

DEVELOPMENTS IN EMPLOYMENT LAW IN NORTHERN IRELAND

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Introduction

Changes in the landscape of employment law continued at their usual hectic pace throughout 2004. New measures on subjects as diverse as asylum and immigration, sexual orientation discrimination, disability discrimination, equal pay, the minimum wage and data protection have been introduced. An unusually high number of significant cases on core employment topics have been decided by the appellate courts. These have included important rulings on the nature of the employment relationship; the implied term of trust and confidence; workplace stress; whether the unfair dismissal compensatory award can include damages for injury to feeling; the extent of the protection afforded to whistleblowers and the first cases under the Fixed-Term Employees Regulations. For the first time, the House of Lords has ruled on the extent of the employer's duty to make reasonable adjustments under the disability legislation.

The complexity of employment law has long since brought to an end the time when Industrial Tribunals were the preserve of trade unionists and personnel managers. The increasing legalisation of employment disputes is illustrated clearly by the presence of large numbers of solicitors, junior counsel and QCs at Long Bridge House, on both sides of the table in employment disputes. It has also been noted that some tribunal applications take longer to hear than some murder trials. The industrial action taken by NIPSA in summer 2004, which forced the closure of the Tribunals for several weeks, served only to exacerbate the persistent problem of delays in the hearing of tribunal cases. While a straightforward unfair dismissal case may be disposed of within 6 months, there is currently a backlog of some 1,500 discrimination complaints, some of them dating back to 1999. New discrimination complaints are lodged at a rate of some 600 a year.

A number of measures have been taken to try to deal with the problem and more changes are in the pipeline. Tribunal resources have been enhanced. In recent times, three additional full-time tribunal chairmen have been appointed and in 2004

the ranks were further swelled by the recruitment of a dozen or so additional part-time chairs. Phase 1 of the new tribunal rules came into force in Northern Ireland on 4 April 2004. Further changes are due to come into force in April 2005 (along with the introduction of the new statutory discipline and grievance procedures).

The perceived failure of some legal representatives to co-operate in the expeditious preparation of cases for hearing has led to the adoption of a more robust and ruthless system of case management by the Tribunal. New Rules of Procedure (which appear as Schedule 1 to the new Tribunal Rules) have introduced a new case management system, including the provision and exchange of witness statements, which was effective from 1st November 2004. This new system enables the Tribunal to take a much more active and interventionist role in the management and progress of the cases before it.

This paper seeks to explore many of these changes, and others, which have been introduced during the course of 2004. It is divided into four parts. Part 1 examines legislation which has come into force during the course of the year under review. Part 2 considers proposals for new measures which are likely to take effect in the not too distant future. Part 3 explains a number of recent consultation papers, reports, recommendations and proposals which may be introduced on a slightly longer timescale. Finally, in Part 4, the paper discusses a selection of recent important rulings on key employment law issues from the appellate courts. The paper takes account of developments up to the end of January 2005.

References: please note that references generally appear at the end of each numbered section of the paper. In many cases the references are to electronic sources and will appear as hypertext links in the web-based version of the paper.

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PART 1 - LEGISLATION AND RELATED MATTERS IN FORCE

1.1 New Compensation Limits For Unfair Dismissal and Redundancy Payments

Under the **Employment Rights (Increase of Limits) Order (Northern Ireland) 2005** 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 £270 to £280. The maximum compensatory award has risen from £55,000 to £56,800. The amount of guarantee payment payable to an employee in respect of any one day has risen from £17.80 to £18.40. Interestingly, the new rates apply wherever the appropriate date falls after 6th February 2005. Traditionally increases in compensation limits in Northern Ireland have only applied from late March. In the case of an unfair dismissal action the relevant date means the effective date of termination of the employment contract as defined by Article 129 of the Employment Rights (Northern Ireland) Order 1996. In relation to a guarantee payment it means the day in respect of which the payment is due.

The Order can be found at:

<http://www.northernireland-legislation.hmso.gov.uk/sr/sr2005/20050012.htm>

It has also been announced that the standard rate of statutory maternity, paternity and adoption pay will rise from £102.80 to £106 a week from April 2005. The earnings threshold will rise from £79 to £82 per week.

