

SPRING 2006

People

The FFW Employment Review

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Introduction and case update

Welcome to the Spring 2006 issue of *People*. We hope that everyone has survived the exceptionally grey and dull start to the year, and is now looking forward to the many changes to employment law that 2006 will bring!

In view

TUPE

At last the new TUPE regulations have been published, and are due to come into force on 6 April 2006. Some of the headline changes are:

- Service provision changes, which typically include the contracting in or out of services, or the replacement of one contractor by another, will now be clearly within the scope of TUPE
- There will be an obligation on the old employer to provide the new employer with specific 'employee liability information' at least a fortnight before the transfer
- Much of the case law that has developed since TUPE first came into force in 1981 will be given statutory force
- Where employees transfer to a new employer, changes to terms of conditions of employment will be void, unless the principal reason for any change is an economic, technical or organisational reason entailing changes in the workforce. Where the old employer is insolvent, however, changes will be valid where either the old or the new employer agrees all variations with the appropriate representatives of the employees (i.e. a trade union or elected employee representatives)
- Both old and new employers will be liable for failure to inform and consult with a trade union or employee representative

The new regulations can be accessed at: <http://www.opsi.gov.uk/si/si2006/20060246.htm>.

Guidance to the new regulations is available on the DTI's website at <http://www.dti.gov.uk/er/individual/tupeguide2006regs.pdf>.

Age

The age equality regulations were published in final form on 9 March, and laid before parliament that day. They will come into force in October 2006, as promised by the government. The age regulations are available on the DTI website at http://www.dti.gov.uk/er/equality/draft_regs.doc and the accompanying notes at http://dti.gov.uk/er/equality/notes_on_regs.doc.

Equality

The new Equality Act has just been given Royal Assent – this act will, when in force, create the new Commission for Equality and Human Rights (CEHR), which will gradually replace and consolidate the Commission for Racial Equality, the Equal Opportunities Commission, and the Disability Rights Commission, and will also deal with issues of discrimination on the ground of sexual orientation, religion or belief, and (once the legislation is in force) age. The date for the CEHR to go 'live' is likely to be October 2007. The DTI's press release states that the CEHR will also be tasked with promoting awareness and understanding of human rights and encouraging good practice by public authorities in meeting their Human Rights Act obligations.

The new Equality Act will also:

- make discrimination on the grounds of religion or belief in the provision of goods, facilities, services, premises, education and the exercise of public functions unlawful
- create a duty on public authorities to promote equality of opportunity between men and women and to prohibit sex discrimination in the exercise of public functions, and
- provide powers to outlaw discrimination on the grounds of sexual orientation in the provision of goods, facilities and services

Redundancy pay and employment tribunal awards

The limits on tribunal awards increased with effect from 1 February 2006. The maximum basic award for unfair dismissal has increased to £8,700, the compensatory award for unfair dismissal to £58,400 and the limit on a week's pay to £290. A full list of the new limits is available on the DTI website at <http://www.dti.gov.uk/er/pay/limits-pl827a.htm#1>.

Maternity etc pay and statutory sick pay

Rates of statutory maternity, paternity and adoption pay increase in April, from £106 per week to £108.85 per week. The rate of statutory sick pay will rise to £70.05 per week (it currently stands at £68.20).



Case update

Grievances

In our Winter 2005 newsletter, we looked at the cases of *Cooke v Secure Move Property Services Limited*, *Stewart v Barnetts Motor Group* and *Aspland v Mark Warner*, all of which dealt with the issue of what amounts to a grievance under the statutory dispute resolution procedures, as set out in the Employment Act 2002 (Dispute Resolution) Regulations 2004, and the Employment Act 2002. Several more cases have emerged since then, and it is clear that, provided an employee puts his or her complaint against the employer in writing, this will amount to a grievance under the relevant legislation, regardless of whether he or she says it is a grievance, or whether it complies with the employer's procedure.

