ECJ to rule on TUPE scope

Beckmann v Dynamco (High Court 14/1/2000, unreported)

We reported the disappointing decision of the EAT in Frankling & others v BPS Public Sector Limited in LELR 27 in October 1998. In that case, the EAT found that redundancy benefits payable under Section 46 of the NHS Whitley Agreement did not transfer under TUPE because they were akin to pension rights. The case was settled before the Court of Appeal heard the case, leaving the EAT judgment intact.

In a case backed by UNISON where Thompsons is instructed – Beckmann v Dynamco – the same issue has now been referred by the High Court to the European Court of Justice. A decision can be expected in about 18 months time.

If successful, the case will enable many workers who transferred under TUPE to the private sector and who are later made redundant at age 50 or over to get the public sector redundancy terms from their new employer.

The issue is whether the Whitley terms relate to old age, invalidity or survivors' benefits and so are excluded from TUPE protection, or not. Also in issue is whether it matters that the sums are paid under a statutory instrument, rather than the contract of employment.

Similar provisions to those found in Section 46 of the Whitley Agreement in the NHS apply in local government, the Civil Service and throughout the public sector.

The case will therefore have repercussions across the public sector and private contractors should take note of their potential future liability when they bid for public sector contracts.

Union members in the affected categories may need careful advice.

UNAUTHORISED DEDUCTIONS FROM WAGES

Legal but not clean

New Century Cleaning Company v Church [2000] IRLR 27 Court of Appeal

In a disappointing decision, the Court of Appeal has found that a unilateral reduction in the money payable per job to window cleaners does not amount to an unlawful deduction from wages for the purposes of Section 13 of the Employment Rights Act 1996.

Mr Church and his colleagues were paid according to an unusual formula. They were divided up into teams, each with a team leader. A team would accept a particular job for which there would be a "work-bill" price payable by the employer to them. It was then up to the window-cleaners in each team to decide how they would divide up between themselves the global "work-bill" price. It was usually on a percentage basis.

Section 27 of the Employment Rights Act 1996 defines "Wages" as "any sums payable to the worker in connection with his employment….whether payable under his contract or otherwise". Mr Church therefore had to establish that the amounts he had previously been receiving were such sums.

The Employment Tribunal concluded that the rate offered for regular jobs was a contractual entitlement which could not be varied without bilateral consent. Alternatively, the rate was a key element in the calculation of wages, so that the "wages properly payable" were those being received before the unilateral reduction took effect. The Employment Appeal Tribunal upheld the decision.

The Court of Appeal disagreed, finding that the "wages properly payable" by an employer to a ☛

Sick pay and the DDA

Hood v London Clubs Management Ltd (London North Employment Tribunal, unreported)

The operation of contractual sick pay schemes may have to be re-considered in the light of the Disability Discrimination Act 1995, according to the case of Hood v London Clubs Management Ltd, a GMB backed case pursued by Thompsons.

Mr Hood is disabled and as a result has to take a significant amount of time off work. His employer's sick pay scheme provide for payment only being made at the discretion of the Manager, up to a maximum of 26 weeks pay per year for long serving employees. In the past, Mr Hood had received payment when he was off sick, as had his colleagues. However, in 1999, due partly to his taking more time off work for sickness than previously, and partly to a budget deficit for the company, his manager decided not to pay him any sick pay at all. Mr Hood brought a claim under the Disability Discrimination Act 1995.

The Tribunal held that Mr Hood was disabled, and that the failure to pay Hood sick pay when he was off work, amounted to less favourable treatment on the grounds of his disability. They also held that in the circumstances, the Company had not justified the failure to pay : "Although there was some evidence that the budget… was overspent, no real attempt was made to show that failure to pay sick pay was justified by the financial situation of the Company at large." Likewise, they found that the failure to pay amounted to a failure to make a reasonable adjustment.

Although the decision is being appealed, it is difficult to fault its logic. A failure to pay sick pay to someone off work sick due to a disability is clearly detrimental treatment due to that disability. The failure will therefore require to be justified.

