely unrelated to this, the employer had falsified her payslips so they showed a lower net payment than she actually received. Ms Hall queried this but was told that "it's the way we do business".

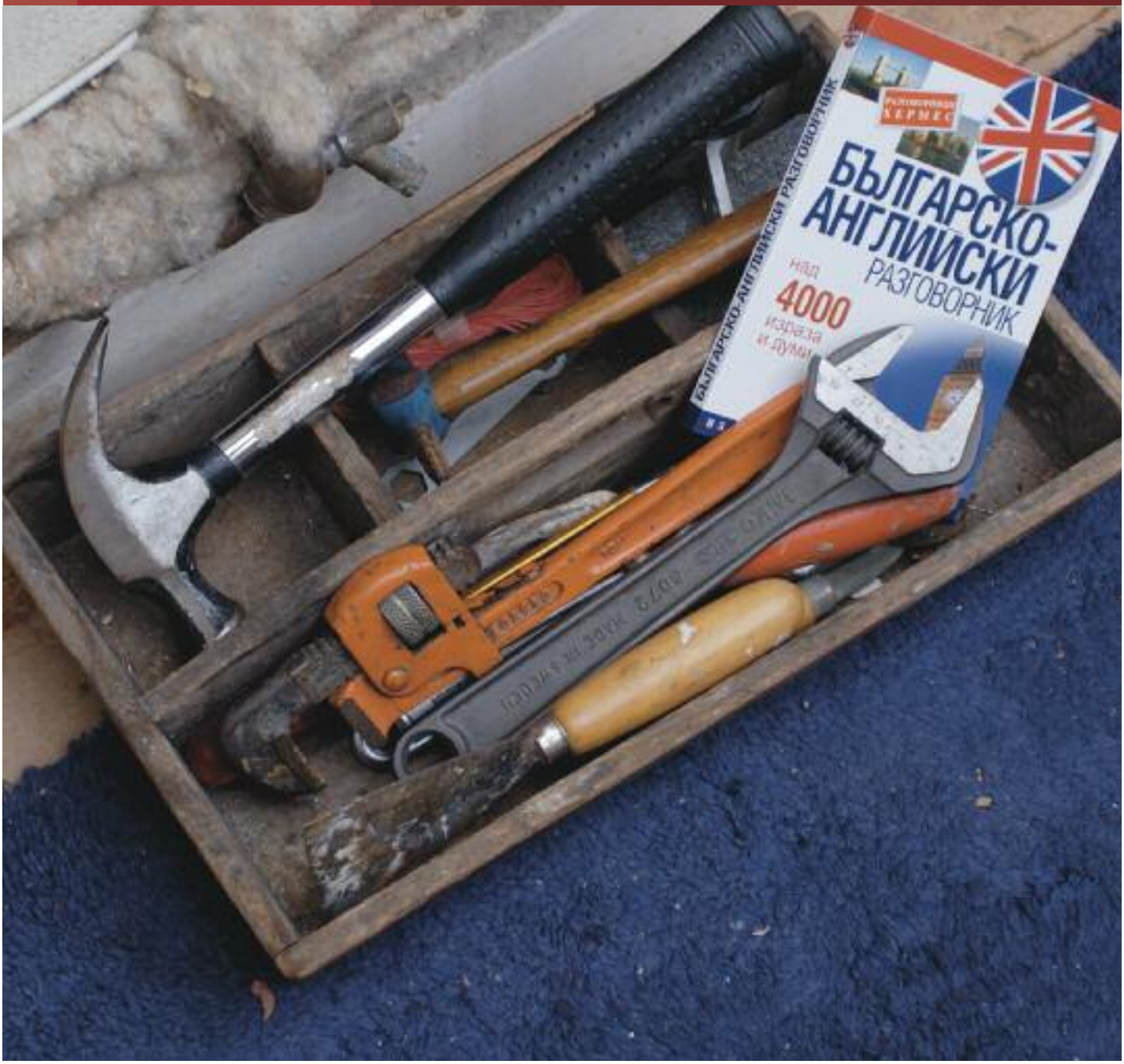
  The court held that even though the contract was illegal, she could claim sex discrimination because her claim was based on a statute rather than the contract. Her acquiescence in her employer's failure to deduct PAYE had no bearing on the discrimination claim. (**Hall -v- Woolston Hall Leisure Ltd 2000**).

- Mr Vakante, a Croatian asylum seeker, applied to work at the defendant school without a work permit, by falsely stating he had a right to work in the UK. He made 17 allegations of race discrimination against the school. His claim failed because the court said that his illegal conduct was so bound up in the claim that allowing it would appear to condone his illegal behaviour (**Vakante -v- Addey and Stanhope School 2005**).

Employment agencies and gangmasters

Agency workers are workers provided to a third party by an agency to work on agreed tasks. With few rights, worse terms and conditions than permanent staff and little employment protection, agency workers are among the most vulnerable in any workplace. A large proportion of agency workers are also migrant workers.

The law around agency workers is both complex and fluctuating and the following provides only a brief overview.