Employers who refuse to deal with a grievance that does not meet the criteria under their internal procedure but does comply with the statutory rules, are likely to be penalised in any subsequent employment tribunal claim. In particular, any compensation which an employer is ordered to pay to an employee may be increased by between 10 and 50%.

In both *Shergold v Fieldway Medical Centre* and *Galaxy Showers Limited v Wilson*, it was held that a complaint raised in a letter of resignation amounted to a written grievance under the statutory dispute resolution procedures. *Shergold v Fieldway Medical Centre* also provided guidance on how basic a written complaint may be and still amount to a grievance. The EAT stated that there is no need for a document containing a grievance either to

- set out the exact nature of the case or
- be identical to the content of a subsequent employment tribunal claim, provided that there was material similarity, or
- invoke or mention the relevant legislation or the company's grievance procedure

In *Commotion Ltd v Rutty*, a further case in this area, Mrs Rutty informally sought flexible working in order to care for her grandchild. When this was refused, she made a formal application which was also refused, and an appeal, which was turned down. She resigned and claimed constructive unfair dismissal, sex discrimination and breach of the flexible working procedures, arguing that she had raised a grievance with her employer in or by submitting her formal application for flexible working. Mrs Rutty succeeded on all three heads, and the tribunal and the EAT agreed that her flexible working application also amounted to the presentation of a grievance.

Vicarious liability

The Court of Appeal has ruled for the first time that two employers can both be vicariously liable for the negligence of an employee. In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, the claimants contracted with the first defendants (D1) to install air conditioning in their factory. D1 subcontracted work to the second defendants (D2), who supplied a fitter. D2 then contracted with the third defendants (D3) to supply further labour, namely another fitter and a fitter's mate. D3's fitter's mate, working under the supervision of D2's and D3's fitters, caused a flood which damaged the factory.

Until now, courts have taken the approach that only one employer may be vicariously liable for an employee's negligence. Here, for the first time, the CA held that there are some cases where the exercise of trying to establish who, out of two employers, is responsible for an individual's negligence is misleading, and what should be focused on instead is whose responsibility it is to control an employee and to prevent him or her from acting negligently. Sometimes, where the employee in question is so much a part of the work, business or organisation of both employers that both were responsible, there is no reason why they should not both be found to be vicariously liable.

Pregnancy discrimination

In *North Western Health Board v McKenna* [2005], Ms McKenna, suffering from a pregnancy-related illness, took sick leave for the majority of her pregnancy. She continued to be off sick after her maternity leave had finished.

Her employer's sick leave scheme provided that employees were entitled to 365 days' sick leave in a period of 4 years, of which the first 183 days' absence in a 12-month period was paid at the full rate, with the balance at half pay. Pregnancy-related illness was not distinguished from any other type of illness. Ms McKenna was paid in accordance with the scheme, except whilst on maternity leave, during which she received her full salary.

Ms McKenna claimed sex discrimination in that her pregnancy-related illness had been treated in the same way as any other illness, and that her resulting absence had been offset against her overall sick-leave entitlement. She also argued that reducing her pay by half after 183 days amounted to less favourable treatment under European equal pay legislation.

The European Court of Justice (ECJ) said that a rule providing for the reduction of pay after sickness absence has lasted a certain time is not discrimination on the basis of sex or equal pay. The ECJ also held that it is



not discriminatory to offset periods of such illness against a maximum total number of days of paid sick leave to which a worker is entitled.

Redundancy and flexibility clauses

In *Land Securities Trillium Ltd v Thornley* [2005], Ms Thornley was an architect with the BBC. Her contract of employment contained a flexibility clause that stated that 'you will perform to the best of your abilities all the duties of this post and any other post which you may subsequently hold and any other duties which may reasonably be required of you...'

Ms Thornley was accordingly assigned 'full service projects' which meant that, although she had some management responsibilities, she was still required to be very hands on. However, when the department was transferred to Land Securities, Ms Thornley's workload changed so that she was monitoring the work of external consultants, rather than undertaking architectural duties herself.

