# An Examination of Recent and Likely Future Developments in Employment Law in Northern Ireland

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***The views expressed in this paper are the responsibility of the author and should not be regarded as being endorsed by the Labour Relations Agency.***

## Introduction

Any review of employment law developments of the past twelve months inevitably concludes that we live in interesting times. The year 2003 was no exception. The past year or so has seen the introduction of much legislation, which will enable working parents to better reconcile their working and family lives. New rights on maternity, paternity, adoption and flexible working patterns have become a reality. The new discrimination agenda set by Europe has also come into effect. There are new laws prohibiting discrimination on grounds of a person's sexual orientation and new, stronger, definitions of indirect discrimination, harassment and victimisation (including post-employment discrimination) which are to apply across all the different discrimination jurisdictions. New developments on Equal Pay and Working Time were also implemented.

The apparently ever-increasing burden of cases on the tribunal system has led to the introduction of new measures to promote the resolution of disputes within the workplace. The new rules will mean major changes to the law on unfair dismissal. Basic statutory discipline and dismissal procedures will have to be incorporated into every contract of employment and the failure to observe these procedures will lead to a dismissal being deemed unfair. A statutory grievance procedure will be introduced, and an employee who fails to follow it will find his or her tribunal claim barred. Consultation on the precise way in which these new rules are to operate is expected to take place this spring, with full implementation later in the year. In the meantime the Courts and Tribunals remain as active as ever and some of the more important of the year's decisions are included at the end of this review.

If 2003 was a busy year, 2004 may be busier still. This review attempts to identify proposals, which seem likely to take effect in the near future, particularly in relation to the discrimination agenda and on the European front. Looking to the slightly longer term, a number of measures still at the consultation stage have been included along with a number of reports and recommendations relevant to those with an interest in employment law.

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## 1. Legislation and Related Matters In Force

### 1.1 Working time

On the 1st August 2003 new measures designed to protect an estimated 15,000 workers from working excessive hours came into force under the Working Time (Amendment No.2) Regulations (Northern Ireland) 2003 SR No. 330. These provisions are designed to bring a number of groups of workers previously excluded from the Working Time Directive within its ambit. The workers in question include:

- Non-mobile workers in the road, rail, air and sea transport sectors
- Mobile workers in the rail and non-HGV road transport sectors
- Offshore oil and gas workers
- Doctors in training (provisions to be phased in gradually)

The new rights include the 48-hour maximum working week, four weeks' paid annual holiday, rest breaks, health assessments for night workers and an 8-hour limit on night working.

Some workers are still not covered by Working Time regulation. Seafarers, sea fishermen, mobile workers on the inland waterways and some aviation and road transport workers will be given protection under separate specific regulations still to be announced.

### 1.2 Fixed term employees

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 (SR 2002 No. 298) came into force on 1st October 2002. The regulations implement the Framework Agreement on Fixed Term Work concluded by the European Social Partners in 1999 and annexed to the Directive on Fixed Term Work (1999/70/EC). This is the latest part of a package of European Union measures designed to increase employment protection for so-called atypical workers and to increase flexibility in the workplace. Still under discussion at European level is the proposal for an Agency Workers Directive. The member states have been unable to reach agreement on **when** protection should start – the alternatives which have been discussed include immediate protection, from the first day with the client company,

after six weeks or after three months. The proposed Directive has not yet been adopted.

The new fixed term employees regulations require that fixed-term employees must not be treated any less favourably than comparable permanent employees, unless this is objectively justified.

A fixed-term employee is defined as a person with a contract of employment which is due to end when a specified **date** is reached, a specified **event** does or does not happen or a specified **task** has been completed. This would include seasonal or casual employees, employees engaged to cover a maternity leave or sabbatical, employees on task contracts – setting up a database or running a training course. Only those who are "**employees**" are covered and agency workers are specifically excluded. The employee can compare their treatment to that of a comparable permanent employee who works for the same employer, in the same establishment, doing the same or broadly similar work. Comparisons with a hypothetical employee or a previous employee or an employee who works for an associated employer are not permitted by the regulations.

Under regulation 3, less favourable treatment will occur when a fixed-term employee does not get a benefit, whether contractual or not, which a comparable permanent employee receives, or is offered a benefit on less favourable terms. The regulation mentions in particular periods of service qualification and the opportunity to receive training or to secure a permanent position in the organisation. Pension rights are also included.

An employer may be able to argue that there is a reason why it is "objectively justifiable to treat fixed-term employees differently from comparable permanent staff" (reg.4). This will be the case where it con be shown that the treatment:

- Is to achieve a legitimate objective, for example a genuine business objective
- Is necessary to achieve that objective, and
- Is an appropriate way to achieve that objective

Sometimes the **cost** to the employer of offering a particular benefit to an employee may be disproportionate when compared to the benefit the employee would receive. An example of this might be where a fixed-term employee is on a contract for three

months and a comparator has a company car. The employer may decide not to offer the car if the cost of doing so is high and the need of the business for the employee to travel can be met in some other way. Employers need to consider whether less favourable treatment is objectively justified on a case by case basis.

Schedule 2 to the regulations repeals the provisions enabling an employer to persuade fixed-term employees to **waive** their right to a **redundancy payment**. The effect is that any waivers inserted into contracts agreed, renewed or extended after 1st October 2002 will not be valid and fixed term employees may qualify for the right to statutory redundancy pay. If the waiver clause is in a contract concluded prior to that date, then the waiver will still apply, provided the contract is not renewed or extended after that date.

Fixed-term employees on "task contracts" of two years or more will now have a right to statutory redundancy pay. Where a fixed–term contract, which is now defined to include a task contract, expires and is not renewed, the employee is dismissed (in law). Employees on task contracts will thus also enjoy (for the first time) the right not to be **unfairly dismissed**, the right to receive statutory minimum notice of termination of employment, rights in respect of guarantee payments and medical suspension and the right to receive a written statement of reasons for dismissal.

Under regulation 8 the use of **successive fixed-term contracts** is limited to **four years**, unless the use of further fixed-term contracts is justified on objective grounds. For the purposes of this part of the regulations, service accumulated after 10 July 2002 will count towards the four-year limit. There is no limit on the duration of the first fixed-term contract. If a fixed-term contract is renewed so that it extends beyond the four-year period it will be treated as a permanent contract, unless the use of a fixed-term contract can be objectively justified. An employee has the right to ask for a written statement confirming that their employment is permanent or setting out the reasons for the use of a fixed-term contract beyond the four-year period. The employer must provide this within 21 days.

Fixed-term employees have the right to receive information on permanent vacancies within their organisation.

A very useful summary of the legislation is available at www.dti.gov.uk/er/fixed-pl512a.htm

Note also that the rules on **part-time workers** have had to be changed to permit part-time workers who are claiming less favourable treatment to compare themselves with a full-time worker on either a permanent or a fixed–term contract. Part-time Workers (Prevention of Less Favourable Treatment) (Amendment) Regulations (Northern Ireland) 2002 (SR 2002 No. 286)

### 1.3 Young workers

From 6th April 2003 new measures apply to the working hours of young workers aged between the minimum school leaving age and their eighteenth birthday. The working time of such workers is limited to 40 hours in a week and 8 hours in any one day. Night working between 10pm and 6am or 11pm and 7am is prohibited.

The amending legislation can be accessed at:
http://www.northernireland-legislation.hmso.gov.uk/sr/sr20030119.htm

### 1.4 Working parents' rights

A series of new rights for working parents came into force on 6th April 2003 with much publicity. These include new rights to paid paternity and adoption leave and extended maternity rights. The Employment (Northern Ireland) Order 2002 was made at Privy Council last November and no fewer than 13 sets of regulations have since been made under the Order, setting out how the detailed arrangements will operate.