Employment Agency Regulation

Employment Agencies are regulated by the Employment Agencies Act 1973 (as amended) and the Conduct of Employment Agencies and Employment Business Regulations 2003.

The 2003 regulations distinguish between:

- employment agencies that introduce workers to a user who then contracts directly with the worker and
- employment businesses that enter into contracts with workers and supply their services to the user organisation.

Many of the obligations are, however, common to both. For instance, the provision that agencies cannot charge workers except in limited circumstances (such as theatrical agencies).

Unfortunately some agencies try to avoid the law by including general clauses into agreements entitling them to make deductions from the worker's wages for items such as transport, equipment, uniform and meals.

Nor can they withhold or threaten to withhold a worker's pay on any of the following grounds:

- that the user has not paid the employment business
- that the worker cannot produce a time sheet authenticated by the user
- that the worker has not worked during

Migrant Workers' Unit

Thompsons has opened a new Migrant Workers' Unit, dedicated to assisting with individual cases, providing seminars and talks, assisting unions with recruitment initiatives and providing leaflets/ publications in the most widely spoken languages.

a period other than that to which the payment relates
- any other matter within the control of the employment business.

If an employment agency or employment business fails to comply with any of its obligations under the 2003 regulations, it may be liable under both criminal and civil law. Members should seek legal advice if they suspect a breach of these regulations.

A public register listing the licensed gangmasters is available online or by telephoning the GLA

Regulation of gangmasters

A "gangmaster" is an individual or business that supplies workers to agriculture, horticulture, shellfish gathering and food processing and packaging (commonly referred to as a labour provider); uses labour to provide a service in the regulated sector such as harvesting or gathering agricultural produce; or uses labour to gather shellfish.

It is illegal to supply workers to the regulated sector without a Gangmasters Licensing Authority (GLA) licence. To successfully apply for a licence, labour providers need to meet the legal requirements in areas such as health and safety, tax and pay.

It is a criminal offence for a gangmaster to operate without a licence within the regulated sector. A public register listing the licensed gangmasters is available online or by telephoning the GLA. It is also a criminal offence for someone to use an unlicensed gangmaster. Licences can be removed from gangmasters (such as Baltic Work Team Ltd in Cornwall whose licence was recently revoked for exploiting Bulgarian workers) who do not comply with the mimimum standards required to obtain a licence.

Employee or Self Employed?

Most workers can be divided into two main categories: an "employee" who provides their services under a contract of services or a "self employed" person who is an independent contractor engaged under a contract for services. The question whether someone is an "employee" or "self employed" can be very difficult, particularly for agency workers.

The status of agency workers is important, however, because it dictates the employment rights available to them. Generally "employees" have more rights than "self employed" workers. So, for example, only employees have the right to claim unfair dismissal and statutory redundancy payments.

Main employment rights

Migrant workers working legally in the UK have the same employment rights as other workers, including:
- the right not to be unfairly dismissed
- the right to a written statement of employment terms
- the right to enforce a contract of employment
- the right to an itemised pay slip
- the right not to have unlawful deductions made from wages
- the right to the national minimum wage
- the right to working time protection
- the right to health and safety protection
- the right to take part in trade union activities
- the right not to suffer a detriment for making a public interest disclosure.

The courts have developed several tests and the following are two of the most important (which must be present in all cases to be an employee):
- control – the employer must exercise some day to day control over the worker
- mutuality of obligation – there must be an obligation on the employer to provide the work and a corresponding obligation on the employee to perform it.

Even if both of the above basic criteria are satisfied, the worker concerned may still not be an employee for employment law purposes. Other factors must be considered, none of which may be essential in any particular case but which will together allow a picture to be painted from which the question can ultimately be decided. What is certain though is that the traditional basic tests of "control" and "mutuality of obligation" remain fundamentally important.

Agency workers – employed or self employed?

Unfortunately the courts have themselves been in some disarray when it has come to applying these tests to agency workers.

The Court of Appeal said in both **Dacas -v- Brook Street Bureau (UK) Ltd & anr (2004)** and **Cable and Wireless plc -v- Muscat (2006)** that as a general (but not invariable) rule a temporary agency worker supplied by an employment agency to an end-user client could be an employee of the client and will be neither self employed nor an employee of the agency itself.

In the case of **Consistent Group Ltd -v-Mrs K Kalwak and ors (2007)**, however, the Employment Appeal Tribunal held that a worker was an employee of the employment agency which supplied them to an end-user client even though it was the end user rather than the agency who exercised control over the actual operation of their work.