Ms Thornley told her employer that as a result, she was losing her skills as an architect and was in fact, redundant. She also said this would make it hard to find a new job. She was told that she would not be made

redundant, but was instead given a new job description. She resigned and successfully claimed unfair constructive dismissal.

The tribunal and the EAT found that the imposition of a new job description fundamentally breached the term of her contract that her principal duty was to 'lead... large..projects in which she would have a hands-on role' and this, in effect, required her to cease doing her principal job and take up a new one. This would also have the effect of deskilling her. The extent and nature of the changes to Ms Thornley's duties imposed on her by her employer were not covered by the flexibility clause in her contract and she was, in fact, redundant.

Whilst a flexibility clause can be useful to include in an employment contract, as it provides scope for an individual's tasks to develop without the need for re-negotiation of the contract, employers must recognise the limitations of what a flexibility clause can achieve, and stop short at imposing a new job on an employee. Whilst employees will usually be willing to undertake training to enhance their skills as their job changes, clearly it is not acceptable to develop their role so that they are losing their skills and their worth in the job market.

2

Protection from age discrimination

We have all been monitoring the progress of the age equality regulations, due to come into force in the UK later this year, and discussing the implications of this new law for employers, and how to prepare.

Recently, however, there has been a decision by the European Court of Justice (ECJ) in a German case, *Mangold v Helm*, which, if it is followed, is likely to have a far-reaching impact on age equality law.

Background

The European equality directive covering age, religion or belief, sexual orientation and disability, was agreed between the member states of the EU in 2000. It has been brought into force in member states in phases, according to a timetable. The deadline for the age equality regulations to be in force is December 2006. The UK government aims to bring the regulations into force a little early, in October 2006. So we all thought, on this basis, that employees would have no protection against discrimination on the basis of age until late 2006.

You will also know about the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which brought into force another European

directive, the directive on fixed-term work, in the UK. As ever, all states in the EU were bound to implement this directive: in Germany, the national law implementing the directive came into force after the date upon which the European equality directive was agreed between member states, and (obviously) before the deadline for implementing the age equality regulations in 2006.

The German legislation stated, in accordance with the directive, that fixed-term contracts are normally unlawful unless objectively justified. There was an exception: where an employee was 52 or older, such fixed-term contracts did not need to be objectively justified. Germany justified this exception as having the legitimate aim of improving older workers' access to the job market.

Mangold v Helm

Mr Mangold, who was 56 years old, was employed on a fixed-term contract of eight months.



A few weeks after starting employment, Mr Mangold brought a claim against his employer, arguing that the term limiting the length of his contract was incompatible with the age discrimination provisions of the European equality directive.

Before the ECJ, the German government and Mr Mangold's employer argued that the fixed-term directive, as transposed into German law, was intended to encourage older workers back into the labour market and this is why it included an exception for workers older than 52. They also argued that the European equality directive's provisions dealing with age equality did not have to be implemented until December 2006, and therefore the directive could have no impact on the legality of the current exemption.

The ECJ accepted that the European equality directive states that differences of treatment on the grounds of age *'shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'*

The ECJ accepted that the purpose of the German legislation was legitimate in that it was intended to promote the vocational integration of unemployed older workers, but concluded that the method used to achieve that aim was not appropriate or necessary, as it was a blanket provision and did not take into account such issues as whether the worker had been previously unemployed.

Importantly, the ECJ also said, on the age equality issue, that:

- national legislation which allows employers to treat employees who are 52 or older less favourably than younger people offends the principle of eliminating discrimination on grounds of age; and,
- it did not matter that the age equality regulations do not have to be implemented until December 2006, as the 'over-52' exemption had been introduced after the European equality directive, with its age equality provisions, had been agreed by member states

Comment

This clearly is a major departure from how we have perceived the impact of European directives up to now. We have always understood that a directive only affects individuals and businesses in member states once it has been implemented in national law, or, in some cases, where the deadline for implementation has passed, and the state has failed to bring it into force. This case,

however, seems to be saying that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law, and as such, it gives individuals rights *before* the directive is implemented in member states.