In the case of sick pay, the only real justification that could be advanced by an employer is the need to save money – not a justification defence that has so far found favour with Tribunals in the context of the sex and race discrimination legislation. Particularly in relation to discretionary sick pay schemes, justifying such a failure to pay may be difficult.

Can the principle be taken further, and a case made for pursuing a similar claim where there is no sick pay scheme at all? If it is a question of balancing the interests of employees with disabilities and the interests of their employers, then the adverse consequences for a disabled employee in receiving no money at all when they are off sick, surely far outweigh the disadvantage to the employer in paying them.

The decision of the Employment Appeal Tribunal will be reported in due course. In the meantime, this case will be a valuable tool in securing sick pay for disabled workers.

worker are sums to which the employee has some legal, though not necessarily contractual, entitlement. There was nothing in the contracts of employment which entitled the team to the same price each week for the same jobs and there was no apparent reason to imply a term to the effect that the employers were obliged to maintain the rate at which a job was offered.

In addition, because the amount due to each worker was dependent upon the agreement reached within the team, any particular window-cleaner's share of the amount paid by the employers was not sufficiently certain to have contractual force.

This is an excessively restrictive interpretation of the phrase "…wages properly payable". Parliament did not define wages in terms of "Wages to which a worker is legally entitled".

Tribunals should be able to look beyond a technical definition of a legal entitlement to the industrial reality of the situation. The industrial reality was that a recurrent job carried a recurrent price, and the employer should not have been able unilaterally to reduce that price.

We need to be vigilant to ensure that the implications of this case are not extended to other quirky forms of payments.

Blindfold the boss's all seeing eye

Lurking behind the thin facade of human resources rhetoric, with its jargon of worker involvement and empowerment, are employer practices of surveillance which may have the effect of depriving workers of their autonomy, privacy and dignity. Computer monitoring of work-rates and working time, close circuit TV, "secret" customers, interception of phone-calls and e-mails, drug testing, psychometric screening and the collection of information about all aspects of workers' lives are just some of the examples of forms of "hyper-surveillance".

Call centre workers and banking staff will be very familiar with these practices. New technologies promise new threats. Already in the USA employers have used infra-red badges continuously to track worker movements and, yet more bizarrely, chair sensors to detect how long people are at their desks. An American judge strongly criticised the effect of such constant surveillance in a case involving CCTV filming: " [CCTV] is not only personally repugnant to employees but it has such an inhibiting effect as to prevent the employees from performing their work with confidence and ease... To have workers constantly televised is…reminiscent of the era depicted by Charlie Chaplin in "Modern Times" and constitutes... an affront to the dignity of man".

Workers and unions have increasingly begun to respond to the harms caused by these techniques, both through collective bargains and more direct forms of resistance (in the USA nurses' infra-red badges regularly turn up in patients' bed-pans). But the law has, up to now, failed to keep pace. At present there is no right to privacy in English law. Although the Interception of Communications Act 1985 makes it illegal to intercept phone and e-mail communications, it does not apply to interceptions which take place on private networks – the usual manner of employer interception. "Bugging" and CCTV are entirely unregulated. Apart from the weak protection of the Rehabilitation of Offenders Act 1974 and the Data Protection Act 1984 (which only applies to information held on computers, and not to paper files), there is little restriction on the sorts of information employers can demand of workers, or what use employers can make of it. The law on unfair dismissal provides only limited restraint against dismissals for out of work activities. To take one example, in Mathewson v RB Wilson Dental Laboratory [1988] IRLR 512 a dental technician was summarily dismissed when his employers learnt that he had been caught by the police in possession of a small piece of cannabis during his lunch hour. Although there was no evidence that he had ever used it or even possessed it at work, the tribunal's finding of fair dismissal was upheld on appeal.