1.2 Minimum Wage

The rates for National Minimum Wage rose from 1 October 2004, following the recommendations of the Low Pay Commission. For workers aged 22 and over the new rate is £4.85, up from £4.50. The development rate, which applies to workers aged 18-21 inclusive, is now £4.10, formerly £3.80. A new rate for 16 and 17 year olds who are no longer of compulsory school age has been introduced for the first time. In Northern Ireland a person reaches this age immediately after the 30th June of the school year in which their 16th birthday occurs. The rate which applies is £3.00 per hour. The rate does not apply to 16 and 17 year old apprentices.

During the last week of October the TUC made its submission to the Low Pay Commission regarding next year's rates. It has recommended a rise of 50 pence in the adult rate, taking it to £5.35 an hour and has argued that this rate should apply to all workers aged 18 and over. The TUC suggests that there should be a substantial rise in the rate of NMW to £6 per hour, during 2006.

Important new minimum wage regulations applying to output workers also came into force on 1 October 2004, by virtue of the **National Minimum Wage Regulations 1999 (Amendment) Regulations 2004**. The new rules apply to all output workers including homeworkers. "Output work" is defined as work which is paid wholly by reference to the number of pieces made or processed by a worker or to some other output such as the number of transactions or tasks that are completed. Homeworkers are employed by a wide range of companies in a variety of roles including assembling Christmas crackers, packing greetings cards and feeding drawstrings into cloth products. They are entitled to receive national minimum wage but they are often paid according to a piece rate. Low wages are endemic.

The new rules mean that the old system of "fair estimate" agreements must be replaced by a new system of "rated output work". Employers must pay a fair piece rate, which is determined by reference to the rate of performance of an average worker. They have to give workers clearer information about the rate at which they are expected to work. Since October 2004, an employer has been obliged to carry out tests to establish the mean hourly output rate and he must pay 100% of this rate to all relevant workers. This can be done by testing all workers engaged on the task, or by testing a sample, which must be a representative sample. Under the National Minimum Wage Act 1998 the burden of proof is on the employer to satisfy a court that he is complying with his obligation to pay national minimum wage.

In April 2005, pieceworkers will see a further improvement in their wages when employers will have to pay a rate of 120% of the mean hourly output rate for an agreed block of work. This will mean that more employees, not just the fastest, will receive national minimum wage rates for home and piecework.

Further information can be found on the DTI national minimum wage website. A detailed guide is available at: www.dti.gov.uk/er/nmw/fpr_final_guidance.pdf

The Agricultural Wages Board for Northern Ireland has increased minimum rates of pay for agricultural workers in all age groups by 5%. The new rate for workers aged 19 and over is £5.09 per hour, operative from 5 April 2004.

It is interesting to note that, according to a report released by the GMB union in February of this year, 7 out of the 10 lowest paid areas for full time workers in the United Kingdom are in Northern Ireland. The lowest paid area in the UK is County Down where average earnings for full time workers amount to £16,281 per annum. The highest is the City of London with an average of £50,905.

1.3 Working Time – Junior Doctors

By virtue of the **Working Time (Amendment No. 2) Regulations (Northern Ireland) 2003** (SR No.330) provisions regulating the working time of hospital doctors in training are to be phased in gradually from 2004 until the end of July 2009. For a three-year period starting on 1st August 2004 junior doctors are subject to a 58 hour maximum working week. Department of Health figures released in March this year for Northern Ireland indicated that 91% of doctors were working within the weekly maximum, while 73% were “fully compliant” with all relevant working time requirements, including rest breaks, health assessments for night workers and an 8-hour limit on night working. The British Medical Association, the organisation which represents the majority of doctors in the province, has made representations to DHSSPS officials to press for higher compliance rates.

Whilst on the subject of junior doctors’ working hours, the European Court of Justice, in the case of *Landeshauptstadt Kiel v Jaeger* [2003] IRLR 804, ruled that **all** the time spent by doctors on-call at their employers’ premises should count as “working time”, even if they have in fact not been called upon and may even have been sleeping. It would seem that, if time is not to count as working time, an employee must be able to leave the employer's workplace and (following the guidance of the DTI) "be free to pursue leisure activities". Furthermore it is not permissible to offset the right to compensatory daily rest against periods of inactivity while on call. Instead, a period of equivalent compensatory rest must follow immediately upon the period of work to which it relates.

