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9 GOUGH SQUARE

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EMPLOYMENT LAW BULLETIN

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Old wine in new bottles?

Susan L Belgrave

Should we be celebrating the demise of the statutory dispute resolution procedures or tearing our hair out [what is left of mine from the last bout of legislation] with frustration at the latest attempt by government to 'simplify' employment law? Only time will tell whether the flexible approach coming into force on 6 April 2009 will be more user friendly than the rigidity of the old regime.

The revised Code of Practice and guidance from ACAS on Disciplinary and Grievance Procedure are a bit of a curate's egg. The good part is that they are not statutorily binding, the bad part is that it is not entirely clear how tribunals will apply their powers to impose a 25% uplift on recalcitrant employers or employees who unreasonably fail to follow the code in situations where they ought to have done. Those at greatest risk will be small employers with a small or non-existent HR function and, as always, employees without the benefit of good legal advice at an early stage. It may be that the draconian nature of the old regime has meant that rudimentary disciplinary and grievance procedures are in existence in workplaces all over the country. One can only hope that employment tribunals take into account the circumstances of such individuals before invoking their powers of sanction in this area. Unfortunately, there still seems to be a wide variance between and within regions when it comes to exercising judicial discretion.

Don't burn those regulations just yet – there are some complex transitional provisions which have been published which mean that, apart from cases already before the courts, cases which involve trigger events occurring before 5 April 2009 will still be subject to the statutory dismissal and grievance process. The rules for disciplinary or dismissal procedures are more straightforward as it will be the date on which, for example, the dismissal occurred rather than the date of the conduct of the employees. Indeed, the employer or employee may well have already begun stage 1 or 2 of one or other procedures and should bring that to a natural conclusion. The situation is more complicated in relation to the grievance procedure and the provisions may have a particular impact on more complex claims where 'trigger events' may date back over a period of time. Will there be a debate over discrimination claims where the employee relies on events over a period of time, or where an employee mounting a claim of constructive dismissal relies on a series of events over several months or indeed years? A trigger event may be the date of a grievance lodged. In a case of victimisation it may be the date of detriment or indeed the date of any grievance, but once again, tribunals may be grappling with a series of events some of which have to be classed as background rather than substantive issues before the tribunal. Unfortunately, the parties will not be able to agree which regime should apply as this is a jurisdictional matter for the tribunal and I am sure lots of creative energy may be spent determining which regime is more advantageous in any given circumstance given the tribunal is penal powers. It will be a couple of years before this transition has ended.

As my real property lecturer at Bar School used to say 'elephant traps, beware elephant traps'.... [Cave! Hic dragones…for the purists among you]

Susan L Belgrave

The Posted Workers Directive

Catherine Atkinson

'Striking' the Balance

The unofficial or 'wildcat' strikes that took place across the country in response to the employment of European workers at the Lindsey Oil Refinery in Lincolnshire put the use of posted workers centre stage. The present economic situation and fears of increasing unemployment have exacerbated the perceived threat of posted workers undercutting the terms and conditions, including the pay, of domestic workers. The Posted Workers Directive (96/71/EC) was viewed by many as a protection against such 'social dumping'. However, the Directive sought to protect, not only the rights of posted workers and but also the economic freedoms guaranteed under the EC Treaty. The balance struck between these two competing objectives by the European Court of Justice ('ECJ') sought in a series of cases from the ***Finnish Viking Line Case C-438/05*** and ***Swedish Laval Case C-341/05*** in December 2007 to the ***Rüffert Case C-346/06*** in April 2008 and ***Case C- 319/06 Commission v Luxembourg*** in June 2008 has led to considerable political controversy. These judgments have significant implications, not only for how Member States can protect both domestic and protected workers but also for the trade unions' future use of collective action.

A 'Minimum' or 'Maximum' Directive?

The Posted Worker Directive requires Member States to ensure minimum standards for posted workers including the determination of terms and conditions of employment. These minimum standards include the need to lay down maximum work periods and minimum rest periods, minimum rates of pay, minimum paid annual holidays, health and safety at work and non-discrimination provisions. Prior to ***Viking*** and ***Laval*** the Directive was often considered to be a 'minimum' directive, laying down a "hard core" of minimum working conditions but not preventing Member States from providing greater protection.