But there are signs of change, much of it driven by Europe. Already, buried away in paragraph 4 of the Schedule to the Display Screen Equipment Regulations 1992 (derived from a European Directive) is a provision making it illegal for an employer to use a "quantitative or qualitative checking facility...without the knowledge of the operators or users"; this would apply to secret monitoring of the work-rates or performance of computer workers. Other laws which are shortly to come into effect or to be introduced in Parliament should offer additional and more general protection. They present new opportunities for unions and workers to challenge some forms of surveillance.

- First, the Human Rights Act 1998, which comes into force on 2nd October 2000, will give legal effect to most of the Articles of the European Convention on Human Rights, including the right to privacy in Article 8. The European Court of Human Rights has recognised that this right does not end at the workplace door. Finding that private interests could include professional activities, in Niemitz v Germany (1992) 16 EHRR 97 it stated that "it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest

This month's guest author is Michael Ford, Barrister at Doughty Street Chambers and author of *Surveillance and Privacy at Work*, published by the Institute of Employment Rights.

opportunity of developing relationships with the outside world". Subsequently, in Halford v UK [1997] IRLR 471 the Court held that secret phone tapping of a police woman's office telephone infringed her right to privacy, and the same conclusion applied to dismissals of gay and lesbian soldiers by the army: see Smith v UK [1999] IRLR 734. While the nature and extent of the right to privacy at work remains rather undeveloped, the enactment of the Human Rights Act is likely to restrict some of the more flagrant workplace practices. Article 8 may require, for example, the provision of private spaces at workplaces, times and means of communication which are free from surveillance. Secret surveillance is likely to infringe Article 8 in the absence of good justifications.

■ Second, the Data Protection Act 1998 comes into force on 1st March 2000. Unlike the 1984 Act, it is not restricted to information held on computers and will apply to a wide range of information held by employers about the workforce e.g. in personnel files. It regulates what information is collected, how it is kept, and what is done with it; and it gives important rights of access to "data subjects". Of particular note are the provisions concerned with "sensitive personal data", defined in s.2 to include information about such matters as an individual's political opinions, religious beliefs, trade union membership, ethnic origins, health, sexual life and the commission or alleged commission of criminal offences. The obtaining and processing of information of this sort is tightly regulated. Either the worker must give explicit consent to the processing or another condition must be met – for example, that processing is "necessary" to meet a legal duty imposed on the employer. Expressly recognising the threat of new technology to personal privacy in the workplace, the Data Protection Commissioner has announced that she will issue a Code of Practice governing the use of personal data by employers which will introduce tighter restrictions on employer surveillance, automated processing and the collection of sensitive information.

The new laws should offer additional and more general protection from surveillance at work.

■ Third, the government has stated that it will shortly introduce new legislation controlling the interception of communications, in the form of a Regulation of Investigatory Powers Bill. The inadequacy of the Communications Act 1985 was conceded by the government in the Halford case. Following the ruling of the European Court of Human Rights, the Home Office issued guidance (HOC 15/99) to all government departments, advising them to give adequate warnings of any interception of workers' phone conversations and to provide them with payphones to make private calls. OFTEL published guidance along similar lines to private companies. A Home Office consultation paper, published in June 1999, has proposed new legislation which will make it unlawful to intercept communications on all telecommunications networks, whether public or private. It proposes, however, that the new Act will not apply to interceptions in the course of lawful business where the system operator has taken reasonable steps to inform parties that these may occur; secret interceptions will require authorisation.

These developments will go some way to overcoming the current legal blindness to most forms of privacy infringements at work. While the strategic importance of the new laws should not be underestimated, unions and workers should not fall into the opposite error. The law is only likely to regulate some, usually the most blatant, kinds of privacy infringements; much unwelcome surveillance will continue to fall outside its net. Laws will usually be several years behind the technology, and the political appetite for closer regulation is lacking. Moreover, forms of surveillance which are justifiable in one type of workplace – for instance, to protect health and safety may be perceived as unwarranted intrusions in another. Compulsory duties of information and consultation, as in France, would be welcome. In their absence, the best way forward may well be to seek to address these complicated issues through collective bargains or other forms of joint regulation – as some unions have already begun to do. Laws from other countries and international organisations may serve as a useful starting point (see, for example, the International Labour Organisation Code of Practice on the Protection of Workers' Personal Data and the rather more enlightened laws in France).