1.4 Asylum and Immigration

For the first time in its recent history, Northern Ireland currently benefits from the skills and services provided by large numbers of migrant workers. Many employers

will need to note that on 1st May 2004 changes to section 8 of the Asylum and Immigration Act 1996 came into force. These changes relate mainly to the type of documents which employers will be required to check and copy in order to avail of the statutory defence against prosecution for employing an illegal worker. The changes have been brought about by the accession of the ten new Member States to the European Community and are to be found in the **Immigration (Restrictions on Employment) Order 2004**.

Since the 1996 Act came into force it has been a criminal offence to employ someone who does not have the right to work in the UK, on pain of a £5,000 fine. However, if certain specified documents are seen and copied, the employer has a defence to a prosecution, unless he or she actually knew that the individual concerned was an illegal worker. The new rules have tightened up the pre-employment checks and the records that must be kept of those checks. All employees taken on after 1st May 2004 are covered by the new rules (unless they transferred under a TUPE arrangement, in which case they are exempt). It is important that these checks are carried out universally, in respect of all prospective employees, in order to avoid allegations of discrimination on grounds of race, ethnicity or nationality.

The 2004 Order sets out two categories of document.

- Category 1 documents include a UK or European Economic Area passport or any other passport endorsed by the Home Office with an indefinite right to remain in the UK. Such documents are sufficient evidence in their own right.
- Category 2 documents include items such as a P45 or other Inland Revenue document or letter from the Benefits Agency showing a person's National Insurance number. These must be supported by other papers that confirm immigration status such as a UK birth certificate or letter from the Home Office. Work permits are also covered by category 2. Again, these must be supported by further documentation, such as a passport or other travel document showing that the applicant has the right to enter or remain in the UK and is allowed to take the job.

The new rules require an employer to make and retain copies of the relevant documents and to retain these for **three years** after the employment ends. They must also check that the document presented genuinely relates to the employee concerned. Does the passport photograph look like the individual presenting it?

Does the date of birth seem about right? The onus is the employee to produce the documents and allow copies to be taken. A failure or refusal to do so would justify the withdrawal of a job offer.

Government guidance sets out exactly which documents will suffice and shows examples of immigration stamps. It is available on the Home Office website at: www.ind.homeoffice.gov.uk under "Employer's Information" There is also a helpline number – 0845 0106 677.

The Government has also set up a Worker Registration Scheme in order to monitor workers from eight of the new EU states. Under the **Accession (Immigration and Workers Registration) Regulations 2004**, employers must make sure that any non-exempt employee from one of the new member states, who is taken on after 1 May 2004, has either registered or applied to register with the Home Office under the new scheme. This applies to nationals of Estonia, Latvia, Slovakia, Hungary, Lithuania, Poland, Slovenia and the Czech Republic. Nationals of Malta and Cyprus are not required to register and are to be treated in the same way as other nationals from the European Economic Area, who are allowed to enter and work in the United Kingdom and who do not require a work permit. Workers from the other eight countries have a responsibility to register within one month of commencing employment. There is a one-off registration fee of £50. Workers will be issued with a certificate which allows them to work legally in the United Kingdom but this will lapse if they lose their job within the first twelve months. If they find another job they must renew their registration. As long as the worker remains employed during the first twelve months he/she will be entitled to the same State Benefits as workers from the other Member States (including Housing Benefit, Child Benefit, tax credits and disability benefits). If a worker stops work during the first twelve months, access to these benefits will be lost. After twelve months continuous (legal) employment they will be able to work in the UK without restriction and have access to benefits.

Where an employer is taking on a worker from one of the eight countries involved in the Workers' Registration Scheme, the following procedure must be followed:

- Workers who are taken on as employees should be informed, on starting the new job, that they are required to register immediately with the Home Office
- Employers are required to check, within one month, that the employee has in fact registered, and

- Once registered, the employee will be issued with a registration certificate and the employer should make and keep a copy of this.

Employers will be liable to prosecution if they cannot produce, after a month of the employee's start date, either a copy of the registration application form or, once it has been issued, a registration certificate from the Home Office. The maximum penalty is £5,000. If a worker fails to register within one month, the employment should be terminated. It will, however, be a defence for an employer to show that he/she took and retained a copy of a document, which either appeared to establish that the worker did not require registration or had applied for a registration certificate.