Viking Line ABP was a ferry operator incorporated under Finnish law who in 2003 sought to reflag its vessel by registering it in Estonia in order to avoid continuing to pay the level of wages applicable under the Finish collective bargaining agreement. Co-ordinated strike action prevented the reflagging but with Estonia's accession to the European Union in 2004, Viking sought to declare the collective action contrary to Article 43 as a restriction on the freedom of establishment.

Laval was a company incorporated under Latvian law which posted construction workers to Sweden to work on building sites operated by a Swedish company. In Sweden minimum rates of pay were determined by collective agreements negotiated on a case by case basis. When negotiations with the Swedish trade union broke down Laval signed a collective agreement with a Latvian trade union. Laval sought a declaration that the consequential collective action of the Swedish trade union was unlawful and brought a claim for compensation.

The ECJ's judgment in Laval found that collective action which sought to secure terms and conditions greater than those provided by the Directive constituted an obstruction to the freedoms guaranteed under EC Treaty. The terms and conditions that the Directive required Members States to put in place were therefore not the minimum that had to be established but an exhaustive list they could not go beyond. A 'minimum' interpretation was rejected as enabling Member States to supersede the free movement of workers and services. The ECJ held that Member States could not impose minimum working conditions that went beyond those stipulated in the Directive. Therefore, what was previously interpreted as a 'minimum' directive is in fact to be interpreted as a 'maximum' directive.

The interpretation of the Directive as a 'maximum' directive has been followed in the cases of ***Rüffert*** and the ***Commission v Luxembourg***.

In the case of ***Rüffert*** the public procurement law of Land Niedersachsen was criticised as it laid down that contracts would

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only be awarded to those who undertake that they, and any subcontractors, would sign up to collective agreements. The ECJ found that the collective agreement stipulated higher protection than that afforded by the Directive and could not be justified as a public policy to protect workers because it applied only to public contracts and not private contracts.

Luxembourg's implementation of the Directive was also rejected by the ECJ as obstructive to freedoms guaranteed under the EC Treaty. They acknowledged that a Member State may impose terms and conditions of employment other than those contained in the exhaustive list of Art 3.1 if they constitute public policy provisions. However, they noted that the public policy exception is a derogation from the fundamental principle of freedom to provide services, which must be interpreted strictly. Luxembourg had required: written employment contracts; an automatic indexation of remuneration to the cost of living; the regulation of part-time and fixed-term work; and a respect of collective agreements. The European Court of Justice considered that, in going beyond the specific conditions listed in the Directive, Luxembourg's implementation of the Directive constituted an obstacle to the free provision of cross border services. A similar approach to public policy in several Member States, such as France, Belgium and Italy means that this judgment will have wide reaching repercussions.

The Use of Collective Action

Trade unions have always used collective action to drive up and maintain terms and conditions for workers but their ability to do so where European workers are working in different Member States has been significantly curtailed by the judgments in ***Viking and Laval***.

In both judgments the ECJ found that collective action was a fundamental right. Further, they accepted that *"the right to take collective action for the protection of workers is a legitimate interest which, in principle, justified a restriction of one of the fundamental freedoms guaranteed by the Treaty and that the protection of workers is one of the overriding reasons of public interest recognised by the Court"* (Viking, para.77). However, they found that collective action could be a restriction on the freedom of establishment and needed to be balanced against the rights protected under the Treaty in accordance with the principle of proportionality.

The ECJ said it was for national courts to determine whether collective action was justified but gave strict guidance in their judgment. The ECJ stipulated that national courts should consider: the seriousness of the threat to the jobs or conditions of employment at issue; the proportionality of the collective action; and the exhaustion of other possible means before the initiation of collective action. These considerations present much stricter tests than those imposed by UK laws in determining whether collective action is lawful. They may also greatly ease the ability of employers to obtain injunctions to prevent industrial action where community rights can be implied, needing merely to demonstrate an arguable case.