#### a. New rights for fathers and adoptive parents

Article 3 of the Order deals with adoption leave. Since 1999 adoptive parents have been entitled to unpaid parental leave, but these provisions go much further by enabling one adoptive parent to take adoption leave which mirrors closely the rights to maternity leave. Thus one adoptive parent will be entitled to six months paid and a further six months unpaid leave. Article 6 introduces "Statutory Adoption Pay" for a period of up to 26 weeks. This will be paid at the same rate and administered in the same way as SMP.

Article 5 of the Order deals with paternity leave. It enables detailed regulations for paternity leave to be made, including the right for a working father to take "a single period of leave of at least two weeks" within 8 weeks of the baby's birth, "for the

purpose of caring for the child or supporting the mother". In cases of premature birth a father may have a longer period in which to take paternity leave. The right to two weeks' leave applies also to an adoptive father (or mother in some circumstances). Under article 5 the father is entitled to receive "Statutory Paternity Pay" which is calculated on the same basis as SMP.

**b. Extended maternity rights**

As well as extending the coverage of certain maternity rights, the aim of the legislation is to make it easier for employers to administer and manage maternity leave, and to make it easier for employees to understand their rights and responsibilities. The provisions are included in article 14 of the Order. Key features are as follows:

- 26 weeks Ordinary Maternity Leave (paid)
- 26 weeks Additional Maternity Leave (unpaid)
- 26 week qualification period for pay and for (unpaid) leave
- Notification requirements to be harmonised on the one date – the fifteenth week before the expected week of childbirth
- 26 weeks to be used for the calculation of average earnings
- 4 weeks to be used for all notification requirements
- 4 weeks to be used for the sickness trigger

A considerable amount of information about these changes is available. The Department for Employment and Learning has three guides in its Employment Rights Booklets series:
No.16 Maternity Rights for Employers and Employees
No.34 Rights to Paternity Leave and Pay
No.35 Adoptive Parents – Rights to Leave and Pay

### 1.5 Right to apply for flexible working

Article 15 of the Employment (NI) Order 2002 introduced (from 6th April 2003) the new duty on employers to seriously consider requests for flexible working, where a request is made by an employee with 6 months continuous employment with the

employer, and whose child is below the age of 6. For the parents of disabled children, the cut-off age is 18. The main features of the provisions are as follows:

- The parent making the request must be responsible for the child and be making the application in order to enable them to care for the child
- Parents should make the request in writing, setting out the detail of the working pattern they want
- Accepted applications will mean a permanent change to the employee's terms and conditions
- There should be a meeting within 28 days to consider the request - parents would have a right to be accompanied at this meeting
- The employer should write within 14 days of the meeting, giving his decision - either agreeing to the request; setting out a compromise; or rejecting the request. Details of the appeal procedure should be provided
- An employee who is dissatisfied should appeal in writing within14 days of notification that their request has been refused
- A further meeting should be held within 14 days to discuss the appeal and the decision on appeal should be given to the employee in writing within 14 days
- The employer can put forward a "good business case" to justify the decision. Reasons would include:
    - the burden of additional costs
    - inability to meet customer demand
    - inability to organise work within available staffing
    - inability to recruit additional staff
    - detrimental impact on quality or performance
    - insufficiency of work during the periods the employee proposes to work
    - planned structural changes
    - other such grounds as may be specified by regulation

An aggrieved employee may make a complaint to an Industrial Tribunal or to the Labour Relations Agency for arbitration. The grounds for going to an Industrial Tribunal are narrow. They are restricted to:

- failure by the employer to observe the procedural requirements (failing to hold a meeting; failing to give notice to the employee of a decision in accordance with the regulations; or failing to provide an appeal)

- where the employer's decision to refuse the request was made on the basis of incorrect facts.

The tribunal has power to order the employer to reconsider an application, following the correct procedure; or to pay an award of compensation. The maximum award is set at eight weeks pay.

Where a request has been properly turned down no further request can be made within the next twelve months.

The Employment Rights Series Booklet No. 36 Flexible Working: The Right to Request and the Duty to Consider contains much valuable information.

### 1.6 Equal pay developments

The Equal Pay (Amendment) Regulations (Northern Ireland) 2003 which were published in draft form for consultation earlier this year are due to come into force in Northern Ireland on 2nd December 2003. These regulations will amend the Equal Pay (Northern Ireland) Act 1970 in a number of respects:

- Time Limits. Where there is a "stable employment relationship" between a woman and her employer the time limit for bringing a claim is to be six months from the date on which employment ended. This is intended to cover the situation where a woman is employed on a series of short term contracts in respect of the same employment. Time will begin to run from the end of the series of contracts rather than the end of each individual contract as at present.
- Back Pay. The period in respect of which back pay may be awarded is to be increased from two to six years, in line with the period applicable for breach of contract actions.
- Amendments to procedures in equal value cases. Under section 2A of the present Act, an industrial tribunal can strike out a complaint where it is satisfied that "there are no reasonable grounds for determining that the work of the woman and the man are of equal value". Draft regulation 5 removes this rule, allowing the parties to put in evidence of whether the jobs are equal in value without having to jump this preliminary hurdle. Secondly, the role of the independent expert is to be expanded. The tribunal will in future be able to ask the expert to prepare evidence on whether a Job Evaluation Scheme used by an employer was made

under a system which discriminates on the grounds of sex or is otherwise unsuitable to be relied upon.

Following the coming into force of Article 30 of the Employment (Northern Ireland) Order 2003 (which received the formal approval of the Privy Council on 13th November 2003) a statutory questionnaire procedure is to be introduced for equal pay cases. This will be similar to the questionnaire procedures used in other discrimination cases. The procedure has been in place in Great Britain since 6th April 2003. Regulations governing the new procedure in Northern Ireland are expected late this year or early next year. As in other cases the employer is likely to be given eight weeks to return the completed questionnaire; the response will be admissible in evidence; and failure to reply or evasive or equivocal replies may lead the tribunal to draw an adverse inference.

### 1.7 New compensation rates

Under the Employment Rights (Increase of Limits) Order (Northern Ireland) 2003 (SR 2003 No.241) certain limits on awards that can be made by the Industrial Tribunal have been raised. These are the annual increases which, since 1999, have been index linked. The cap on a week's pay, for the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal, has risen from £250 to £260. The maximum compensatory award has risen from £52,600 to £53,500. The amount of guarantee payment payable to an employee in respect of any one day has risen from £17.00 to £17.30. The new rates apply wherever the appropriate date falls after 11 May 2003.

The rates for National Minimum Wage rose from 1 October 2003, following the recommendations of the Low Pay Commission. For workers aged 22 and over the new rate is £4.50, up from £4.20. The development rate, which applies to workers aged 18-21 inclusive, is now £3.80, formerly £3.60. Further information can be found on the DTI national minimum wage website www.dti.gov.uk/er/nmw. The Inland Revenue, the enforcing authority for national minimum wage, also has a wealth of useful information at www.inlandrevenue.gov.uk/nmw/. The new measures will benefit some 50,000 – 60,000 workers in Northern Ireland. The increase in the adult rate is in the region of 7.1% and a further increase of 35 pence (7.8%) is due to take effect in October 2004.