The ECJ went on to say that member states cannot legislate in a way that is incompatible with the principle of non-discrimination on grounds of age, as set out in the directive. In addition, national courts must uphold the general principle of non-discrimination on grounds of age, and must set aside any provision of national law which may conflict with Community law, even where the deadline for implementation has not passed. Further, it is the responsibility of the national court, hearing a claim which involves the principle of non-discrimination on the basis of age, to uphold an individual's right to protection from discrimination.

What are the implications of this for employers? It is hard to assess, at the moment, exactly what impact this judgement will have, not least because most commentators (but not all) have played down the possible importance of this case. If taken literally, however, it appears that age discrimination is already unlawful in this country. It also means that the government is obliged, when drafting legislation, to do so without discriminating on the grounds of age, and courts and tribunals must make decisions which uphold people's rights not to suffer such discrimination. Employers may therefore find themselves defending such claims before the age equality regulations are in force in this country.



3

Fixed-term employees go permanent

For those of you who work in industries that employ employees on fixed-term contracts – particularly, for instance, the IT and academic sectors - note that 10 July 2006 is D-day for many members of staff on fixed-term contracts: on that date, a significant number will be able to regard their contracts as permanent.

Employers have always had the option of covering short-term staffing needs by employing staff on fixed-term contracts. A fixed-term contract is a contract of employment that lasts for a specific length of time, or which will terminate on the completion of a particular task or on the occurrence or non-occurrence of a particular event.

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force in October 2002, with the intention of ensuring that fixed-term employees (note, not the wider class of workers) should be treated no less favourably than comparable permanent members of staff.

As part of this, the regulations protect fixed-term employees from being prevented, over time, from accruing full employment rights. Specifically, regulation 8 limits the use of successive fixed-term contracts to a period of four years. It ensures that, where an employee has been continuously employed under at least two fixed-term contracts for a total period of four years or more, his or her contract of employment will take effect as a permanent contract unless the employer can objectively justify keeping the employee on a fixed-term basis.

If an employee considers that by virtue of regulation 8 he or she is a permanent employee then he or she has the right to ask for a written statement confirming that position. The employer must provide such a statement within 21 days of the request which either confirms that the employee is now permanent or states why the contract remains fixed-term, setting out the objective justification for maintaining the fixed-term contract.

What amounts to 'objective justification' under the regulations? Renewal of a fixed-term contract will be justified on objective grounds if the employer can show that a further fixed-term contract is being used to achieve a genuine business objective, and that it is both necessary and an appropriate way to achieve that objective.

Continuous employment starts to count, for the purposes of these regulations, from the last date upon which they were supposed to have been implemented, which was 10 July 2002 (the UK was late) so employment before

then does not count towards the four years. This provision will start to 'bite' therefore, on 10 July 2006.

What does this mean in practice? Employers should consider carefully whether there is any reason for keeping staff on fixed-term contracts - or a succession of fixed-term contracts. If not, then employers should bite the bullet and make those staff permanent, so that this step is planned, rather than left to evolve.

Note that there is no limit to the length of time that a first fixed-term contract may last. So what about an employee who entered into a, say, five-year fixed-term contract at the beginning of July 2002 who will therefore have four years' continuous employment by 10 July 2006, but who has not had his or her contract renewed? Is this employee within the protection of regulation 8? If not, can the employer simply wait until the expiry of the fixed-term contract, and wave the employee goodbye?

The answer is that the employee is not within the protection of regulation 8 as it only applies to successive fixed-term contracts. However, because the non-renewal of a fixed-term contract of employment amounts to a dismissal in law, any termination due to non-renewal must be for a fair reason and must be handled using a fair procedure, otherwise the employee is likely to have claims for unfair dismissal and/or discrimination.

Of course, fixed-term contracts may still be used, and will continue to have their uses, and as before, employers should ensure that the terms of their fixed-term contracts and internal policies do not cause their fixed-term staff to receive less favourable treatment which cannot be properly justified.



4 Disability discrimination - extending protection

“Disabled people are four times more likely to be unemployed than their non-disabled peers. The government should try changing employers’ attitudes before victimising disabled people”.