1.5 Tribunal Reform

Phase 1 of the changes to the Rules of Procedure of the Industrial Tribunal and the Fair Employment Tribunal were introduced in April 2004 by the **Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2004** (SR No. 65). These regulations replace the 1996 Tribunal regulations. A separate consultation process for Phase 2 closed on 20th October 2004. The changes in Phase 1 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 can be 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 in 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

On 1 October 2004 a further phase of new Tribunal rules came into force in Great Britain. The aim of the new procedures is said to be the creation of a system which is user-friendly, efficient, which encourages in-house resolution, and which reduces costs to the employer and the public purse. Consultation on similar changes for Northern Ireland closed on 20th October 2004. It is planned to introduce final tribunal rules in Northern Ireland on 3rd April 2005. 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
- A new pre-acceptance procedure under which claims which do not contain prescribed minimum information will not be treated as having been lodged at the tribunal: there will be an obligation on the parties to use the forms prescribed by the Department and these forms will indicate what information is compulsory
- Default judgements without hearings in uncontested cases
- 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

1.6 LRA Code on Time Off for Trade Union Activities

The Labour Relations Agency launched a new **Code of Practice on Time Off for Trade Union Duties and Activities (including guidance on Time Off for Union Learning Representatives)** in May 2004. The Code replaces an earlier code issued in 1993. It provides advice and practical guidance on the right of trade union officials to take reasonable time off work, with pay, to carry out trade union duties and to undertake trade union training. Union officials and members also have the right to reasonable time off work, without pay, when taking part in trade union activities. The new Code also provides guidance on the new statutory right for union learning representatives to take paid time off, during working hours, to undertake their duties

and to undergo relevant training. Union learning representatives are appointed or elected trade union representatives focusing on the learning agenda in the workplace. They provide information and advice about training or learning matters and promote the value of training or learning.

The Code can be accessed and downloaded from the Agency's website at www.lra.org.uk

1.7 Gender Recognition Act 2004

The Act received the Royal Assent on 1 July 2004. Its purpose is to provide transsexual people with legal recognition of their acquired gender, subject to some specified exceptions. Under the provisions of the Act 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.

1.8 Sexual Orientation Discrimination

The Employment Equality (Sexual Orientation) Regulations (Northern Ireland)

2003 came into force in December 2003, at the same time as corresponding regulations in Great Britain, where the first tribunal cases based on the new legislation began to be reported early in 2005. 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. These regulations use concepts of direct discrimination, indirect discrimination, victimisation and harassment. The regulations cover discrimination in the field of employment and vocational training. "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".

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 he 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. 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. There are two categories of GOR, one of which is available to any employer, and another which applies specifically to religious organisations.

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 requirement” and it is “proportionate” to apply that requirement in the particular case. An example might be a job counselling victims of homophobic abuse.

The regulations 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 government’s view is that the GOR would apply only to ministers of religion plus a small number of posts outside the clergy. Fearing that the “organised religion” exception might in fact be applied more widely, the TUC and a number of trade unions backed a challenge to the legislation in the High Court, during the course of 2004. The challenge was unsuccessful and an appeal was lodged. The outcome is awaited.

Indirect discrimination

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.

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.

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.

1.9 Disability Discrimination

A number of measures on disability became operational in Northern Ireland on 1st October 2004. Many of the changes in the employment field are contained in the **Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004** (SR No.55). Other measures in force include:

- Sections 21(2)(a), 21(2)(b) and 21(2)(c) of the Disability Discrimination Act 1995 (the physical access duties).
- The Disability Discrimination (Providers of Services) (Adjustment of Premises) Regulations (Northern Ireland) 2003

- The Disability Discrimination (Employment Field) (Leasehold Premises) Regulations (Northern Ireland) 2004

Anyone providing services to the public, whether free or for payment, may now be required to make changes to the physical features of their premises to ensure that disabled people can access those services. This includes shops, banks, hotels, parks, pubs, cinemas, hospitals, advice agencies and professionals such as dentists, solicitors and estate agents – and many more besides. The changes which they may need to make are not limited to entrances and exits but include matters such as signs inside and outside the building; toilets and washing facilities; steps and stairs; lifts and escalators and parking arrangements.