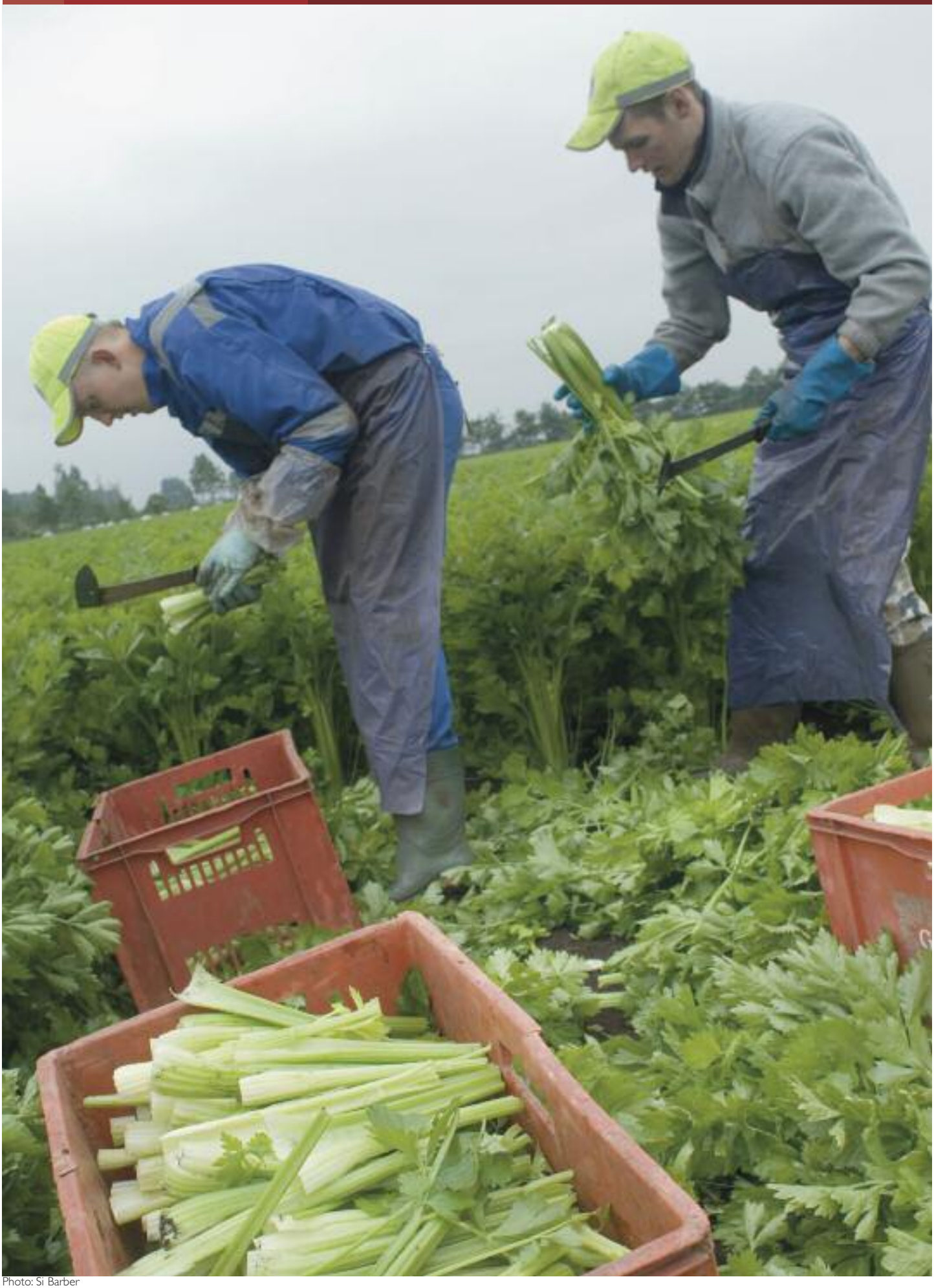
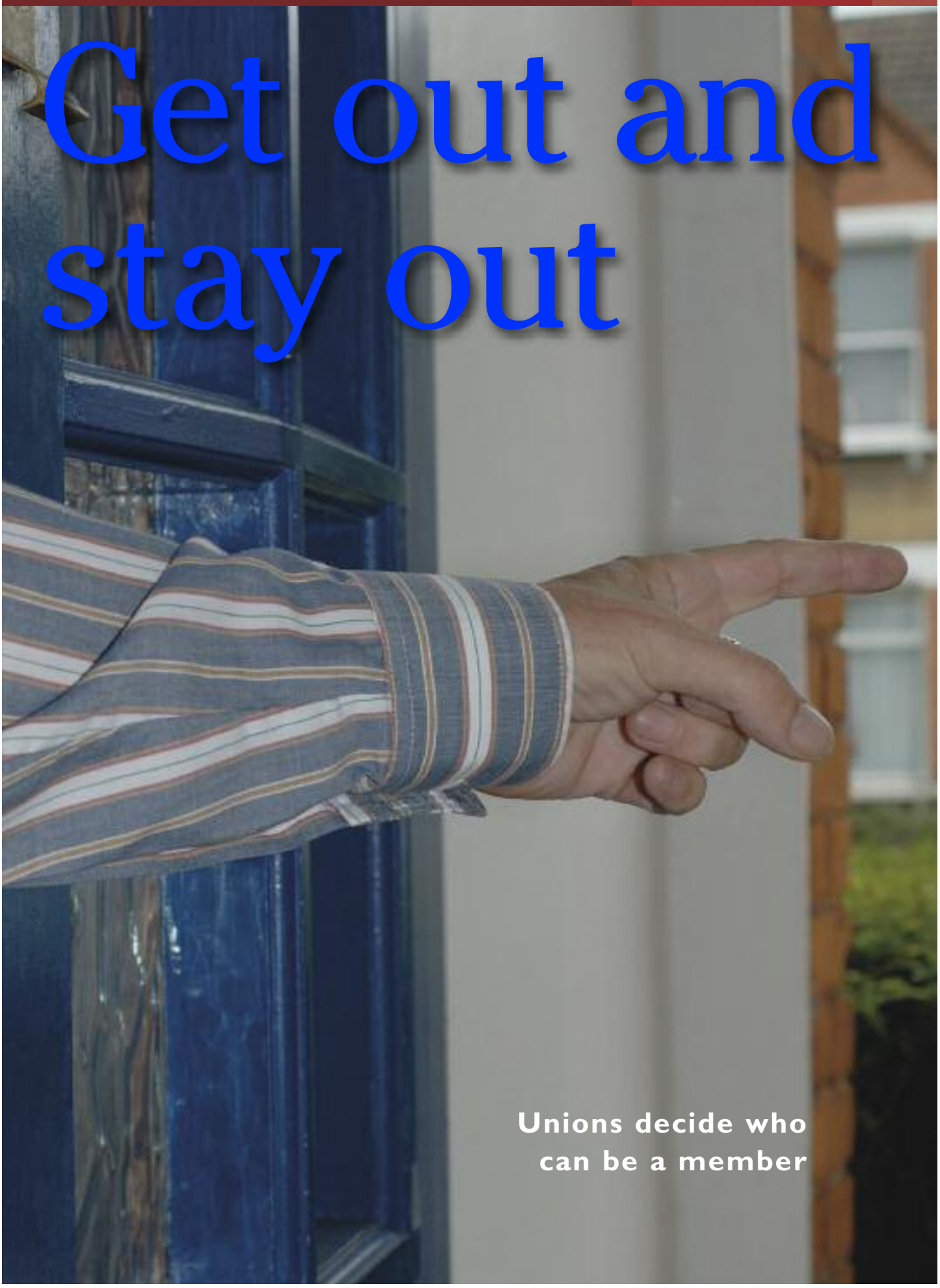