### 1.8 Sexual Orientation Discrimination

The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 came into force in December 2003. The regulations implement the sexual orientation aspects of the EU Equal Treatment in Employment Framework Directive (EC2000/78) which established a framework for eliminating employment discrimination based on **religion, belief, disability, age** and **sexual orientation**. Harmonisation and consistency are clearly the aims. These regulations use concepts of **direct** discrimination, **indirect** discrimination, **victimisation** and **harassment**, which are to be common across the different discrimination jurisdictions and which differ somewhat from the older, more familiar definitions. The regulations cover discrimination in the field of employment and vocational training. “Employment” is given a wide definition, to cover those working under a contract of employment or a contract personally to execute any work or labour. Agency workers, office holders, the police, Crown servants and members of the armed forces are given the same protection. People seeking work or vocational training, seeking qualifications from a professional body and students or those applying for a place at a further or higher education establishment also come within the ambit of the new regulations. Where an employment relationship has come to an end, the individual is still protected, provided the action complained of **arises out of and is closely connected** to the employment, as where a former employer gives a discriminatory job reference.

“Sexual orientation” is defined as meaning “a sexual orientation towards persons of the same sex; persons of the opposite sex; or persons of the same sex and the opposite sex”. The law therefore protects people from discrimination whatever their sexual orientation. However it does not protect against discrimination relating to particular sexual practices or fetishes, nor can it be argued that “orientation” towards children brings a paedophile within the scope of the regulations.

The regulations reflect existing discrimination legislation by prohibiting discrimination in the arrangements the employer makes for determining who shall be employed; failing to offer someone employment; discriminating in relation to the terms of

employment; the opportunities for training, transfer or promotion; and dismissal or any other detriment. Discrimination can be direct, indirect or consist of victimisation.

**Direct discrimination**

This occurs if, on the ground of sexual orientation, A treats B less favourably than he treats other persons. An obvious example is where A refuses to appoint B because B is gay. The wording used is wide enough to cover **perceived** as well as **actual** sexual orientation. Thus if A refused to appoint B because he thought B was a lesbian, this would amount to discrimination whether or not B was in fact a lesbian. B would not have to prove her sexual orientation, nor even disclose it to the tribunal. An employer who claims not to have a problem with homosexuality per se but who frowns on **sexual activities** of practising homosexuals (such as kissing) may be guilty of direct discrimination if he turns a blind eye to the sexual habits of heterosexual employees. There can be no justification in law for direct discrimination unless a genuine occupational requirement applies.

**Genuine occupational requirement (GOR)**

This has proved one of the more controversial aspects of the regulations. Where a GOR exists the employer may dismiss or refuse to employ, promote, transfer or train the individual if he or she does not meet the requirement as to sexual orientation. In the GB regulations there are two categories of GOR, one of which is available to any employer, and another which applies specifically to religious organisations. In Northern Ireland, only the first of these, the "general GOR" is to apply, and religious organisations will be able to seek to avail of it like any other employer.

The general GOR can be applied by any employer if the nature of the employment or the context in which it is carried out means that being of a particular sexual orientation is a "**genuine and determining occupational requi**rement" and it is "**proportionate**" to apply that requirement in the particular case. It is difficult to think of many examples but it has been suggested that it might apply to jobs which involve counselling or other support services related to sexual matters. It seems that the GOR is limited. The employer must be able to show that of a particular sexual orientation is **essential**, not just one of a number of desirable factors. Where only a small part of the overall duties of the job requires an employee to be of a particular sexual orientation it might not be proportionate to apply the requirement if an

employer might reasonably redistribute the work so that existing employees of the requisite sexual orientation perform those duties.

The GB regulations (in contrast to those in NI) contain a more specific GOR applicable only to employment which is “for purposes of an **organised religion**”. The employer may apply a requirement as to sexual orientation “to comply with the doctrines of the religion” or “because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers".

The NUT has expressed concern that this regulation will give faith schools a wide ability to refuse to employ gay and lesbian teachers and indeed other staff. The government’s view is that the GOR would apply only to ministers of religion plus a small number of posts outside the clergy. The NUT has indicated its intention to seek a judicial review of the corresponding regulation in GB on the grounds that it is wider than the Directive allows and therefore does not give adequate protection to employees. The GOR relating to religious organisations is not explicitly restricted to cases where the requirement is genuine, determining or proportionate or to cases where a legitimate objective is being pursued, as required by the Directive.

**Indirect Discrimination**

The definition of indirect discrimination in these regulations differs from the definitions used in older discrimination legislation. The new wording follows closely that used in the Directive and reflects a **more flexible definition** of indirect discrimination, which relies less heavily on statistical evidence. The new definition can be viewed as an attempt to widen the scope of indirect discrimination and make it easier to establish. Indirect discrimination will occur where A applies to B a “**provision, criterion or practice** which A applies or would apply equally to persons of a different sexual orientation to B, but which puts or would put persons of the same sexual orientation as B at a **particular disadvantage** when compared with other persons; which puts B at that disadvantage; and which A cannot show to be a **proportionate** means of achieving a legitimate aim”.

An example would be where a brewery advertised for a couple to run a pub and expressed a preference that the couple be married. Although not explicitly discriminatory this would put gay couples at a disadvantage since they cannot marry.

The brewery would have to show that the requirement pursued a legitimate aim and that it was proportionate to apply it in this instance.

**Harassment**

In the UK harassment has previously been classified as a type of less favourable treatment amounting to direct discrimination rather than being dealt with specifically in discrimination legislation. Under the requirements of the Directive it is now necessary to classify harassment as a separate cause of action. Under the Directive harassment occurs where there is unwanted conduct, which has the purpose or effect of violating the victim's dignity **and** of creating a hostile, degrading, humiliating or offensive environment. Under the new regulations the harasser's conduct will only be regarded as having the effect of violating the victim's dignity or creating a hostile environment where it should **reasonably** be considered as having that effect. This introduces an objective element to the test, thus closing the door to a claim by an oversensitive employee against an unintentional harasser.

**Victimisation**

As with existing legislation the government has introduced measures designed to ensure that individuals are not discouraged from making complaints under the Regulations out of fear of retaliation from the employer. The employee must not be treated less favourably on grounds that s/he has brought proceedings under the Regulations; has given evidence in connection with a case brought under the Regulations; or has alleged that the employer has done an act which would be unlawful under the regulations.

**Exceptions**

There are a number of specific areas where the sexual orientation rules are entirely excluded. These include actions done for the purpose of safeguarding national security; limited positive action training programmes; and most controversially, anything which prevents or restricts access to a benefit by reference to marital status. This means that survivor benefits in a pension scheme, which are only available to the widow or widower of a deceased employee and not to an unmarried partner, whether same sex or opposite sex, cannot be challenged. This is justified by the government on the grounds that "distinctions between the rights of married and unmarried people are outside the scope of Community competence, because

marriage is a family law concept which is regulated by the laws of the Member States". In October 2003the TUC announced that it is to co-ordinate a union-backed challenge to this part of the regulations, following objections from the NUT, Amicus – MSF and UNISON.

The rules on vicarious liability for discrimination, enforcement and burden of proof are similar to those in sex discrimination cases. There is a questionnaire procedure set out in the regulations.

### 1.9 Other discrimination developments

New regulations on race and on religion/belief have recently come into force in Northern Ireland in order to implement the government's obligations under the EU Race Directive and the Framework Employment Directive (in so far as it relates to religion/belief). These changes are contained in the:

- Race Relations (Amendment) Regulations (Northern Ireland) 2003, which came into force on 19th July 2003
- Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003, which came into force on 2nd December 2003

In the course of the consultation process on these changes the government stated its objective to make the equality legislation more coherent, as far as possible, and that it would use "the same wording for all the main concepts: direct discrimination, indirect discrimination, harassment and victimisation" (including post employment victimisation). By and large the new regulations reflect this commitment and use similar definitions to those contained in the new regulations on sexual orientation, studied above. One difficulty, however, is that the definition of race in the new race regulations is a narrower one, covering only race, national or ethnic origin, but not nationality or colour.