The principal changes in the employment field include:

- The employment and occupation provisions of the DDA are expanded to include the police, prison officers, fire-fighters, partnerships, qualification bodies, providers of practical work experience, barristers and pupils.
- The exemption for firms employing fewer than 15 people is disapplied
- Employment outside Great Britain will not be automatically excluded
- A new definition of direct discrimination “on grounds of the disabled person’s disability” is added to the existing three types of discrimination (unjustified less favourable treatment for a reason relating to disability; unjustified failure to make reasonable adjustments; victimisation)
- The scope of the duty to make reasonable adjustments has been widened from “arrangements made by the employer” to “any provision, criterion or practice applied by the employer”. The examples of steps which an employer might take in order to comply with this duty now include specific reference to “training, mentoring and support”
- Both constructive dismissal and the non-renewal of a fixed term contract are expressly stated to be forms of dismissal for the purposes of the DDA
- The legislation has been extended to post-employment events that arise out of and are closely connected to employment.
- A freestanding definition of harassment has been introduced which removes the need for a comparator
- It is now unlawful to publish discriminatory advertisements
- Changes have been made to the burden of proof

In December 2003 a **Draft Disability Discrimination Bill** was presented to Parliament to implement certain recommendations of the final report of the Disability Rights Taskforce, "*From Exclusion to Inclusion*". This does not extend to Northern Ireland and a separate Order in Council will be necessary to ensure that disabled people in Northern Ireland are not disadvantaged in relation to their counterparts in Great Britain. It was originally intended that public consultation on a draft Order would be underway by autumn 2004, but delays in finalising the GB Bill have meant that the consultation in Northern Ireland will be delayed, most likely until early 2005.

In December 2004 the Department for Work and Pensions eventually launched its consultation on the Disability Discrimination Bill. The main provisions of the Bill are as follows:

- The definition of disability is to be extended to cover those people diagnosed with the progressive conditions of cancer, HIV and multiple sclerosis. The consultation seeks views on the use of the regulation-making power of the Secretary of State to exclude certain types of cancer from this extension.
- The Bill adds to the existing duties on landlords and managers of rented property so that they would have to make reasonable adjustments to their policies, practices or procedures, change a term of the letting or provide auxiliary aids and services. The document seeks views on the proposals for regulations to support these duties.
- It brings larger private members' clubs within the scope of the DDA
- The questions procedure – views are sought on whether to extend this procedure, which currently applies in the employment and occupational field, to discrimination in areas covered by Part 3 of the Disability Discrimination Act, namely the provision of goods and services.

The Consultation Document is available at:

http://www.dwp.gov.uk/consultations/consult/2004/ddb/private_clubs_premises.pdf

1.10 Equal Pay Questionnaires

On 25th August 2004 the **Equal Pay (Questions and Replies) Order (Northern Ireland) 2004** (SR No.322) came into force. This sets out a prescribed form through which a complainant may question the respondent concerning matters which the complainant considers may breach the equal pay legislation.

1.11 Equal Pay (Amendment) Regulations (Northern Ireland) 2004

These long awaited regulations, which came into force on 28th April 2004, amend the time limits within which a person must institute proceedings before an industrial tribunal in respect of a claim under the Equal Pay Act (Northern Ireland) 1970. The Regulations also amend the time period in respect of which an industrial tribunal or court is able to award any payment by way of arrears of pay or damages and amend the procedures in equal value cases.

- 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 1970 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”. 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 expanded. The tribunal may now 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.

It seems likely that further streamlining of equal value procedures will take place. Consultation on new proposals for Great Britain ended in June 2004. The proposals were contained in a document entitled: “Towards Equal Pay; A Consultation on Proposals to Streamline Equal Value Tribunal Procedures” available on the DTI website. <http://www.dti.gov.uk>

1.12 Part 4 of the Data Protection Code of Practice – Health Information

The fourth and final part of the Data Protection Code of Practice was published in draft form at the beginning of December 2003. The consultation period finished on

27th February 2004 and the final version was (eventually) published by the Information Commissioner in December 2004. It will be recalled that:

- Part 1 of the Code dealt with Recruitment and Selection;
- Part 2 with Storing Personal Data, and
- Part 3 with Monitoring Employees at Work.