Photo: Si Barber

Get out and stay out



Unions decide who can be a member

Following a court decision earlier this year, trade unions are to regain the right (within limits) to choose who can – and cannot – be a member. **Victoria Phillips**, head of Thompsons' Employment Rights Unit, looks at the implications of that decision and the government's response to it.

Background to the decision

The train driver's union ASLEF decided to expel one of its members after he stood as a BNP candidate in local elections. This was contrary to ASLEF's rule that individuals who hold views that are diametrically opposed to the objects of the union (such as fascist organisations) cannot be members.

However, the BNP member challenged that decision and two employment tribunals agreed with him, saying that section 174 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992 bars unions from action that is due, at least in part, to membership of a political party.

So the union lodged a claim at the European Court of Human Rights (ECHR), arguing that UK law contravened article 11 (freedom of assembly and association) of the European Convention on Human Rights.

The question for the court was whether the UK government had struck the right balance between the member's rights and those of the trade union. It decided that it had not (see weekly LELR 5).

The court noted that, just as an employee or worker should be free to join, or not join, a trade union without being sanctioned or subject to disincentives, the trade union should also be free to choose its members. Article 11 could not be interpreted as imposing an obligation on associations or organisations to admit anyone who wanted to join.

While the court had some sympathy with the notion that any worker should be able to join a trade union, it gave more weight to ASLEF's right to choose its members. It recognised that trade unions are not bodies "solely devoted to politically-neutral aspects of the well being of members, but are often ideological, with strongly held views on social and political issues."

Because Mr Jay Lee's membership of the BNP was in fundamental conflict with ASLEF's political objectives, ASLEF was therefore entitled to expel him from membership. Consequently section 174 was in breach of article 11 in making his expulsion unlawful.

In the light of the court's decision, the government has little option but to change the law to give unions more autonomy

Current law

Following amendments to the law in 2004, section 174 of TULRCA starts from the presumption that anyone who wants to become (or to remain) a member of a trade union has the right to do so. Unions are only allowed to exclude or expel them for one of a number of permitted reasons, which includes unacceptable "conduct" by the member.

Section 174 also provides (in effect) that whereas taking part in the activities of a political party is not protected, mere membership counts as "conduct" and so cannot give grounds for exclusion or expulsion.

And if a union does expel or exclude someone because of their membership of a political party, the 1992 Act gives that member the right to complain to an employment tribunal and ask for compensation ranging from a minimum of £6,600 to a staggering £69,900. Little wonder that some groups on the extreme right have been encouraging members to make full use of these provisions.

Consultation

In the light of the court's decision, the government has little option but to change the law to give unions more autonomy and duly issued a consultation document in May (which closed in August). Arguing that the judgment was rooted in the circumstances of this particular case, the government's approach can best be described as minimalist.