The new regulations also implement changes to the burden of proof in discrimination cases. The position will now be that, once a prima facie case has been established, the onus shifts to the employer to prove that he or she did not commit the act of discrimination. If this onus is not discharged, a tribunal shall (ie must) find that the employer unlawfully discriminated.

Changes to the definition of indirect discrimination and to the burden of proof in sex discrimination cases were implemented some time ago, by amending the Sex Discrimination Order. Further amendments to the Order are expected soon, to bring it into line with the other discrimination legislation. Together, all these changes to discrimination law will go a considerable way towards harmonisation and simplification of the law, in preparation for the Single Equality Bill, discussed below.

### 1.10 Internal Disciplinary and Grievance Procedures

Statistics from the Office of the Industrial Tribunal and the Fair Employment Tribunal demonstrate that growing numbers of people are having recourse to litigation as a means of resolving disputes between employee and employer. Annual applications to the Industrial Tribunal increased by over 60% in the period 1991 – 2001. The rate of complaint in Northern Ireland is much higher than in the rest of the United Kingdom. The heavy caseload has led to serious delays in the tribunal system and the appointment of extra staff, a strengthening of the management structures and revision of the Tribunal Rules of Procedure are all underway.

The Department for Employment and Learning, following an extensive consultation process, has introduced new measures, which would encourage employees and employers to resolve disputes at the earliest opportunity and within the workplace wherever possible. Recourse to the tribunal system should be seen as a last resort. The changes are contained in the Employment (Northern Ireland) Order 2003, although they will not take effect until public consultation has taken place. The government's intention is that the Order should be fully in force by 1st October 2004.

The proposed changes include:

- Minimum statutory discipline and grievance procedures
- No exemption for small firms
- Failure by an employer to comply with procedures will lead to a finding of unfair dismissal and may also lead to increased compensation
- Failure by an employee to comply may lead to reduction in compensation
- Failure by an employee to submit a grievance in writing may bar a tribunal from hearing a claim based on that grievance
- Measures to improve compliance with the employer's duty to provide employees with a written statement of their terms and conditions of employment

- A fixed period for conciliation by the LRA
- Mandatory use of IT1 and IT3
- Fast track procedure for simple cases
- Changes to the costs regime of the tribunals

## 2. Proposals likely to take effect in the near future

### 2.1 Transgender developments

The government has introduced a draft Gender Recognition Bill on foot of a number of cases taken to the European Court of Human Rights challenging the UK's failure to properly recognise the rights of transsexuals. In particular, in the case of **Goodwin v United Kingdom** [2002] IRLR 103 (ECHR) the Court held that the lack of recognition in the UK of a transsexual's new gender identity for legal purposes such as the issue of a birth certificate and the right to marry is a breach of both Article 8 of the Convention (right to respect for private life) and Article 12 (right to marry).

On 11th July 2003 the draft Gender Recognition Bill was published by the Government. The purpose of the Bill is to provide transsexual people with legal recognition of their acquired gender, subject to some specified exceptions. Under the provisions of the draft Bill legal recognition will follow from the issue of a Gender Recognition Certificate by a Gender Recognition Panel. Before issuing a certificate the panel must be satisfied that the applicant:

- Has or had gender dysphoria
- Has lived in the acquired gender throughout the preceding two years
- Intends to continue to live in the acquired gender until death

In practical terms it is intended that on issue of a certificate the person will be entitled to a new birth certificate reflecting the acquired gender and will be able to marry someone of the opposite gender to his or her acquired gender. In this way he or she will have access to employment benefits dependent upon marriage, such as pension rights for a surviving spouse or travel concessions for married partners.

### 2.2 Single Equality Bill

In May 2001 a Draft Single Equality Bill was prepared by the Office of the First Minister and Deputy First Minister (OFMDFM) and a consultation exercise commenced. The target date for the new legislation was originally July 2003, but this proved over-optimistic and was abandoned. However the Government was required

to implement the European Race Directive by July 2003 and provisions of the Equality Directive relating to sexual orientation and religion by December 2003. OFMDFM therefore proposed the use of affirmative resolution regulations made under section 2(2) of the European Communities Act 1972 to implement the Directives by the due dates. New Race Relations (Amendment) Regulations (Northern Ireland) 2003 were duly brought into force on 19th July 2003. Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 are due to come into force on 1st December 2003. On the same date the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 will also come into force. A consultation exercise in relation to age discrimination is also under way though no legislation is expected to be in force until December 2006. New disability legislation is planned for 2004. As we have seen, the government has repeated its commitment to harmonisation of the legislation.

OFMDFM also gave an undertaking to produce another draft Single Equality Bill during 2004. It now seems that a Green Paper will be issued in January 2004 which will be the subject of extensive consultation. A draft Bill will be presented to the Assembly perhaps by autumn 2004 for enactment in early 2006.

A number of useful publications defining the position of the Equality Commission and explaining the current issues for debate are available on the Commission's website at www.equalityni.org. These include:

- The Position Paper on the Single Equality Bill (October 2001, 58pp)
- Single Equality Bill – Further Considerations (February 2002, 13pp)
- The Equality Legislative Reform: Implementation of European Union Directives (July 2002, 14pp.)
- Update on the Single Equality Act (Autumn 2002, 43pp)
- Responses to OFMDFM Consultation on the Implementation of the EU Equality Obligations in NI (April 2003, 40pp)
- Legislative Reform: Commission Powers/Judicial Process (August 2003 10pp)
- Response to the DTI age consultation 2003 "Equality and Diversity: Age Matters" (October 2003)

### 2.3 Information and Consultation Directive

In July the Department of Trade and Industry published a consultation document "High Performance Workplaces: Informing and consulting employees" containing draft regulations to implement the EU Information and Consultation Directive (2002/14/EC)

The Directive was adopted by the Council in February 2002. Member States have until **23 March 2005** to introduce implementing legislation. Employees will be given new rights to receive information and be consulted. Previously such rights were limited to consultation about collective redundancies, transfers of undertakings and health and safety, and, in large multi-national companies, consultation through European Works Councils. The new Directive gives employees rights to be informed about the business's economic situation, informed and consulted about employment prospects and informed and consulted about situations likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers. Application of the Directive can initially be restricted to businesses with 150 or more employees. After two years (ie 2007) it will apply also to businesses with 100 or more employees, and after a further year it will apply to businesses with 50 or more employees. The Directive has no application to firms with fewer than 50 employees.

Information and consultation must take place at an appropriate time and at the relevant level of management. Normally it will be done via employee representatives, defined according to national law and practice. The representatives, having received the appropriate information, may meet the employer, present their opinion and receive a reasoned response.

Under the DTI's new proposals, the obligation to set up information and consultation arrangements will only arise if a request is made by at least 10% of the workforce. Employers will only be able to escape the new requirements if they have in place existing arrangements for information and consultation and can show that these have employee approval. Prudent employers might therefore want to consider setting up such arrangements before the new law comes into force. Where an existing scheme is up and running the Regulations still allow for the employees to press for a new arrangement. However, to do so they will need the endorsement of at least 40% of the affected workforce in a ballot.

The draft regulations provide that where no agreement can be reached following an employees' request, a default model arrangement should apply. This prescribes that employers must inform the worker representatives about the "recent and probable development of the undertaking's activities and economic situation". The duty to inform and consult also extends to:

- The situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the organisation
- Decisions likely to lead to substantial changes in work organisation or in contractual relations, including transfers of undertakings and collective redundancies.