This final part of the Code concerns Information about Workers' Health and provides guidance about complying with the Data Protection Act when handling such information. It addresses such issues as the collection and subsequent use of information about a worker's physical or mental health or condition. Collection will often be carried out by some form of medical examination or testing, but may involve other means such as health questionnaires.

Part 4 of the Code will therefore apply to information such as:

- A questionnaire completed by workers to detect problems with their health
- Information about a worker's disability or special needs
- The results of an eye test taken by a worker using display screens
- Records of a worker's blood type held in case of an accident
- Results of a test carried out to check a worker's exposure to alcohol or drugs
- Results of genetic tests carried out on workers

Before dealing with specific issues, Part 4 sets out some general considerations on the handling of information about workers' health in the form of key principles. These include:

- It will be intrusive and may be highly intrusive for an employer to obtain information about a worker's health
- Workers have a legitimate expectation that they can keep their personal health information private and that employers will respect this privacy
- If employers wish to collect and hold information on their workers' health they should be clear about the purpose and satisfied that this is justified by real benefits that will be delivered
- One of the sensitive data conditions must be satisfied
- Workers should be aware of what information about their health is collected, the nature and extent of the information held and the reasons for which it is held
- The assessment of the implications of the worker's health or his or her fitness for work should normally be left with a suitably qualified health professional

Part 4 of the Code then sets out certain general recommendations with regard to the processing of health information. These are amplified in the Supplementary Guidance provided by the Information Commissioner and are as follows:

- i. Identify who in the organisation can authorise or carry out the collection of information about workers' health and ensure that they are aware of their employer's responsibilities under the Data Protection Act
- ii. If medical information is to be collected ensure a sensitive data condition can be satisfied
- iii. Identify clearly the purposes behind the collection of information about workers' health and the specific business benefits which it is likely to bring
- iv. Protect information about workers' health with appropriate security measures. Ensure that wherever practicable only health professionals have access to medical details about workers.

Part 4 recommends that information about health should be kept separate from other personnel records, perhaps by keeping it in a sealed envelope or subject to additional access controls if stored on an electronic system. Information collected to run a pension or insurance scheme should not be available to an employer unless this is necessary for the administration of the scheme.

The Supplementary Guidance points out that as health information is "sensitive personal data" the appropriate level of security is a high one. Part 2 of the Code gives more information on the appropriate security arrangements. The Guidance repeats the principle of "need to know" access and that this should be applied strictly. It may be necessary for managers to know about a worker's state of health in order to protect that worker or others. If this is the case the manager should be subject to a contractual conditions of confidentiality equivalent to those imposed on a health professional by their professional standards.

All four parts of the Code can be accessed from the following link:

<http://www.informationcommissioner.gov.uk/eventual.aspx?id=446>

1.13 Coming Into Force Of The Freedom Of Information Act 2000

The Freedom of Information Act 2000 is designed to establish a new culture of openness and transparency in public administration. From January 2005, it gives a general right of access to all types of "recorded" information held by public

authorities, subject to certain exemptions, and imposes obligations on public authorities to disclose information in response to written requests.

As a means of promoting openness, the Act also requires each authority to take proactive steps to put its information in the public domain. Many authorities, including the Department for Employment and Learning, will be required to produce and to publish a Publication Scheme that lists documents produced in the course of their work. The Scheme will set out the classes of information which are held; the way in which it is intended to publish the information; and whether a charge will be made for the information. The Department has published an on-line guide available at:

http://www.delni.gov.uk/docs/pdf/NICS_FOI_leaflet_01.pdf

1.14 Employment Relations Order (Northern Ireland) 2004

On 17th November 2004 this legislation received the Royal Assent. Its purpose is to give effect to the Government's review of the Employment Relations Act 1999 (and its counterpart, the Employment Relations (Northern Ireland) Order 1999).

The new Order includes measures to do the following:

- Improve the arrangements for the statutory recognition of trade unions for the purpose of collective bargaining and establish new protections against intimidation of workers by employers or unions during recognition ballots
- Strengthen the rights of trade union members by ensuring clear rights to use union services and by providing that workers cannot be given financial or other inducements by employers to forego key union rights
- Enhance protections for employees on lawfully-organised official industrial action by extending the protected period against unfair dismissal from eight to twelve weeks and excluding lock-out days from the calculation of the protected period.
- Provide specific redress for employees who are dismissed or suffer other detriment because they are summoned or have been away from work on jury service

The Order corresponds to the Employment Relations Act 2004, in force in Great Britain (other than sections 43-46).