This comment appeared on the BBC’s ‘have your say’ web pages, the day after the Work and Pensions Secretary announced reforms to incapacity benefits, which he argued would help disabled people to return to work. It also comes after a wave of changes and extensions to the ambit of disability legislation in this country. Whether or not it is correct to assert that employers’ attitudes are a bar to the employment of disabled people, the evolving law to contain disability discrimination in the workplace and beyond, provides disabled people with increasing rights, and will inevitably change attitudes towards disabled people, for better or worse.

By way of background, when the Disability Discrimination Act 1995 (DDA 1995) came into force, it became unlawful to treat an employee, potential employee or job applicant less favourably than a non-disabled employee etc, for a reason relating to that person’s disability, unless the treatment could be objectively justified. Treatment may be justified only if the reason for it is both material to the circumstances of a particular case and substantial. However, such treatment cannot generally be justified if the employer is under a duty to make reasonable adjustments to accommodate the disabled person, but fails to do so.

A person is disabled under the DDA if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. A physical impairment amounts to a disability if it affects such abilities as mobility, manual dexterity, speech, hearing or eye-sight. Until recently, a mental impairment only included clinically well-recognised mental illnesses such as schizophrenia and manic depression.

So, what has changed? Firstly, on 1 October 2004 the Disability Discrimination Act 1995 (Amendment) Regulations 2003 came into force, introducing the concept of direct discrimination. Direct discrimination occurs where someone is treated less favourably *on the ground of* their disability - for example, he or she is not offered training or a promotion because he or she suffers from, say, cancer. This is in addition to the existing disability discrimination of less favourable treatment *for a reason relating to* a person’s disability – i.e. less favourable treatment, not because of the cancer itself, but because, for example, he or she has lots of hospital appointments.

The addition of direct disability discrimination is significant as, if a claimant can show that he or she has indeed suffered direct discrimination, the respondent employer may not raise a defence of justification. This brings disability discrimination protection into line with protection in other areas such as sex and race.

The amending regulations also expressly add harassment as a form of discrimination, bring work placements within the scope of the DDA 1995, and reverse the burden of proof, so that if a claimant can show a tribunal that on the facts of the case it appears that discrimination took place, then the onus moves to the employer who must then show that there was, in fact, no discrimination. The small employers’ exemption has also been removed, although the size and resources of an employer remain factors to be taken into account when assessing whether the employer has complied with the duty to make reasonable adjustments.

From 5 December 2005, the Disability Discrimination Act 2005 extended the ambit of the DDA 1995 even further: it now covers people with HIV infection, cancer or multiple sclerosis from the point of diagnosis, (in other words, before the illness has impacted on an individual’s ability to carry out normal day-to-day activities), the requirement that a mental illness must be ‘clinically well-recognised’ in order for it to be regarded as an impairment under the DDA 1995 has disappeared, and third party publishers are now liable for publishing discriminatory advertisements. The Department for Work and Pensions estimates that these changes will protect about an extra quarter of a million pre-symptomatic people.

Anticipatory duties

Recent legislation also imposes anticipatory duties on businesses and public authorities. This means that such organisations have a general duty to disabled people to pre-empt discrimination, rather than a duty to react to an individual disabled person’s needs. For example, October 2004 saw the advent of an obligation on businesses and other organisations to take reasonable steps to replace features of their premises which act as a barrier to disabled people who wish to access their services, and public authorities will soon be under a wide-ranging duty positively to promote disability equality, by developing and then implementing schemes to promote equality of opportunity for disabled people,



eliminate discrimination and harassment, take account of disabled people's disabilities even where that involves positive discrimination, promote positive attitudes towards disabled people, and encourage participation by disabled people in public life.

Recent case law has also developed and explained the ambit of rights in this area.

The important case of *Archibald v Fife Council* was heard by the House of Lords in mid-2004. This case considered the position of a disabled person who becomes totally incapable of doing the job for which he or she has been employed, and is therefore vulnerable to losing that employment, but is, nevertheless, capable of carrying out another role for the employer.