Friendly to families?

Maternity and Parental Leave Regulations 1999

With the arrival of the Maternity and Parental Leave etc Regulations 1999, one of the main planks of the Government's much heralded family friendly policy came into effect with the introduction of (unpaid) parental leave for employees, male or female, and the extension and simplification of the existing maternity provisions. The Regulations build on the broad provisions of Section 7 and Schedule 4 of the Employment Relations Act 1999, and in relation to the parental leave sections, purport to implement the EC Framework Agreement on Parental Leave agreed between unions and employers at European level back in 1996.

The parental leave provisions are already in effect for those employees whose babies were born on or after 15th December 1999. The maternity provisions will take effect in relation to employees whose babies are due on or after 30th April 2000.

The rules on parental leave provide for every employee, with over one year's continuous service, who has or acquires parental responsibility for a child whose date of birth is on or after 15th December 1999, to take up to 13 weeks unpaid leave for the purpose of caring for that child. The right continues up until the child is aged five, except for children who are entitled to disability living allowance where the right continues until the age of 18.

There are specific rules for adopted children, where the right to take parental leave is available during the five year period following the placement for adoption, up until the child is aged 18.

The 13 week entitlement may be broken up into short periods – no minimum period is prescribed – or may be taken in one block provided this is negotiated in collective or workforce agreements.

During the period of parental leave, the employee's contract still subsists, but all contractual terms are suspended. This is subject only to the employer's ongoing implied obligation of trust and confidence, and any contractual terms relating to notice of termination, disciplinary and grievance procedures, and redundancy compensation. But where there are Christmas and other types of bonuses there are equal pay implications. See Lewen v Denda reported on page 8 of this issue.

On return from parental leave, if an employee has taken no more than four weeks leave, they are entitled to return to their old job. Any more than four weeks and they are only entitled to a job which is "suitable … and appropriate" in the circumstances, if the employer can show that it is not reasonably practicable for them to return to the same job.

Once the employee has returned, all seniority and pension rights continue as before, though they will not have accrued during the actual period of parental leave itself.

The Regulations envisage, and indeed encourage, employers and unions to negotiate and agree collective agreements specifically dealing with the mechanics of how and when parental leave may be taken, providing the agreements are no less favourable than the statutory minimum. If no agreement is negotiated, then Schedule 2 of the Regulations sets out "default provisions" which will then automatically apply.

The default provisions lay down procedures for the exercise of parental leave, such as the requirement for employees to comply with a request from the employer to produce evidence as to the child's date of birth, or the employee's parental responsibility, or the giving or 21 days' notice of taking leave. The default provisions also allow the employer to postpone the period of parental leave for up to six months if he considers that the operation of his business will be "unduly disrupted". Further, the length of parental leave is prescribed, with a minimum period of one week being allowed at any one time, and a maximum four week period in any one year.

The maternity provisions of the Regulations are intended to simplify and clarify the existing set of maternity rights, though whether they will achieve this stated aim is