Schedule 1 to the Order amends aspects of the statutory procedure for the recognition or derecognition of trade unions for collective bargaining purposes. These changes include measures :

- To revise the obligations on employers to provide the union with access to the workers in the bargaining unit during the period of a ballot
- To prohibit the use of “unfair practices” by either the employer or the union during the period of such ballots. “Unfair practices” are defined by the Order, but in general terms they include actions to bribe, coerce or unduly influence workers within the bargaining unit, which are taken with a view to influencing the outcome of a ballot.

The Department for Employment and Learning plans to bring these provisions into force by Spring 2005. To that end it has issued a draft Code of Practice entitled “Access and Unfair Practices during Ballots for Trade Union Recognition and Derecognition”. The Consultation Period runs until 8th April, 2005 and can be accessed at:

http://www.delni.gov.uk/consultDebate/files/DraftCodeofPractice_AccessandUnfairPractices.doc

1.15 Civil Partnership Act 2004

The Act received the Royal assent on 18 November 2004. A civil partnership is defined as a relationship between two people of the same sex, which is formed when they go through a process of registration contained in the Act. The relationship can come to an end through death, dissolution or annulment. The Act aims to enable civil partners to access many of the legal rights and responsibilities to which married couples are entitled. It extends to the whole of the United Kingdom, though there was prolonged debate on whether it should apply to Northern Ireland or not.

Section 252 of the Act amends article 5 of the Sex Discrimination (Northern Ireland) Order 1976. This prohibits discrimination against married persons, in the employment field. The article has been amended to read “Discrimination against married persons and civil partners in the employment field”.

The Act will have considerable repercussions in relation to pension rights and in particular to survivors’ benefits. Most occupational pension schemes provide benefits on the death of a member. Contracted out schemes are obliged to provide a

widow's pension and, on rights accrued since 1989, a widower's pension. Schemes are not required to provide benefits for partners who were not married to the scheme member. Some schemes choose to do so but under Inland Revenue rules, an unmarried partner can only qualify for a survivor's pension if he or she was financially dependent on the deceased employee. The main public sector pension schemes rarely make such provision. This lack of recognition mirrors the position in the state pension system. The new Act affects the right to state, occupational, public service and private pensions for registered same sex couples. The conditions for contracting out are amended to include a requirement for survivors' benefits to be paid to registered partners. Power is also given to Ministers of the Crown and Government Departments to amend any pension legislation with respect to surviving civil partners (section 255).

PART 2 - PROPOSALS LIKELY TO TAKE EFFECT IN THE NEAR FUTURE

2.1 Dispute Resolution Measures

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 (together with the summer's public sector strike action) has led to serious delays in the tribunal system and to significantly increased costs to the public purse and to employers.

The **Employment (Northern Ireland) Order** 2003 contains a number of radical new measures, which are designed to deal with this problem. Of particular note are the requirements for all firms to have in place and to use minimum disciplinary and grievance procedures backed up by financial sanctions. The measures will only enter into force when an appropriate Commencement Order is made, currently scheduled for 3rd April 2005. Corresponding provisions entered into force in Great Britain on 4th October 2004.

The aim of the new measures is to encourage both 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 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

Two guides on the new legislation are available:

"Resolving Disputes at Work – Guidance on the New Legislation for Small Firms" is at <http://www.delni.gov.uk/currentissues/index.cfm/page/details/key/63>

"Resolving Disputes at Work – Detailed guidance on the New Legislation" is at <http://www.delni.gov.uk/currentissues/index.cfm/page/details/key/62>

2.2 New LRA Code of Practice on Disciplinary and Grievance Procedures

The Labour Relations Agency is updating its Code of Practice on Disciplinary and Grievance Procedures mainly to take account of the new statutory procedures. A Draft Code was published for consultation in April 2004. It aims to provide practical guidance to employers, workers and their representatives on:

- The statutory requirements relating to disciplinary and grievance issues
- What constitutes reasonable behaviour when dealing with disciplinary and grievance issues
- Producing and using disciplinary and grievance procedures
- The right to be accompanied at grievance and disciplinary hearings

The revised Agency Code aims to give guidance not just on the new minimum statutory procedures but also on standards of good practice which tribunals will take into account when considering how employers have handled a dismissal. Simply following the new minimum procedures will not necessarily ensure that a dismissal is

fair under the unfair dismissals legislation. Tribunals will still be required to consider whether employers behaved reasonably in all the circumstances. Equally, the fact that an employee has followed the minimum statutory grievance procedures will not necessarily guarantee that he or she will be successful at a tribunal.