Section 6 of the DDA 1995, at that time, placed a duty on employers to make 'reasonable adjustments' to 'any arrangements made by or on behalf of an employer' or any 'physical feature of premises' occupied by the employer, where these arrangements or features 'place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled'. (Since then, the word 'arrangements' has been replaced by 'any provision, criterion or practice' which, it is anticipated, will make the concept wider).

In *Archibald*, it was considered what amounts to an arrangement made by or on behalf of the employer – if something is not an arrangement, the duty to make a reasonable adjustment does not arise. It was held that arrangements, whilst undefined, could include almost anything that places a disabled person at a disadvantage, including a job description for a post, and importantly, the liability of anyone who becomes incapable of fulfilling their job description to be dismissed.

Archibald has been followed in two recently reported cases, which both demonstrate just how widely arrangements, and therefore the duty to make reasonable adjustments, are construed.

In *Rothwell v Pelikan Hardcopy Scotland Limited* [2006], Mr Rothwell had suffered from Parkinson's disease for many years. When his condition deteriorated, the doctor appointed by the employer to assess him reported that she felt that he was no longer fit to work. She also stated that she had requested a consultant's report. The consultant's report was more optimistic, and referred to a new treatment that Mr Rothwell could try which might contain his condition and enable him to continue to work.

The employer did not see the consultant's report. On the strength of the doctor's report, it arranged a meeting with Mr Rothwell to dismiss him, the decision to do so having been reached beforehand. At this meeting, Mr Rothwell told his employer that he was unhappy with the doctor's

report, and that the consultant did not agree that he was unfit for work. In spite of this, the dismissal stood.

The EAT held that it would have been a reasonable adjustment for Mr Rothwell's employer to have consulted with him about his fitness to continue working, before deciding to dismiss him on the grounds of ill-health. Dismissal was clearly a critical step, and there was no urgency which might have made it unreasonable to expect the employer to delay. Had the employer delayed, it would at least have been made aware of the contents of the consultant's report and of the possibility of a new treatment, both of which might have influenced the decision-making process.

On the same basis, it was held that Mr Rothwell had been unfairly dismissed.

In *Smith v Churchills Stairlifts plc* [2006], Mr Smith, who was disabled and had trouble walking, was interviewed by Churchills. As a result of the interview, Churchills agreed to send him on a training course to be a salesman, after which, if he passed, he would be employed to sell radiator cabinets.

After the interview but before the course started, Churchills decided that all salesmen would have to take a full-size radiator cabinet, weighing about 25 kilos, to show to clients, as it thought that this would make it easier to convert a demonstration into a sale. Because of his disability, Mr Smith would have been unable to do this, and the offer to send him on the training course was withdrawn as a result. Mr Smith claimed disability discrimination.

Mr Smith failed before both the ET and EAT. Before the Court of Appeal, however, and as in *Archibald*, the word 'arrangements' was considered. It was held that carrying a full-size radiator cabinet was an arrangement. The facts that

- the offer of a place on a training course was subject to an implied condition that Mr Smith was, or was believed to be, able to carry a radiator cabinet, and
- the offer of a place on the course was liable to be withdrawn if he could not do so

were also arrangements. These arrangements put him at a substantial disadvantage in comparison with people who were not disabled and therefore the employer had a duty to make reasonable adjustments. A reasonable adjustment would have been to allow sales by different methods on a trial basis. Failure by the employer to do so amounted to discrimination on the basis of disability.

Conclusion

The trend in both new legislation and recent case law is towards increased protection from disability discrimination. Certainly prejudice against disabled



people in the workplace still exists, as is clear from the amount of cases in this area, as well as anecdotal evidence, but the fact that protection for disabled people is developing and increasing, must, over time, positively influence workplace culture. Employers should have in place policies that outlaw disability discrimination, and

should train managers on the developing law. Employers should also be prepared to consider alternative approaches to carrying out the job or various tasks, and to listen to any suggestions that a disabled person might make to facilitate his or her inclusion in the workplace.