The two options it proposed were:

Option A – amend section 174 to exclude any explicit reference to a special category of conduct relating to political party membership and activities. So membership of a political party, not just taking part in its activities, would cease to be protected.

Option B – retain the special category of conduct relating to political party membership and activities, but amend the rights not to be excluded or expelled. The union's decision would therefore be unlawful unless:

- the political party membership or activity concerned was incompatible with a rule or objective of the union, and
- the decision to expel was taken in accordance with union rules or established procedure.

Given that the second option would, undoubtedly, generate arguments about what constitute the "rules and

objectives" of a union, the first option seems preferable.

However, it is a pity that the government did not use this opportunity to propose far more substantial amendments to section 174 in particular (or repeal it altogether) and other restrictive trade union law in general.

The decision is very good news for trade unions, it's just a pity that the government doesn't appear keen to comply with it

Repeal of section 174

Overall, section 174 serves very little purpose, given all the other legal safeguards that are available to members of trade unions. Trade unions are, for instance, subject to similar restraints as employers and cannot therefore discriminate on grounds of race, sex, disability, religion and belief, sexual orientation and age.

And if a union breaches its own rules, members have a right to take their union to court or to make a complaint to the Certification Officer under section 108A TULRCA. Members also have the right not to be unjustifiably disciplined under section 64 of the same statute.

In ASLEF, the ECHR said that section 174 amounted to an excessive restriction on the rights of trade unions to determine their own membership conditions. Effectively, it hampers the basic principle of trade union autonomy and should be repealed.

Repeal of section 64

The government would also do well to look at section 64 of TULRCA, which gives individual members of unions the right not to be unjustifiably disciplined.

That includes taking action against a member because they did not take part in or support a strike or some other form of industrial action.

This rule applies whether or not the majority of members supported the action following a lawful ballot. In other words, unions cannot enforce a democratic decision against a dissenting member, even if that member agreed to the rules and took part in (or even voted in favour of) the ballot.

This section of the law is now difficult to reconcile with the idea of freedom of association as endorsed in **ASLEF -v- UK**. How can one member have the right to participate in a democratic decision about taking industrial action, but not be subject to the rules of the union when they refuse to abide by the collective decision reached by all the other members? It simply does not make sense.

In the meantime

Until changes are made to the law, unions should be alert to claims brought under section 174 by (among others) excluded BNP members. The Human Rights Act 1998 says that employment tribunals have to construe section 174 "so far as is possible" in a way which is compatible with the decision of the ECHR in ASLEF.

The duty on tribunals, however, is only to interpret the law and not to re-write legislation. So tribunals are unlikely to re-write the wording of section 174 to allow a union to expel someone for simple membership of a political party.

In that event, the union should consider lodging a claim before the ECtHR, just as ASLEF did, as the arguments would essentially be the same. It would be important, however, to check first that there was no basis for an appeal, as the ECtHR will refuse to hear an application if the union has not first exhausted all domestic avenues.

Conclusion

It is clear that **ASLEF -v- UK** marks a break with the primacy of freedom of association as an individual's right to belong (or not to belong) to a union. Instead, according to the ECtHR, unions have the right (within limits) to decide their own values and objectives, and exclude (or expel) people who oppose them.