This would seem to include even redundancies below the current 20-employee threshold for collective consultation obligations to arise. The issue of the overlap with existing statutory obligations to inform and consult does not appear to have been addressed. Employers will want to avoid two parallel consultations with two separate groups before transfers or mass redundancies. The answer would seem to be to ensure that any structure set up will satisfy the requirements of all the legislation. The position of employers with respect to recognised trade unions is no clearer. Views are invited in the consultation paper.

An employer does not have to disclose information where the information is such that "according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to, the undertaking". Any person to whom information is supplied in confidence has a legal duty under the regulations not to disclose it, even to the employees whom they are representing. The proposed sanction on employers who breach the regulations is a fine of up to £75,000.

These new laws have the potential to radically change the face of employment relations in the United Kingdom and to bring us closer to the European model of employment regulation.

### 2.4 TUPE

It is now over two decades since the original Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) were introduced to give effect to the

Acquired Rights Directive (77/187/EC). The purpose of the legislation was to protect employees' rights in the event of the transfer of a business to a new owner. Difficulties have arisen, largely in the context of competitive tendering. TUPE potentially applies where part of an undertaking (such as its cleaning or catering services) is contracted out to an external service provider and on subsequent occasions, when one contractor is replaced by another. Decisions of both the European Court of Justice and the domestic courts have been plagued with uncertainties and fine distinctions.

The Directive was revised in 1998 to give the Member States the option to introduce certain flexibilities into their national laws on transfers. A preliminary consultation exercise was undertaken by the DTI in autumn 2001 but little has happened since then. The delay appears to have arisen because of the government's uncertainty about extending TUPE to **pensions**. Occupational pension rights are currently excluded from the terms and conditions that have to be preserved on a TUPE transfer. This has often undermined the protection afforded by TUPE where pensions have represented an important part of the employees' remuneration package.

On 14 February 2003 the Secretary of State for Trade and Industry finally confirmed the DTI's timetable for reform of TUPE. She said that draft revised regulations would be published this October for further consultation with a view to coming into force in Spring 2004. Pension rights however are to be covered "separately and to a longer time-scale" as part of the government's general review of pensions. The new measures will include clarification of when the transfer of labour-intensive operations such as cleaning, catering and security fall within the scope of the legislation. Another reform will oblige the outgoing employer to **inform** the incoming one of the **employment rights of staff**. There is also clarification on the circumstances in which employers can lawfully make transfer-related dismissals or changes in terms and conditions of employment. Finally the way in which TUPE operates when an **insolvent** undertaking is sold is to be improved, with a view to promoting a "rescue culture" in which businesses and jobs, which would otherwise be lost, are preserved. In the case of a genuinely insolvent business (which includes wound up businesses but not those in administrative receivership) the new employer (the transferee) will be able to agree **changes to terms and conditions** of employment with employees without falling foul of TUPE. In addition, liability for **arrears of wages** will not transfer over, but will be met by the state, subject to the statutory weekly maximum pay.

These initiatives have the potential to make life significantly easier for parties caught up in TUPE transfer situations while also enhancing employee protection in the process.

## 3. Consultation Papers; Codes of Practice; Reports; Recommendations

### 3.1 Data protection

At the time of writing the first three parts (of a total of four parts) of the Employment Practices Data Protection Code of Practice (made under the Data Protection Act 1998) have been released.

Part 1 deals with Recruitment and Selection and was published on 14th March 2002 by the Data Protection Commissioner. This part of the Code is concerned with data which an employer might collect and keep on any individual who works for, used to work for or applied for a job with him or her. Under the 1998 Act, such a person has a right to formally request access to his or her records. A fee of up to £10 is chargeable and an employer must provide the information within no more than 40 calendar days after receipt of the fee. The Code gives examples of the personal data likely to be covered by the Act, and lays down a number of benchmarks for job applications. Information should not be sought from applicants unless it can be justified as being necessary to enable the recruitment decision to be made, or for a related purpose such as equal opportunities monitoring

Part 2 of the Code was published in September 2002 and explains the procedures for storing personal data about employees and job applicants and the rights of employees wishing to access these records. This part of the Code defines eight Data Protection Principles and gives detailed guidance on good practice in relation to employment records.

**Part 3** of the Code was finally issued in **June of this year** after considerable delay. It deals with monitoring employees at work. This would include, for example, monitoring of e-mails, use of the internet, monitoring telephone calls at work or use of vehicles supplied by the employer. The Data Protection Act provides that the adverse impact of the monitoring of employees must be justified by the benefits. This part of the new Code suggests that this is best done by carrying out an impact assessment. This assessment must consider:

- The purposes behind the monitoring
- Any likely adverse impact on the employees or others – such as customers

- Alternatives to monitoring, or to the type of monitoring suggested
- The obligations that will arise; and
- Whether the monitoring is justified

In considering any likely adverse impact the employer must take into account:

- The likely intrusion into employees' private lives
- The extent to which the employee will be aware of the monitoring
- Who will see the information, which may be sensitive
- The impact on the employment relationship
- The impact on other professionals – for example solicitors – who may have confidentiality issues
- How the monitoring will be perceived – will it be seen as oppressive or demeaning?

This part of the Code also makes good practice recommendations to ensure compliance with the 1998 Act.

Part 4 of the Code will deal with medical information.

### 3.2 Age discrimination

The EU Equal Treatment Framework Directive (EC 2000/78) places all Member states under an obligation to introduce legislation outlawing age discrimination. On 2nd July 2003 the government outlined its proposals for implementing the Directive by 2006 in a consultation paper for GB entitled "Age Matters". In Northern Ireland, OFMDFM issued a Consultation Paper entitled "Prohibiting Age Discrimination in Employment and Training on 6th October, inviting responses by 23rd January 2004. The proposed new rules will involve a fundamental change to the way in which age is currently used as a criterion in employment related decisions. They will protect workers **of all ages** from discrimination based on age. The government plans to introduce draft regulations in Autumn 2004 so that businesses are given a two-year period to undertake a fundamental review of all practices and procedures to ensure full compliance by December 2006.

It is intended that the new legislation on age discrimination will apply to most aspects of employment and vocational training, as with other forms of discrimination legislation. Where a decision is made on the basis of an individual's actual or

perceived age this will amount to direct discrimination. In Great Britain it is proposed that there should be a limited **defence to direct age discrimination** in exceptional circumstances. An employer in GB would have to show firstly that the age discrimination fell within a list of specific aims set out in the regulations; and secondly, that it was both appropriate and necessary in the circumstances. The list of specific aims includes:

- Health, welfare and safety
- Facilitation of employment planning such as succession planning
- Particular training requirements for the post in question
- Encouraging and rewarding loyalty
- The need for a reasonable period of employment before retirement (an employer who has exceptionally justified a mandatory retirement age of 65 might not want to appoint a new employee who is just a few months short of 65 if the need for and cost of training would outweigh any productivity advantage to the employer).
- Financial planning

In Northern Ireland, the decision on whether to permit objective justification of direct discrimination on grounds of age has not yet been made. Views are specifically sought on this question, in the light of the statutory equality duty in section 75 of the Northern Ireland Act 1998 to have due regard to the need to promote equality of opportunity with respect to age. A decision will be taken following the consultation.

Where a blanket policy or practice disadvantages a certain category of person because of his or her age, even if this effect is inadvertent, it is proposed that this should amount to **indirect** age discrimination. The government is proposing a simple defence of justification of indirect age discrimination. It would be possible to justify a policy, which indirectly discriminates on grounds of age, without reference to the list of specific aims noted above. All that is needed are good objective reasons for the difference in treatment.