5 Collective redundancy consultation – recent developments

In many cases, an employer who is proposing to make multiple redundancies is required to consult with representatives of the affected employees.

The requirements for this consultation are set out in the Trade Union and Labour Relations (Consolidation) Act 1992, (TULR(C)A), and are triggered where the employer is proposing to dismiss as redundant at least 20 employees at one establishment within a period of 90 days or less.

TULR(C)A requires that the consultation must begin “*in good time*”, and at least 90 days before the date on which the first proposed dismissal takes effect where 100 or more redundancies are proposed at the establishment within a 90-day period. Where between 20 and 99 redundancies are proposed, the consultation must begin at least 30 days in advance.

The employer is also required by TULR(C)A to provide certain written information to the representatives.

If the employer does not carry out consultation in accordance with these rules, it may face a penalty of up to 90 days' full pay (known as a protective award) for each affected employee.

TULR(C)A implements the European Collective Redundancies Directive (the directive) in the UK. The directive also requires the consultation process to begin in good time but, unlike TULR(C)A, does not lay down any minimum time frames. Surprisingly, the directive does not stipulate when a redundancy actually takes effect, as it could be either when notice of dismissal is given, or when the notice expires, and the employment relationship terminates. This has led to some debate as to the point by which consultation must begin. Furthermore, if a redundancy takes effect under the directive when the notice of dismissal is given, must the consultation procedure have been concluded, or merely be under way, before such notice is given?

In *Junk v Kühnel* [2005], the European Court of Justice (ECJ) considered these questions. It ruled that a 'redundancy' for the purposes of the directive is effected when the employer gives notice of termination rather

than when that notice expires and therefore, importantly, the obligation to consult arises prior to any decision by the employer to terminate contracts of employment.

The ECJ also noted that the directive specifies that consultation should be carried out ‘*with a view to reaching an agreement*’ and that the consultation procedure should ‘*at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected...*’. It therefore concluded that the directive effectively imposes an obligation to negotiate, and that the consultation process must be concluded before notices of dismissal are issued.

So *Junk* gives us the position under European law. However, TULR(C)A is worded somewhat differently to the directive, talking, as shown above, in terms of ‘*proposing to dismiss*’. Following *Junk*, what exactly does this mean, and can TULR(C)A be interpreted in accordance with that decision?

The case of *Leicestershire City Council v UNISON* [2005] was heard in the UK after the ECJ decision in *Junk*, and it considered whether the same interpretation should be given to the obligations under TULR(C)A.

The Council had carried out a job evaluation of about 9000 jobs. As a result, on 18 November 2002, an officer of the council presented a report to the employment committee which said that about 2,600 employees would be dismissed and re-engaged on less favourable terms. The formal, or political, decision to dismiss those employees, was taken by the employment committee on 12 December 2002. The council took this date as the date which triggered its obligations under TULR(C)A, and on 18 December 2002 it sent a document purporting to contain the necessary information to UNISON, one of the recognised trade unions.

UNISON sought protective awards, arguing that the decision to dismiss the employees had actually been taken by 18 November and that by notifying the union



only on 18 December, the council had breached its obligation to inform and consult in good time. The council responded by arguing that no proposal to dismiss had been made until the formal decision of the employment committee, and that the officer's report on 18 November had been by way of a recommendation.

The employment tribunal and the EAT both agreed with the union, and ruled that the decision to make the redundancies had been taken by 18 November when the report was presented. Following *Junk*, the EAT said that

effect must be given to the construction of the directive, which aims to avoid dismissal for redundancy and which therefore requires consultation at a stage before decisions on dismissal for redundancy are made. There is no straining of the language of TULR(C)A by construing '*proposing to dismiss*' as '*proposing to give notice of dismissal*'. According to the EAT, that requires something less than a decision that dismissals are to be made, and something more than a possibility that they might occur.

6 Pensions update

There will be major changes to the pensions regime in the United Kingdom from 6 April 2006 affecting both company pension schemes and personal pensions.