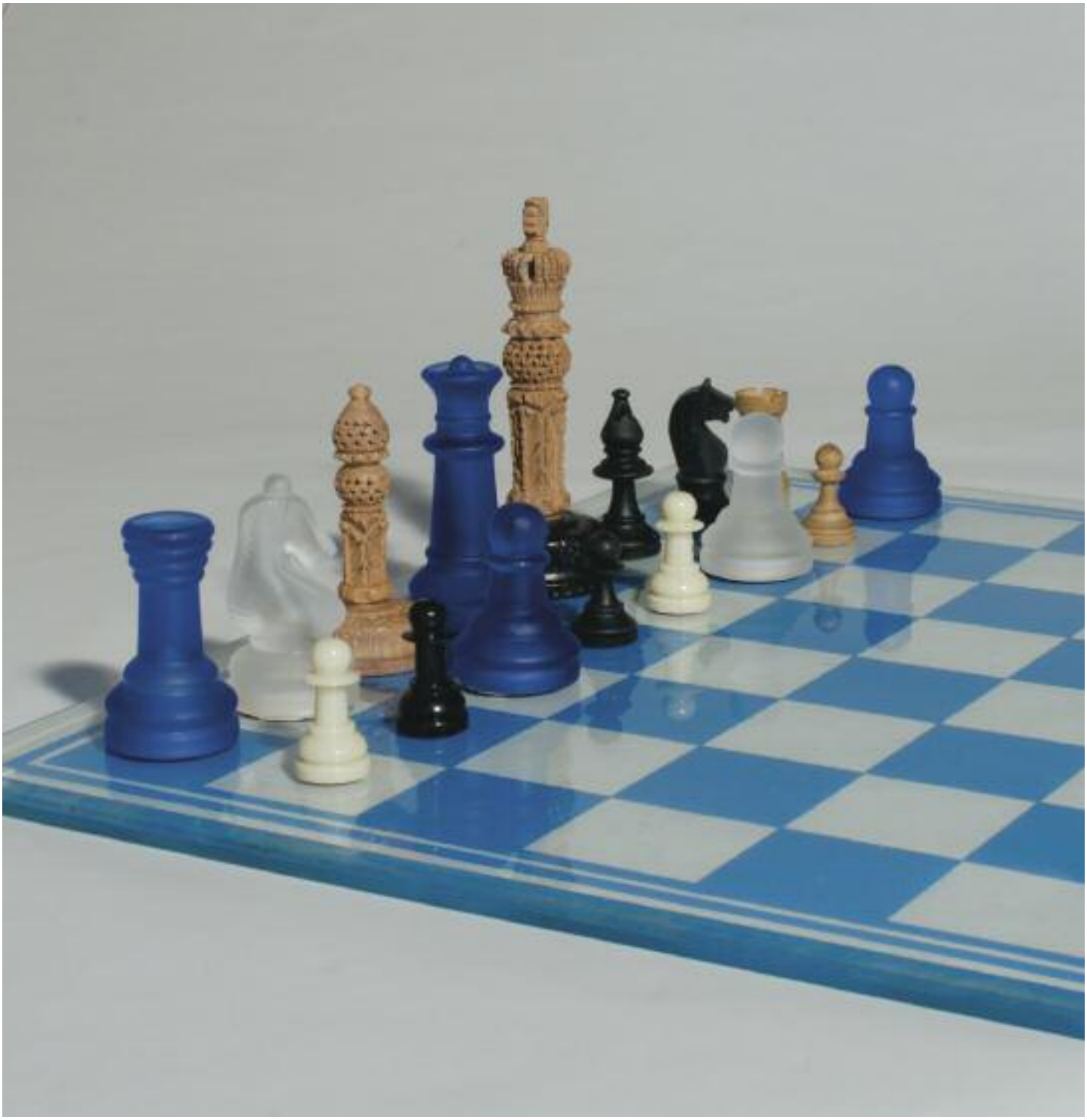
Equally, it is clear that individuals have the right to participate in collective bodies, but that right is conditional on abiding by their rules and accepting the outcomes of decisions which they reach. The case also therefore reinforces the court's groundbreaking decision in **Wilson, Palmer, NUJ and RMT -v- UK (2002, IRLR 568)**.

The decision is very good news for trade unions. It's just a pity that the government doesn't appear keen to comply with it.

To read Thompsons' response to the government consultation on ASLEF -v- UK go to: www.thompsons.law.co.uk/ltext/implications-trade-union-law.htm

Simply equality?

An overview of the government's proposals for a single equality bill



Earlier this year, the government issued a consultation paper proposing a single equality bill, a commitment first made in its 2005 election manifesto. The consultation period closed at the beginning of September 2007.

Caroline Underhill, head of Thompsons' Equal Pay Unit, takes a look at some of the issues raised in the document.

Background

The law against discrimination has developed piecemeal since 1970, but over the last few years, it has expanded exponentially. In addition to sex, race and disability, there is now legislation outlawing discrimination on the grounds of sexual orientation, religion and belief as well as age.

Faced with the prospect of having six different commissions to cover each area of law, the government decided a few years ago to create a single body to oversee them all – the Commission for Equality and Human Rights (CEHR). This brand new single equality body starts work in October 2007.

At the same time, it became clear that many trade unions, lawyers and equality practitioners wanted a wholesale review of what had become a complicated mishmash of discrimination law. The idea of a single equality law started to take shape.

Does it make sense?

There is no doubt that it makes sense to have one single equality law. At the moment, UK equality legislation is both complex and fragmented, with nine different statutes and regulations.

Add to that all the different European directives and you have, as the government finally agreed, a compelling case for both simplifying and standardising the law to make it easier for everyone (including lawyers) to understand.

However, there is no guarantee that will be the outcome, given the all too obvious emphasis in the government's consultation paper on keeping the regulatory burden on employers to a minimum.

In addition to sex, race and disability, there is now legislation outlawing discrimination on the grounds of sexual orientation, religion and belief as well as age

What is being proposed?

The government has said that it wants to take the opportunity of introducing a single Act to both simplify existing law and to extend it. Bearing in mind that the structure of our society has changed in many ways since the 1970s, this is not easy.

As might be expected, the proposals in the paper are detailed and extensive as the law in this area is so complex. The Act will not just cover employment, but also service provision, housing and public services, functions and duties.