It is proposed that **mandatory retirement ages** will amount to unlawful direct discrimination. As these are extremely common throughout the UK this is one of the key issues for the consultation process. The consultation paper contemplates the introduction of a statutory default retirement age of 70 after which employees could be forced to retire without employers having to justify their decision. Employers would

however be free to continue to employ people over the age of 70 or to choose to set a retirement age higher than 70.

Article 6(2) of the Directive specifically allows employers to continue to set age requirements for admission to occupational **pension** schemes and for entitlement to retirement benefits and to continue to use age criteria in actuarial calculations – provided this does not give rise to sex discrimination. The government proposes to take full advantage of this exemption.

The statutory upper age limit for claiming unfair dismissal will no longer apply. However, depending upon the decision about justification of direct discrimination, employers may be able to dismiss as of right on the ground of retirement anyone who has reached the employer's mandatory retirement age – if he has managed to justify one – or the statutory default retirement age. The basic award for unfair dismissal will no longer be calculated by reference to an employee's age but will be **one week's** pay for each year of service up to the normal maximum of 20 years.

For redundancy purposes, employment below the age of 18 will no longer be discounted when calculating redundancy pay. Age will cease to be a factor in redundancy pay calculations and the same formula as for the basic award will apply. Views are sought on whether an upper age limit for entitlement to redundancy pay should be retained or amended.

Decisions in relation to recruitment, selection and promotion based on age will be unlawful. Pay and non-pay benefits based on age will amount to direct age discrimination. However benefits based on length of service or seniority may be allowed where they can be justified by the employer. One of the specific aims – encouraging or rewarding loyalty – seems to have been designed with this purpose in mind.

A Genuine Occupational Requirement defence will be available in very rare cases where age can be shown to be a genuine requirement of the job. The example of acting is given.

The legislation will also incorporate a right not to be **harassed** or **victimised**.
In line with other recent changes to discrimination law the government is proposing a right to bring a claim for age discrimination against a former employer or training

institution where a close connection still exists. This will clearly impact upon the practice of giving references.

A number of documents relevant to this consultation can be downloaded at: www.ofmdfmni.gov.uk/equality

### 3.3 Tribunal reform

The 25th September saw the introduction of a consultation paper from the department for Employment and Learning which proposes changes to the Rules of Procedure of the Industrial Tribunal and the Fair Employment Tribunal. The consultation document deals only with what is described as Phase 1 of the tribunal reforms. This aims to bring the rules in Northern Ireland into line with revised rules brought into force in England and Wales in 2001. The closing date for responses was 21st November 2003 and new rules could be made as early as December 2003. A separate consultation process will be undertaken for Phase 2 before the Rules are amended again in late 2004.

The changes aim to reduce the number of unmeritorious cases entering the tribunal system, to reduce the costs to business and the public purse and generally to improve the handling of cases. The changes for Phase 1 are grouped under three headings:

Weak Cases

1. Power for tribunals to strike out weak cases
2. Increase in pre-hearing review deposit from £150 to £500
3. Rise in ceiling on costs from £500 to £10,000
4. Power for a tribunal to award costs against parties when their conduct warrants it
5. Requirement for a tribunal in certain circumstances to consider the award of costs against a party

Case Management

6. Duty on parties to assist the tribunal n its task of processing cases justly, fairly and expeditiously
7. Provision for tribunals to give practice directions (including directions as to witness statements) as appropriate

8. Introduction of penalties such as costs or striking out etc. where parties have failed to comply with the directions of the tribunal

National Security

9. Provision permitting Crown employees (including members of the security and intelligence agencies) to bring claims to tribunals in a similar manner to other employees

In relation to Phase 2, the new Employment (Northern Ireland) Order 2003 contains provision for a number of further reforms to be applied in the tribunal rules. These will include:

- The introduction of a fixed period during which the parties can avail of the conciliation service provided by the Labour Relations Agency
- An obligation on the parties to use the forms prescribed by the Department
- The power for tribunals to authorise the determination of proceedings without a hearing of the case in certain limited circumstances
- The power for the President to issue practice directions to chairmen as to how procedures are to be applied
- Clarification of tribunals' power to strike out originating applications at the pre-hearing stage
- Ability for industrial tribunals to award costs against a representative and costs for preparation time

### 3.4 Fat cat pay

On 3rd June 2003 the DTI published a Consultation Paper on the subject of company directors' remuneration and severance pay, entitled "Rewards For Failure". The document sought views (by 30th September) on whether – and if so what - further measures are needed to ensure that compensation reflects performance when directors' contracts are terminated. The possibilities for both legislative control and voluntary "best practice" measures are explored.

On the legislative front, two main options are considered:

- A new law allowing company boards to overrule a payment to a director, which was not "fair and reasonable" irrespective of the contractual terms. As the

consultation document points out, this would raise “significant legal and practical difficulties”

- Implementing the Company Law Review recommendation to limit contracts to one year, or three years on first appointment, with a ban on clauses which offer compensation which is greater than the remuneration which would have been earned over these periods.

Alternatively, legislation may not be considered necessary and a voluntary approach may suffice. It is suggested that voluntary industry codes of practice might make provision for:

- Cutting notice or contract periods
- Capping severance pay to six month’s salary where a director is dismissed
- Phased rather than lump sum severance payments, which would be paid monthly and cease when the director obtains a new post. While this could undoubtedly reduce the total cost to shareholders it might simply act as a disincentive to look for employment.

The CIPD has stated that best practice is the most effective way of dealing with this issue while CBI recommendations include full disclosure of contractual terms and conditions; one year rolling contracts; part-payment in shares and regular contractual reviews. They suggest that the different elements of severance pay – basic pay, earned bonuses and pensions – need to be separated out clearly. The TUC has sent an appeal to the European Commission asking it to establish a European level legal framework on executive pay.

### 3.5 Balancing work and family life

The government remains committed to helping parents balance their work and family responsibilities. As discussed earlier, a whole raft of new “family friendly” measures came into force on 6th April 2003. A **further consultation exercise** to explore the next steps was launched with the publication of the consultation paper “Balancing Work and Family Life: Enhancing Choice and Support for Parents” in January. This document acknowledges that the new measures will take some time to “bed down” and also confirms the commitment to review the duty to consider requests for flexible working in three years time. It puts forward a number of proposals:

- How to widen access to home childcare

- Improving the tax and National Insurance exemptions on employer-supported childcare to offer a better incentive to employers
- How well the system of supporting childcare costs through tax credits is working
- The case for counting unpaid maternity leave as being in work for the purposes of tax credits
- The case for allowing a mother on paid maternity leave to claim support with childcare costs in order to settle a child into childcare prior to returning to work
- Allowing parents to use their full **parental leave as one block** at the end of maternity, paternity or adoption leave
- Whether to allow **fathers time off to attend ante-natal care**
- Whether to extend the period of paid **paternity leave** and/or to introduce unpaid paternity leave
- The case for extending paid paternity leave in the case of multiple births and disabled children
- The impact of the new maternity, paternity and adoption leave provisions

The consultation closed on 31st August 2003. The paper can be found at: www.dti.gov.uk/er/individual/balancing.pdf

### 3.6 Employer supported childcare

A consultation document on employer supported childcare was published by the Treasury a month later, in February 2003. It explains the government's thinking on how the existing tax and National Insurance exemptions could be reformed to better support the government's childcare strategy. In particular it considers how this could be done to provide a better-targeted incentive for employers to support the provision of childcare for their employees. Existing tax and National Insurance exemptions are reviewed. Childcare costs are already tax-deductible for employers, who are also exempt from Class 1A NICs for most forms of childcare that they contract to pay. Employees are exempt from a tax charge on the benefit of receiving a place in a workplace nursery.