The current regime of Inland Revenue approval for pension arrangements, which provides maximum lump sum and pension benefits which vary with age, salary and the date an employee joined the scheme, and uses complex formulae, will be removed. It will be replaced by a system of tax-free allowances, of which the two main allowances will be:

- Total employer and employee annual contributions of up to 100% of salary or £215,000 (whichever is the lower); and
- a 'lifetime allowance', i.e., an assessment by the Inland Revenue (typically carried out when an individual retires) of a lump sum equivalent to the value of an employee's total pension rights throughout retirement of up to £1.5 million. This figure will be index-linked

As these are allowances, employees may contribute or receive greater benefits, but any amounts above the allowance levels will be subject to tax. In contrast, under the old regime, employees could not contribute or receive greater benefits than the maximum allowed under a tax approved scheme.

Some employment contracts obviously rely on the current regime which caps personal pension contributions on an age-related scale which starts at 17.5% of gross salary for those aged under 35. Since this regime, and therefore the caps, are disappearing, employers will have to review all employment contracts which rely on these caps.

If you do not carry out such a review, your employees may well become entitled to higher rates of employer contributions when the caps are removed on 6 April

2006. For instance, if you currently pledge to your employees that you will match their contributions to their personal pensions, currently you would not be required to pay more than 8.75% (i.e. half of the 17.5% for those aged under 35). However, under the new regime, if an employee decided to increase his or her contribution to 50% of salary, then, depending on how the contract of employment is drafted, you could be bound to match that contribution and also pay 50% of salary.

Errors in pension scheme booklets

Pension schemes are usually governed by intricately drafted and difficult to read Trust Deeds and Rules. For the benefit of employees, these are simplified into scheme booklets which provide basic information about the scheme, its benefits and complaints procedures. Typically, such booklets contain a disclaimer that they are not legally binding and that the Trust Deed and Rules override the booklet if there is any inconsistency.

Recently (in the case of *Steria Ltd v Hutchinson*), the High Court upheld a decision of the Pensions Ombudsman that such a disclaimer will not always be valid. If the booklet makes a clear statement about a member's entitlement, the scheme trustees or the employer may be forced to deliver that entitlement, even if the Trust Deed and Rules say the opposite. In *Steria*, the scheme booklet said that the employee could retire at the age of 62 with a full pension because he had worked for the employer for over 20 years. The Trust Deed and Rules did not provide an automatic right to this pension and instead provided that a pension on retirement at 62 would be reduced because it was being paid ahead of the normal retirement age of 65. Both the Pensions Ombudsman and the High Court have ruled



that the employer must fund benefits in full, payable from the age of 62.

Companies leaving final salary schemes

In September 2005, the government finalised and brought into force amendments to the Pensions Act 1995 and new regulations, the Occupational Pension Schemes (Employer Debt etc) (Amendment) Regulations 2005. This legislation provides that when a company leaves a final salary scheme which has other employers in it and does not wind up, it must pay a debt to the scheme trustees calculated at a level to provide that the trustees could buy insurance policies for all of that employer's employees' benefits. This legislation also gives the Pensions Regulator power to approve alternative "approved withdrawal arrangements" where

another company, for instance, a parent company, would guarantee to pay that insurance-based debt in the future in certain circumstances.

The Pensions Regulator has recently issued guidance on how it will exercise these powers. This guidance (available at www.thepensionsregulator.gov.uk) confirms that the Regulator is taking a hard line on such arrangements and will only approve them where it appears that the outgoing employer may be unable to pay the full debt and that by using the guarantee route, the trustees are more likely to obtain full funding of the debt. As a result, we would expect the approved withdrawal arrangement route will only be available in exceptional cases where it is more likely that the debt will be paid if the arrangement is allowed.

7 Contacts

Our employment law partners - Margaret Davis, Richard Kenyon, David Fisher and Greg Cain - lead a team of specialist lawyers with many years of experience in the employment field. If you need employment advice or assistance, please contact one of the following:



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