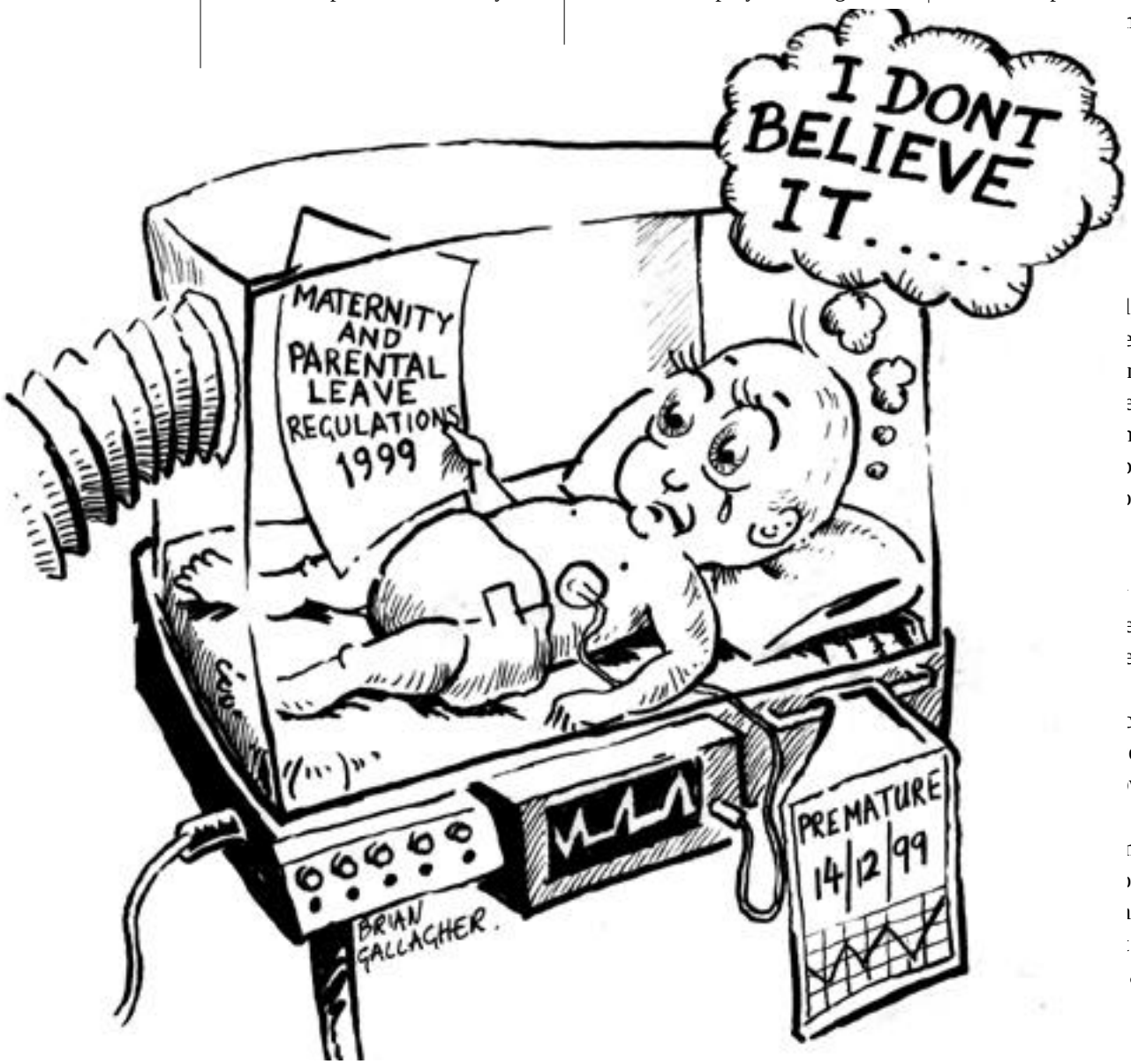
open to question.

The current basic structure of automatic and unqualified ordinary maternity leave, followed by up to 29 weeks additional maternity leave, is preserved. However, ordinary maternity leave, currently 14 weeks long, will be extended to 18 weeks. Additional maternity leave, currently available to employees with two years' continuous service, will now be available to all employees with one year's service. A failure on the part of the employee to comply with any notification requirement will now not have the effect of jeopardizing the right to return. Instead, the right to return is preserved but any fail-

During ordinary maternity leave, the contract will, as now, subsist, but without the right of the employee to receive wages or salary. After ordinary maternity leave, the employee has the right to return to her old job. During additional maternity leave on the other hand, the status of the contract is exactly the same as during parental leave, namely suspended except for a few restricted obligations, and after additional maternity leave the employee again has same restricted right to return to the same or similar job, as after parental leave.

In line with the equivalent rights under the Employment Rights Act an employee is protected from detriment or dismissal for exercising their rights both in respect of parental leave and maternity leave.