The Government believes that it is time to review the tax and NICs exemptions to ensure that these continue to support its childcare aims. The proposals would widen the current **workplace nurseries tax exemption**, simplifying the requirements that employers need to meet to qualify for an exemption and offering a better incentive to

support a wider range of good quality childcare provision. The requirement for the employer to have management responsibility of the childcare facility would be removed.

The consultation period ended on 31st May 2003. The document is available at www.inlandrevenue.gov.uk/consult_new/index.htm

### 3.7 Teleworking

The DTI published a new guide to teleworking at the end of August. It aims to provide assistance to parties seeking to set up or regulate more closely a telework arrangement. The Guide has come about as a result of collaboration between the social partners including the CBI and TUC. It defines teleworking as:

> "a form of organising and/or performing work using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis".

It provides useful guidance on a range of measures, including **health and safety** issues relevant to teleworking. It draws the attention of employers to their duties under the Display Screen Regulations, which require employers to assess and reduce the risks of teleworking; plan breaks or changes in activity; provide eye tests and health and safety information and training. Attention is also drawn to a new taxation measure introduced in the 2003 budget, which allows employers to meet some or all of the incidental household expenses incurred by employees who work at home, without giving rise to a tax charge.

The Guide is available at: http://www.dti.gov.uk/er/individual/telework.pdf

### 3.8 Industrial Court

The second annual report of the Industrial Court was published on 1st July 2003. The report covers the period 1st April 2002 to 31st March 2003. During this period eleven applications for statutory recognition were made by trade unions. Three of these were subsequently withdrawn while two were not accepted by the Court. Of the four cases in which a determination was made, recognition was granted in three and refused in one. The statutory recognition procedures have proved complex and a number of difficult situations have arisen before the Court.

In IC-11/2002 **Amicus/AEEU and Desmond Motors Limited**, the Court ordered a postal ballot to be introduced. The Court encountered significant difficulties in the case which would have been alleviated if the parties had established a written Access Agreement. During the balloting period the Union made a number of claims concerning the conduct of the ballot. The Panel ordered that the ballot be suspended and a hearing was convened to hear submissions on whether the employer had failed to fulfil any of the three duties concerning ballots as specified in the legislation. The Court concluded that the employer had not failed in any of the three duties and the ballot re-commenced. The Union lost the ballot by twelve votes to thirteen.

In IC-13/2002 **Amicus/AEEU and Ballyrobert Cars Ltd** the Union submitted an application in respect of a bargaining unit covering two sites. In the Company's response to the application it came to the attention of the Court that Ballyrobert Cars Ltd might not be a legal entity and upon further investigation by the Court this indeed turned out to be the case. The Court sought information from the Company to ascertain the position and upon receipt of Articles of Association of both separate companies and clarification of the relationship between them, the Court decided that the application could not be accepted. The Union then sought recognition for the two sites in two further separate applications. In both cases the application was granted.

The Annual Report of the Industrial Court is available at:
http://www.delni.gov.uk/docs/pdf/IndustrialCourt0203.pdf

### 3.9 Pensions

A number of recent reports deal with different aspects of funding retirement and with retirement and pensions policy. These include the Green Paper, "Simplicity, Security and Choice: Working and Saving for Retirement" Cm 5677 and an accompanying technical paper, "Simplifying the Taxation of Pensions: Increasing Choice and Flexibility for All" HM Treasury and Inland Revenue, December 2002, available at http://www.dwp.gov.uk

Increasing longevity and declining birth rates mean that the number of people over 50 now exceeds the number of under 50-year-olds. This age shift, together with government fiscal policy in so far as pension funds are concerned, and increased

regulation and complexity associated with final salary schemes in particular, has caused a progressive change in employer approaches to occupational pension provision. Employers have defected from a commitment to pension provision and this has accelerated as a result of changed tax and accounting requirements and falling stock markets. A number of financial scandals have led to loss of confidence in the financial services industry and a decline in savings by individuals. The result is a "savings gap" of some £27 billion, and widespread media reporting that UK pensions are in crisis.

Increases in longevity mean that the average time spent in retirement has increased significantly. Despite this, older workers are leaving the labour market early, so that one third of people aged 50 to state pension age are economically inactive. Only 52% of those over 55 are in work. Only 8% of men and 9% of women work beyond state pension age. Changes already announced by the government include:

- Increasing state pension age for women so that between 2010 and 2020 the age for eligibility will rise progressively from 60 to 65
- Significantly reducing the benefits capable of being accrued under the supplementary State Earnings-Related Pensions Scheme (SERPS) before finally closing the scheme and replacing it with a new Second State Pension
- New protective regulation for employees in occupational schemes in the form of a fallback compensation scheme

The Green Paper sets out proposals for reforming the regulatory structure governing pensions so as to encourage a partnership with employers, an extension of working lives and savings for old age. It details the government's approach to pension provision as being that of "fiscal sustainability" through the provision of a flat-rate pension for all pensioners and targeted top-up state support for poorer pensioners through the new Pension Credit. For those of working age the new Second State Pension provides low and moderate earners and groups of non-workers with the opportunity to earn a top-up pension. The Stakeholder pension provides the opportunity for those without an employer sponsored pension, the self-employed and non-earners to boost their flat-rate State Pension.

The green paper identifies that this approach of targeted state support relies on a partnership with employers and the financial services industry. In proposing reforms to occupational pensions the government is guided by the **need to encourage and**

**support employers** in providing and contributing to good quality pensions by minimising administrative and financial burdens. The aim is to encourage people to save more by introducing measures to increase confidence and the Green Paper proposes;

- The creation of a new independent and proactive **regulator**, strengthening protection for members in the event of insolvency and fraud;
- Extending **TUPE** protection to pensions in private sector transfers;
- **Consultation** requirements before making changes to pension schemes;
- The provision of **information** via regular reports and projections.

The Green Paper identifies the core problem as working lives ending too soon. It sees the primary challenge as ensuring that people keep working until at least state pension age and if possible beyond. It recommends the following:

- Introducing new initiatives to help older people re-enter the labour market
- Reducing financial incentives to remain outside the labour market, by means such as increasing the age at which Pension Credit becomes available
- Implementing further reforms to Incapacity Benefit to reduce dependence by the 50 plus age group
- Increasing incentives to work beyond state pension age and to defer taking state pension
- Increasing the minimum age from which an immediate pension can be taken in an occupational tax-approved pension scheme from 50 to 55 years
- Amending the rules of all public service pension schemes for new members to make an unreduced pension available from 65 rather than 60
- To amend the tax rules which forbid employees drawing down on their occupational pension whilst continuing to work for the same employer.

In the light of these proposals it seems strange that the government has decided to delay implementation of the new rules on age discrimination until the last possible date – December 2006. It is clear from the research that the high inactivity rate of older workers is **employer-led** rather than a matter of employee choice. A range of voluntary “best practice” initiatives, such as the Age Positive campaign, has been shown to be largely ineffective. Delaying implementation of the Directive and continuing to rely on a succession of voluntary initiatives and financial incentives aimed at workers rather than employers will neither address the problem of

workplace discrimination against older people nor increase participation rates for older workers.