Conclusion

In his opinion in ***Laval,*** Advocate General Megozzi considered that *"the Directive pursues a twofold aim of providing minimum protection for posted workers and equal treatment as between service providers and domestic undertakings in similar circumstances. Those two requirements must be pursued concurrently."* However, this twofold aim has been made secondary to the objective underlined by the ECJ. As they stated in ***Rüffert***, the Directive *"seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty"*. That prioritisation has arguably exacerbated differing treatment of domestic and posted workers and has curtailed the ability of member states and trade unions to combat that inequality. While time will tell how consistently different national courts will apply the doctrine of proportionality, the prioritisation of the ECJ has been consistent through their judgments in ***Viking, Laval, Rüffert and Luxembourg***. With protests calling for 'British jobs for British Workers', rising unemployment, and the economic downturn, this series of judgments is unlikely to have been welcomed by the British Government and certainly not by trade unions. And with official collective action curtailed where European freedoms are concerned we may see further 'wildcat' strikes instead. However, these judgments make it clear that any future change of direction will need to be instigated by European politicians rather than the courts or governments of any member state on their own.

Catherine Atkinson

Legislation updater

The Employment Act 2008 (Commencement No 1 Transitional Provisions and Savings) Order 2008
Complex transitional provisions following the abolition of the dispute resolution procedure

- Where an action occurred wholly before 6 April 2009 then the existing grievance procedures continue to apply;
- Where the action complained of began on or before 5 April 2009 and continues beyond this date and the employee submits a grievance before 4 July 2009 the existing procedures will apply (in so far as it relates to a claim with a time limit of three months);
- Where the action complained of occurred on or before 5 April 2009 and, in respect of claims with a time limit of 6 months, the existing procedures will apply where the employee lodges a grievance before 4 October 2009;
- The trigger date for disciplinary and dismissal procedures will be the date on which the employer commenced disciplinary or dismissal action;
- The existing procedures will apply where the employer sent a stage one letter on or before 5 April 2009; or had taken relevant disciplinary action against the employee before this date or had dismissed the employee before this date.

Case law digest

McFarlane v Relate ET 1401179/08 Bristol Employment Tribunal

A Christian psychosexual therapist worked for Relate; his role was extended to include same sex couples and he refused to advise them. He was suspended and later dismissed. He lost his claim for religious discrimination as the tribunal found that Relate would have treated any other employee who, for reasons unrelated to religion, had acted in the same way as Mr. McFarlane, in a way so at odds with its equal opportunities policy. The tribunal also rejected his indirect discrimination claim saying that his dismissal had been a proportionate means of maintaining its commitment to providing a service to all sections of the community without any suggestions of discrimination.

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SEMINAR

Employment Seminar

Unfair dismissal and redundancy update

Laura Elfield and Esther Maclachlan

Topics:

- The demise of the statutory dispute resolution procedures?
- How will the transitional provisions work?
- The new ACAS code and guidance
- Unfair dismissal case law update

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ESTHER MACLACHLAN

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COST
£20.00 + VAT (£23.50)
1 hours CPD

DATE
21st May 2009
Time: 5.30 - 6:30pm
Refreshments will be provided
Limited to 12 places

Please contact Tim Sprules on 020 7832 0500 or email tsprules@9goughsquare.co.uk if you wish to attend or have any queries

Chondol v Liverpool City Council UKEAT/02908/08

The EAT ruled that dismissing a social worker who sought to share his Christian faith with service users did not amount to religious discrimination. There had been two complaints one by a service user who said that the claimant had spoken to him about 'God and the church and that sort of £%&*' and from a psychiatrist treating another patient. It emerged that the claimant had taken the patient from his sheltered housing to his own home and seemed not to understand the distinctions between social worker, carer and friend or that his proselytising behaviour was inappropriate. The dismissal had occurred not because he held religious beliefs but because he sought to share them with, or impose them on, vulnerable service users in direct violation of management instructions.

Age Concern v Secretary of State for Business (Heyday) 5 March 2009 ECJ

The ECJ was asked to consider the lawfulness of the retention by the UK Government of a compulsory retirement age of 65 and whether this was in breach of the Equal Treatment Framework Directive 2000/78. Following the earlier opinion of the Advocate General, the ECJ has stated that the issue must be finally determined by the High Court since member states have a margin of discretion in social policy. The court did state that a compulsory retirement age was permissible and therefore capable of justification as long as the national government could prove to the High Court's satisfaction that such compulsory retirement was necessary to achieve a legitimate aim of public policy. The ECJ rejected Age Concern's contention that the directive required a precise list of aims to be provided in order to justify derogation from the principle of non-discrimination. The decision does not resolve the issue which will now have to be dealt with by the High Court.

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