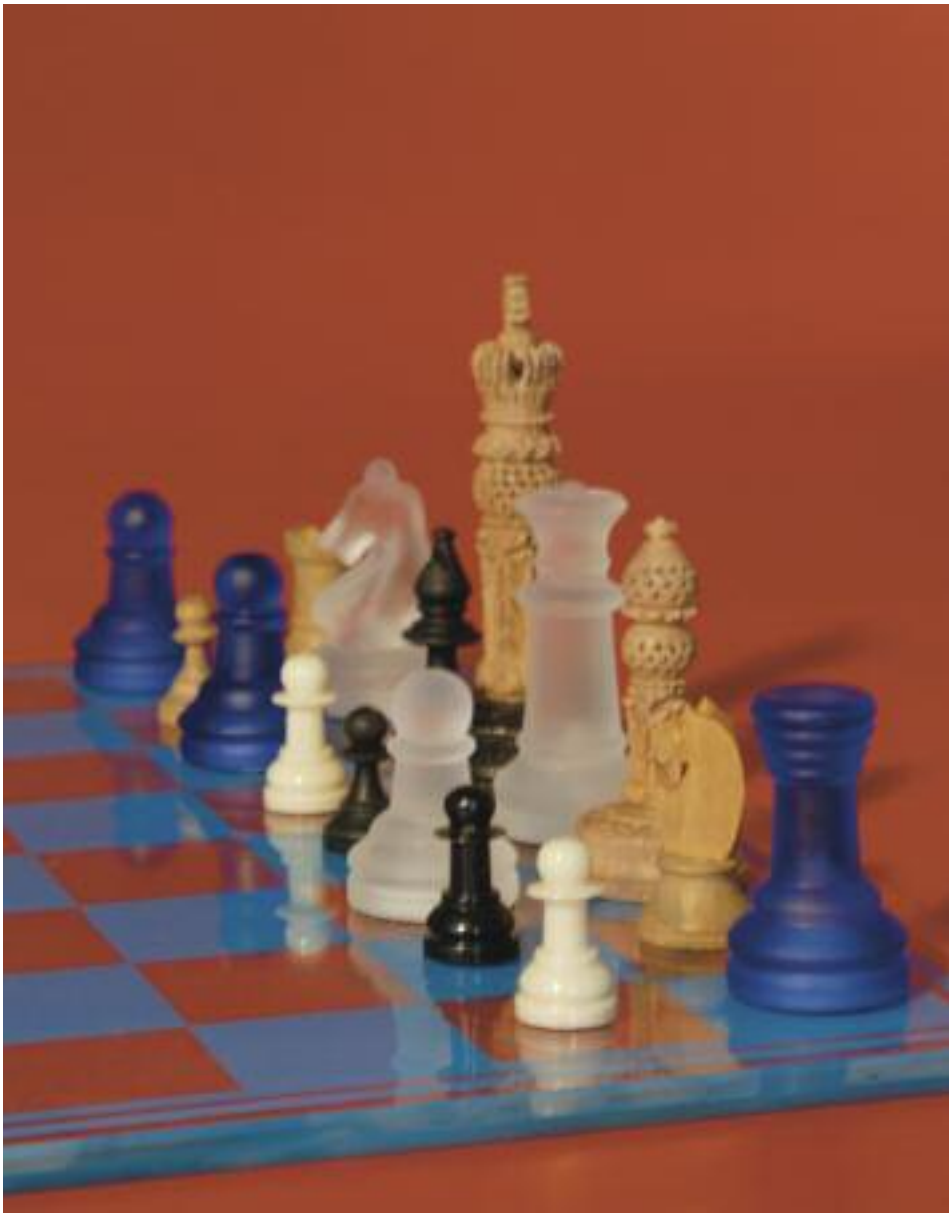
The following is not intended as a full summary of the proposals, but they include:

- One definition of indirect discrimination for all strands except disability discrimination.
- One genuine occupational requirement test except for disability.
- A consistent and simplified definition of victimisation. The emphasis will be on the cause of the treatment rather than needing a comparator (actual or hypothetical) who has been treated differently.
- The possibility of extending the prohibition of harassment in service provision and public functions to all strands of discrimination.

What does it propose for the public sector?

The following are some of the more significant suggestions:

- At the moment a lot of public bodies have to write three equality plans – race, gender and disability. The government proposes to reduce the three plans into a single duty.
- The government proposes to give a clear steer to public bodies about the purpose of a single equality duty, which they must use as a foundation when deciding what action to take.
- Public bodies should have to identify the gender, race and disability issues that they intend to focus on in their equality plan and the government proposes that they should have to do this every three years.
- The government is proposing that, in some instances, public bodies should have more freedom about how to meet their obligations than just through writing equality plans, although they would have to consult their stakeholders when doing so.
- There is also a proposal about whether the obligation to write equality plans should be extended to include sexual orientation, religion or belief and age.
- In terms of enforcement and inspection, the government proposes that the CEHR works with other organisations (such as the social care inspectorate) to find out where there are problems.



What does it propose for the private sector?

It is disappointing (although predictable) that the emphasis in this section is on voluntarism. The government makes no suggestions as to how the private sector should be required to enforce equality and specifically rejects the idea of a statutory requirement on employers to monitor and report on their equality practice. This means that very little is likely to change.

The proposals include:

- Introducing a light touch "equality check tool" to help employers identify problems "quickly and cheaply" so that they can then consider what action to take.
- Introducing a voluntary "equality standard" scheme that businesses could sign up to.

What does it say about equal pay?

Although the consultation document devotes an entire section to equal pay, it starts from the premise that "the evidence does not support legislation mandating equal pay reviews."