These new maternity and parental leave provisions represent a tremendous step forward in the development of a family friendly working environment. However, much concern has been expressed at the serious limitations of the Regulations, not least the 15th December 1999 cut off date for parental leave which will not only exclude 3.3 million employees with children aged under five who were born before the 15th December date, but also represents an inad quate

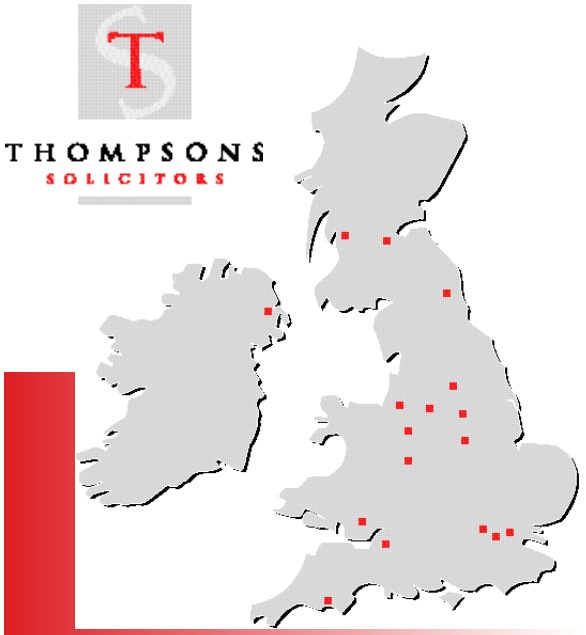


plementation of the European Framework Agreement.

The restriction of the new rights to employees ly, will also e large numbers rs, and the fact eave is unpaid have the effect oloyees will be om exercising

have been the TUC to e cut off date eport on the the judicial cation in future e are also signs vernment may the question of me sort of sub- f its next mani- uitments. Let's the 1999 are not the end

What about my Christmas bonus?



Lewen v Denda ECJ Case C-33/97 [2000]IRLR 6/7

Not very topical in February, but are you entitled to a Christmas bonus paid to other staff if you are away from work on maternity leave or parental leave? The answer will be relevant to all UK employees taking advantage of their rights under the Maternity and Parental Leave Regulations.

Susanne Lewen was employed in Germany by Mr Denda's firm when she became pregnant. Her baby was born on 12th July 1996 and when her maternity leave ended in September 1996 she took parental leave, as permitted by German Law, until 12th July 1999. (Spot the difference between German and UK parental leave entitlement.). During parental leave her contract was suspended. During her leave period, Mrs Lewen did not receive pay from her employer, but an allowance from the State. (Spot another difference.)

Neither did she receive her Christmas bonus in 1996 because she was not in "active" employment in December 1996 although she had worked earlier in the year. She took legal action.

The European Court of Justice decided that the failure to pay the bonus to employees on parental leave can be indirect sex discrimination. They said that although the bonus is paid voluntarily by the employer as an exceptional allowance, it is "pay" within the meaning of article 119 (now 141) of the Treaty of Rome which states that men and women should receive equal pay.

However, whether withholding the payment is unlawful depends on what the bonus is for. If it is payment for work performed during the year then refusal to award it to workers on parental leave is likely to be indirect sex discrimination as female workers are more likely than male workers to be on parental leave and thus to be excluded when the bonus is given.

But the catch is that the court said if the bonus is not a reward for past work but instead is to encourage employees to work hard and reward future loyalty, and a condition of the bonus is that an employee must be in active employment when it is awarded, then it is lawful for the employer to refuse to pay the bonus. This is because a worker on parental leave is in a special situation and cannot be compared to a man or woman at work.

So whether employers can play Scrooge or Santa, will depend on the purpose of the bonus. It will be a question of fact for the Tribunal to determine the purpose of the bonus, so careful minuting of negotiations about any bonuses or one off payments could be crucial. The case has implications for all bonuses – not just those given at Christmas.

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