

Employment Review

WORKPLACE COUNCILS: A SEISMIC SHIFT IN INDUSTRIAL RELATIONS

An EU Directive establishing a framework for informing and consulting employees was adopted by the European Parliament in February and officially published at the end of March. The impact on workplace relations in the UK are likely to be enormous. The Directive does not have to be implemented in the UK until the beginning of 2004 and it is, as yet, unclear how this will be done. It is certain, however, that in the UK, extensive legislation will follow. In most other European countries, existing legislation already provides most of the protection required.

The Directive sets out minimum standards for ongoing information and consultation with employees on a range of business and employment matters, with which employers must comply; failure to do so will attract sanctions. Information must be provided on recent and probable development of the business, together with any measures anticipated, in particular, where there is a threat to employment. Under the Directive "Works Councils" must be set up to facilitate the exchange of information.

The time for implementation depends on the size of the business:

- undertakings (the Directive's term for a business) with at least 150 employees (or establishments, defined as a "unit of business", which could be an office, a warehouse or shop having more than 100 employees) have to be compliant by March 2005;
- undertakings with at least 100 employees (and establishments with at least 50 employees) must be compliant from March 2005;

- undertakings with at least 50 employees (and establishments with at least 20 employees) must be compliant from March 2007.

The Directive will cover more than three quarters of UK workers. Its scope would have been much wider, and it would have come into force much sooner, had the UK government, supported by the CBI, not lobbied to water down the rules. In other EU countries, the Directive will apply to all businesses with 20 or more employees across the board from 2005. In practice, information will only have to be available if it concerns the "recent or probable" development of the undertaking's activities or economic situation. It must, however, be coupled with effective consultation.

Controversy rages over the likely effects on businesses. The CBI has already described the proposals as "a recipe for grinding business decisions to a halt". The TUC, on the other hand, is optimistic about the potential for co-operation and hopes that most Works Councils will be established through local agreement without resorting to the courts.

In any event, as the authors of "Works Councils for the UK" argue, "no other EU legislation has the potential to affect such a wide range of employers and employees, or such a wide range of workplace issues". Employers and employees alike would be well advised to consider the impact of the proposed changes at an early stage. Particular importance should be attached to the training of their respective representatives so that they will be able to play a full part at the appointed time.

Anna Mathias

FIXED TERM CONTRACTS

On 1 October 2002 the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 SI 2002/2034 came into force. These implement the EC Fixed-Term Work Directive (No. 99/70) and are based on the framework set out in Section 45 of the Employment Act 2002. The Regulations should be read in conjunction with the DTI Guide (PL512).

A fixed-term contract is any contract of employment that, under the provisions determining how it

will ordinarily terminate, will terminate on the expiry of a specific term, on the completion of a specific act, or on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of normal retiring age.

The Regulations provide that a fixed-term employee has the right not to be treated less favourably than a comparable permanent employee in respect of the terms and conditions of his contract, or to be subjected to any other detriment by

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any act, or failure to act, on the part of his employer. This includes the right not to be subjected to less favourable treatment in relation to any period of service qualifications relating to any condition of employment; the opportunity to receive training; the opportunity to secure permanent employment; and, less favourable treatment in relation to pay.

Regulation 2 provides that a permanent employee is a comparable employee if, when the treatment in question takes place, both employees are employed by the same employer in the same or broadly similar work, having regard where relevant to whether they have a similar level of qualification and skills. The permanent employee must work or be based at the same establishment as the fixed-term employee or, where there is no comparable permanent employee at the establishment who satisfies the first two requirements, the comparator must work or be based at another establishment of the employer (although not one of an associated employer). Where appropriate, the pro rata principle should be applied to any comparison. Thus there must be a real and not a hypothetical comparator.

The employer can objectively justify the less favourable treatment either by showing that it is necessary for a particular reason or by showing that other aspects of the employee's terms and conditions are more favourable and so offset the less favourable treatment. In order for less favourable treatment to be justified, it should be aimed at achieving a legitimate objective, such as a genuine business objective, and be a necessary and appropriate way to achieve that objective. Whether such treatment is necessary is a matter of degree and each individual case should be considered on its facts and by reference to whether it would be possible to offer the benefit in question on a pro rata basis rather than simply denying it. The Guide states that there may be cases where the cost to the employer of offering a particular benefit may be disproportionate compared to the benefit which the employee would receive, and this imbalance may objectively justify the treatment.

Simon Livingstone

UNLESS ORDERS AND STRIKING OUT

A recent decision by His Honour Judge Clark in the Employment Appeal Tribunal highlights the need to comply with time limits in the Employment Tribunal or risk being struck out. The appeal, in which the writer appeared for the successful Respondent, has not been reported and due to the sensitive subject matter the names of the parties will not be used. The Appellant, who still worked for the Respondent, had lodged a claim alleging sex and race discrimination and victimisation. After previous interlocutory orders had not been complied with by the Appellant and following an earlier adjournment of the final hearing, the ET made an order that unless she lodge with the Respondent further and better particulars of the acts of discrimination complained of by x date her claim would be struck out.

According to the Respondent the Appellant lodged the further particulars with the Respondents one day late. The Appellant alleged that she had delivered the further particulars on time. The Respondent applied to the ET for a ruling that her claim had been struck out and the ET chairman heard evidence from both parties, following which he found that the further particulars had been lodged one day late. The ET ruled that the

Appellant's claim should indeed be struck out, the main reasons being (1) the previous failures to abide by interlocutory orders; (2) the fact that the Appellant had disobeyed an "unless" order; (3) the fact that the final hearing was at real risk of being adjourned due to the necessity of having to decide the strike out issue; (4) potential prejudice to the employees of the Respondent.