Instead, the paper focuses its attention on "promoting the spread of good practice which improves gender equality in both private and public sector organisations, such as getting more women into senior management or improving rates of return from maternity leave." Where have we heard that before?

The government proposes that equal pay (where the difference is due to sex discrimination as opposed to say race, disability or age) should be incorporated into a new Equality Act, but that the current differences between claims relating to contractual and non-contractual issues should be retained. This means that the current difference between the Equal Pay Act and the Sex Discrimination Act will be retained.

What does it say about resolving disputes?

The government wants to resolve as many disputes as possible outside the court and tribunal systems. Having failed dismally with the statutory procedure it put in place in 2004 to promote the informal resolution of disputes, it now suggests the following in relation to discrimination disputes:

- That parties should be encouraged to use alternative dispute resolution processes as these will save time and money, including greater use of "ombudsmen".
- That special courts could be set up to deal with disputes relating to goods and services.

What might an Equality Act look like?

Given the proposals made in the document (and in particular the government's refusal to countenance compulsory measures for employers), an Equality Act is likely to retain many of the complexities of the current law.

At the very least, however, the consultation provided an opportunity for everyone interested in combating discrimination to express their views as part of this extensive review of discrimination law.

Thompsons is the largest specialised personal injury and employment rights law firm in the UK with an unrivalled network of offices and formidable resources.

HEAD OFFICE
Congress House,
Great Russell Street,
LONDON WC1B 3LW
020 7290 0000

BELFAST
028 9089 0400

BIRMINGHAM
0121 262 1200

BRISTOL
0117 304 2400

CARDIFF
029 2044 5300

CHELMSFORD
01245 228 800

DURHAM
0191 3845 610

EDINBURGH
0131 225 4297

GLASGOW
0141 221 8840

HARROW
020 8872 8600

LEEDS
0113 205 6300

LIVERPOOL
0151 2241 600

MANCHESTER
0161 819 3500

MIDDLESBROUGH
01642 554162

NEWCASTLE UPON TYNE
0191 269 0400

NOTTINGHAM
0115 989 7200

PLYMOUTH
01752 675810

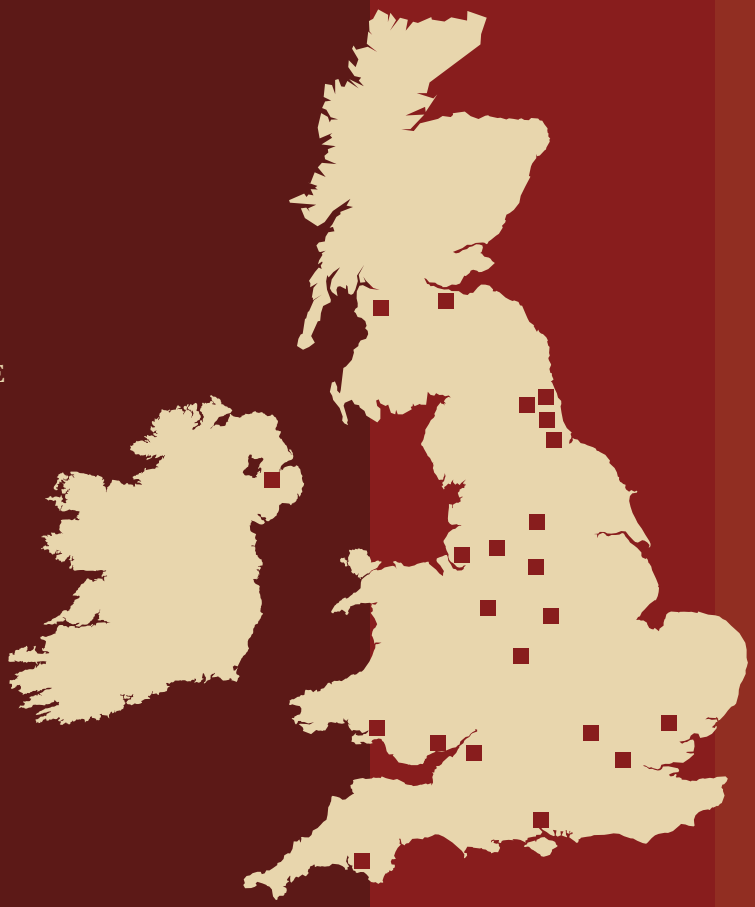
SHEFFIELD
0114 270 3300

SOUTHAMPTON
023 8021 2040

SOUTH SHIELDS
0191 4974 440

STOKE-ON-TRENT
01782 406 200

SWANSEA
01792 484 920



Visit us at www.thompsons.law.co.uk
Email us at lelrch@thompsons.law.co.uk

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

This publication is not intended as legal advice on particular cases.

Download this issue at www.thompsons.law.co.uk

To receive regular copies of LELR email: lelrch@thompsons.law.co.uk

Contributors to this edition:
Rakesh Patel, Victoria Phillips, Caroline Underhill

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Print: www.dsigroup.com/talisman
Front cover photo: Karen Squires

THOMPSONS SOLICITORS