### 3.10 Working Time Consultation Paper

The European Commission announced on 12 January 2004 that it is to undertake a consultation exercise, reviewing the operation of the Working Time Directive and considering how it should be revised in future. The four main areas for consultation are:

- The length of reference periods used to calculate working time
- The definition of working time
- The application of the opt-out on the limit on the working week as operated principally by the UK (but also by some other countries in respect of certain sectors)
- How to use the Directive not only for the protection of workers' health and safety, but also as a tool for the reconciliation of work and family life

Responses to the consultation must be submitted by 31 March 2004. The consultation paper is available through the Legal-Island website. TUC commentary can be accessed at: http://www.tuc.org.uk/work_life/tuc-7469-f0.cfm

## 4. Significant Caselaw Developments

### 4.1 Post–employment discrimination

**Relaxion group v Rhys-Harper; D'Souza v London Borough of Lambeth; Jones v 3M Healthcare [2003] IRLR 285**

These three cases were decided by the House of Lords in June 2003. The cases raised the issue whether the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 cover discriminatory acts, which occur after employment has terminated. A common example of such post employment discrimination is the victimisation of the ex-employee by refusing to give a reference or giving a reference which is unsatisfactory. Until this decision the position had been unclear and unsatisfactory because different standards appeared to apply in respect of sex discrimination and other forms of discrimination claim. In this case the House of Lords held that it is unlawful to discriminate against former employees where there is a **substantive connection** between the discriminatory conduct and the employment relationship at the time when the discriminatory conduct occurs. To some extent this decision has been overtaken by legislative developments. Post–employment discrimination is made unlawful by the new Race Regulations implemented on 19th July and is to be covered by the new sexual orientation regulations. However, the decision is particularly important in the context of **disability legislation**, which will not be changed until the end of 2004. Clearly employers will have to take great care when considering a request for a reference.

### 4.2 Shamoon v Chief Constable of the Royal Ulster Constabulary

Ms. Shamoon was one of three Chief Inspectors in Traffic Branch of the RUC and had been a serving officer for 22 years. One of her responsibilities was to undertake staff appraisals. Although the RUC staff appraisal scheme at the time provided that appraisals would be carried out by a Superintendent, it was the practice in Traffic Branch for appraisals to be done at Chief Inspector level. Following two complaints from constables about Chief Inspector Shamoon's appraisals, the duty was removed from her. The two other male Chief Inspectors in Traffic Branch continued to do appraisals.

Ms.Shamoon made a complaint alleging that the removal of the appraisal duty amounted to sex discrimination. She succeeded with her complaint before the

industrial tribunal but the decision was overturned on appeal to the NI Court of Appeal. One of the grounds for upholding the appeal was that the removal of the responsibility did not constitute a **detriment** for the purposes of the Sex Discrimination Order. According to the Court of Appeal, in order to establish "detriment" there has to be some sort of physical or economic consequence that is material and substantial.

The House of Lords overruled the NI Court of Appeal on this point and held that an employee is subjected to a detriment if "a reasonable employee might feel that they had been placed at a disadvantage with regard to the circumstances in which they work". An unjustified sense of grievance will not be enough to amount to a detriment. In the present case, the applicant felt that her role and position had been substantially undermined and that she was being increasingly marginalised. This was enough to amount to a detriment.

The other principal issue in the case related to question of an appropriate **comparator**. Under article 3(1)(a) a comparison of the cases of persons of a different sex must be such that all the circumstances relevant to the way they were treated must be the same, or not materially different. The other Chief Inspectors were not valid comparators, as no complaints about the way in which they performed their appraisal duties had been made. It was not valid to compare the treatment of someone against whom complaints had been made with the treatment of someone against whom no complaints had been made. However the question could be approached by reference to a **hypothetical comparator**. How would a male Chief Inspector against whom complaints had been made have been treated?

The final issue for their Lordships to decide was whether the reason for the treatment was Ms. Shamoon's sex. They could find no evidence to support an inference of sex discrimination. The claim was dismissed.

### 4.3 Damages after Johnson

**Dunnachie v Kingston upon Hull City Council [2001] ICR 480**

There has been an increasing trend both in Great Britain and in Northern Ireland (in cases such as Feargal Barr) for tribunals in unfair dismissal cases to award damages for personal injuries, including aggravation and **injury to feelings** caused by the dismissal itself or the manner in which it was carried out. This has been justified by

reference to the dicta of Lord Hoffman in a case called **Johnson v Unisys Ltd**. In some cases tribunals made awards of as much as £10,000. In others as little as £250 was awarded. In yet others no award whatsoever was made because tribunals felt that they were not bound by Johnson and had no jurisdiction to make such awards. To resolve the situation the Employment Appeals Tribunal listed for hearing together all appeals pending which had been identified as raising a "Johnson" point.

In **Dunnachie** the President of the EAT Justice Burton made three key points:

- Prior to Johnson there was no possibility of recovery for non-economic loss in claims for unfair dismissal in the Employment Tribunals
- Johnson itself does not require a change in the law because Lord Hoffman's views as expressed in paragraph 55 of his speech were obiter dicta, that is, they were not strictly necessary to the case and therefore not binding in future cases.
- The fundamental nature of the claims in the Employment Tribunal is that of a limited economic claim, both in respect of unfair dismissal (limited to £53,000) and in respect of wrongful dismissal (limited to £25,000). This "self-contained and comprehensible structure" appears to be what was intended by the legislation and has worked well. There is no need for it to be changed and considerable problems would ensue were it to be changed.

It looks as though that may be the end of compensation for in jury to feeling in unfair dismissal cases, unless and until the Court of Appeal does something to change the position.

### 4.4 Larmour v LA Fitness (unreported) Case ref. 2559/01

This is an unusual local case involving a claim of sexual harassment by a male against a female. Following withdrawal of the support of the Equality Commission it was agreed that the hearing would be split into two parts - the first on the merits of the case and the second (if needed) on remedy.

The applicant was employed as a membership sales consultant for a leisure facility. He was subjected to a number of sexual remarks and propositions by a more senior employee. Her treatment of him deteriorated after he failed to respond positively to her behaviour. The tribunal decided that this was a clear case of sex discrimination

and that there were no good grounds for his dismissal. The decision on remedy is awaited.

### 4.5 Upper age limits for unfair dismissal and redundancy

**Secretary of State for Trade and Industry v Rutherford, 2 October 2003 (EAT)**

At the beginning of October the Employment Appeals Tribunal handed down its decision in the case of Rutherford. The EAT has overturned the tribunal's finding that the upper age limits for claiming unfair dismissal and redundancy were unlawful under Article 141 of the Treaty of Rome (which enshrines the principle of equal pay for equal work). The applicants, who were all male, had sought to challenge the statutory provisions which stated that statutory redundancy pay could not be claimed by employees over the age of 65, and that they could not avail of the law on unfair dismissal when over normal retirement age for the job (or over 65 if there was no normal retirement age). They had successfully argued before the tribunal that those provisions indirectly discriminate against men, who generally want to retire later than women and that the provisions could not be objectively justified.

The Secretary of State brought the appeal because, where the employer was insolvent (as in the present case) she was potentially liable in the case of claims for redundancy payments and basic awards in cases of compensation for unfair dismissal.

The EAT concluded that the Employment Tribunal in finding for the complainants had relied upon the **wrong pool** for establishing disparate impact. It had considered as the appropriate pool those aged between 56 and 65 for "whom retirement had some meaning" when it should have taken as the pool the entire workforce. Had the tribunal selected the correct pool it would have found **no disparate impact** and hence no sex discrimination. The issue of objective justification only arose once disparate impact had been established. However the EAT went on to say that had the necessary disparate impact been established it would have found that there was such an **objective justification** unrelated to sex for the statutory provisions in question.

## References

Please note that appropriate references have been given at the end of each section. In many cases the references are to electronic sources and will appear as hyper-text links in the web-based version of this paper.