The Appellant appealed to the EAT. On behalf of the Respondent, it was argued that the decision was a harsh one and the time for lodging of the further particulars could have been extended by the ET chairman by one day. It was further argued that the decision was nevertheless one which the ET chairman, in his discretion, was entitled to make. The EAT accepted this argument and dismissed the appeal. The moral of the story is (1) notwithstanding the Human Rights Act (and right to a fair hearing) the ET is still considered to be the master of its own procedure and the EAT will still be very slow to interfere with an exercise of discretion even if it is seen as "harsh but not perverse"; and (2) ignore interlocutory orders at your peril.

Matthew Rudd

UNFAIR DISMISSAL OF EMPLOYEES OVER 64

According to the Employment Rights Act, an employee loses the right to claim unfair dismissal and any redundancy payment on his or her 65th birthday. In **Rutherford v Harvest Town Circle (Stratford ET 22.8.02 Case no. 3203345/98)** an Employment Tribunal has decided that these provisions breach European law and that the tribunal has jurisdiction to hear claims by those over 64. The Government has announced

that it intends to appeal. This article considers the current position for those 65 and over who wish to claim.

Mr. Rutherford, aged 67, claimed unfair dismissal. He relied on the 'Equal Treatment Directive' (No. 97/80) which states "indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one

sex". He argued the statutory provisions disadvantaged a greater proportion of men over 65 than women because more men are economically active. The Tribunal agreed and found this offended the 'equal pay for equal work' provision (Article 141) of the Treaty of Rome. They therefore had a duty to override the national legislation. On appeal, the EAT (**Harvest Town Circle v Rutherford [2001] IRLR 599**) held that the statistics relied on by the tribunal were inadequate and its consideration of them was unsatisfactory. They criticised the Tribunal for finding no objective justification, having heard no direct evidence as to the social policy reasons behind the legislation. The EAT also gave detailed guidance on the correct use of statistics. The case was remitted to the same Tribunal who heard fresh evidence (including evidence from the Secretary of State on justification) and considered detailed statistics, including different age bands, in a number of different ways. They again held that the UK statutory provisions were indirectly discriminatory and could not be justified.

The present position is that those 65 and over should be encouraged to lodge claims. It is likely that such claims will be stayed pending the out-

come of the Government's appeal to the EAT, and Respondent representatives will no doubt encourage tribunals to follow this course. However, in cases where there is a customary or contractual retirement age above or below 65, it is the employer who will need to give evidence as to justification, as well as or instead of the government. It is arguable that claims in this category should not be stayed. If claims are not stayed, Applicants will probably be able to rely on the detailed statistics annexed to the **Rutherford** decision. The Stratford Tribunal's decision is not strictly binding on other tribunals, but as it contains a thorough analysis of the relevant statistics, it is likely to be persuasive.

If the Government appeals the matter beyond the EAT, Applicants whose cases are stayed are likely to have a long wait. When the different retirement ages for men and women were challenged in **Marshall [1986] ICR 335**, the legislation was not altered until after the European Court of Justice had made its unfavourable decision.

Peter Linstead

DISPUTE RESOLUTION AT WORK

Many complaints to employment tribunals are made in circumstances where an employer does not have an internal dispute procedure or where an employee has failed to use whatever procedures exist. The Employment Act 2002 is intended to address this problem by encouraging parties to resolve disputes through internal procedures by introducing statutory dismissal and disciplinary procedures and statutory grievance procedures which will be incorporated into every contract of employment.

Generally, both the dismissal and disciplinary procedures and the grievance procedure will have three steps starting with a statement of grounds and followed by a meeting and an appeal. There will also be a modified procedure for former employees and where an employee has been dismissed for gross misconduct.

The statutory procedures will apply to most claims (eg. all discrimination claims, redundancy payments and unfair dismissal) and there will be the following sanctions where they are not followed:

- where an employee who is under an obligation to use a statutory grievance procedure does not use that procedure then his or her claim will be barred (but an extension of time for bringing a claim may be allowed so as to enable an employee to submit a belated written grievance procedure);
- where the dismissal and disciplinary procedure has not been completed and the non-completion is wholly or mainly attributable to the employer then the employee will be treated as having been unfairly dismissed;
- adjustments will be made to any compensation payable to reflect a failure

by either the employee or the employer to comply with the relevant statutory requirements (save in exceptional circumstances, the adjustment must be 10 per cent of the award; where it is just and equitable or where there are exceptional circumstances the adjustment can be increased by up to 50 per cent of the award or by an amount less than 10 per cent); it should also be noted that, in unfair dismissal claims, the statutory limit (currently £52,600) is applied after the adjustment.

In order to allow for the procedures to be followed, there will be various powers to extend the time limits in which proceedings in the employment tribunal are commenced. This is likely to take the form of extending the existing time limits by three months and by giving tribunals greater discretion to extend time limits so that the statutory procedures can be completed. Because the statutory requirements are to be incorporated into employment contracts, a failure by an employer to comply with the procedures may amount to a repudiatory breach with the consequence that restrictive covenants will be unenforceable. An employee may also be able to obtain an injunction to prevent an employer imposing a sanction where the relevant statutory procedures have not been followed.

All in all the Act will impose a new and, potentially, draconian system for ensuring compliance with the statutory procedures. From a legal point of view, these procedures are likely to be complicated, and until the procedures are established, many applicants may be confused about what is required.

Adam Swirsky



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