Details of the Code are available on the Agency's website www.lra.org.uk

2.3 Informing and Consulting Workers

The EU Information and Consultation Directive (2002/14) was adopted by the Council in February 2002. Member States have until 23 March 2005 to introduce implementing legislation. The Department for Employment and Learning is responsible for overseeing the implementation of the Directive in Northern Ireland. It completed two public consultations, in 2002 and 2003, which included draft Regulations relating to the implementation. Draft guidance on the NI Regulations was published by the Department in October 2004 and is available at http://www.delni.gov.uk/docs/pdf/NI_Draft_Guidance2005.pdf

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.

Under the 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 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 Single Equality Bill

In June 2004 the long awaited Green Paper on the Single Equality Bill was published by the Office of the First Minister and Deputy First Minister. Its full title is “*A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, anti-discrimination and equality legislation in Northern Ireland*”. A number of documents relating to the consultation on the SEB are available at the website of OFMDFM – www.ofmdfmi.gov.uk/equality. The consultation period ended on 12th November 2004. Legislation is not anticipated before 2006 at the earliest. The process is being watched with considerable interest from across the water where the formation of a Single Equality Authority has been announced and the possibility of single equality legislation is now being considered.

The purpose of the Single Equality Bill is to provide a clear and accessible framework of anti-discrimination law and equality law for Northern Ireland in a single legal instrument. It aims to harmonise existing laws by removing, where practicable, inconsistencies in protection that exist between grounds in much of the current legislation. The development of the SEB has been carried out in parallel with work to implement the EU Framework Employment Equality Directive and Race Directive. The SEB will not reduce the protection afforded by these Directives nor, indeed, any other protection currently offered by existing anti-discrimination legislation.

The Consultation Paper sought views on the following issues:

- Grounds – whether these should be extended to include marital or family status/dependants; pregnancy and maternity; past convictions; victims; socio-economic status; language; gender identity; genetic predisposition and other status.
- Scope – the activities for which protection against discrimination is provided such as employment, education, training, goods, facilities and services, sale and

management of premises. How should differences in the scope of existing legislation be reconciled?

- Definitions of discrimination – current legislation offers protection against direct and indirect discrimination, victimisation and harassment except for disability discrimination which adopts a different approach
- Exceptions – the circumstances in which it is lawful to discriminate in favour of a certain group. How do these need to differ for the different grounds? Should a genuine occupational requirement (GOR) or genuine service requirement (GSR) be included?
- Goods Facilities and Services – should GFS protection be extended to cover any new grounds and how could this best be achieved in relation to age and sexual orientation in particular?
- Addressing under-representation in employment – which grounds should be included in any positive action measures and what is the most workable and effective approach?
- Equality Commission for Northern Ireland – how best to harmonise the powers and functions of the Commission in respect of the different grounds
- Tribunals and Courts – possible options for dealing with discrimination disputes
- Alternative Dispute Resolution – possible options for developing ADR to resolve discrimination disputes

The Equality Commission has published a number of documents on the Single Equality Bill, including its own response to the Consultation Paper. These are available from the Commission's website – www.equalityni.org

2.5 Temporary Agency Workers Directive (Draft)

This proposed Directive follows on from the other EU measures intended to protect part-time workers and those employed on fixed term contracts. The European level social partners were unable to conclude an agreement on temporary agency workers (May 2001) and the European Commission was forced to step in with its own proposals. The draft Directive establishes the principle of non-discrimination, including pay, between temporary agency workers and comparable workers in the organisation to which the temporary agency worker has been assigned. The principle would apply once the agency worker had completed six weeks employment with the same client organisation. Exceptions from this principle would be possible when an objective justification existed, in particular where agency workers were offered

permanent contracts with their agency and were paid even on those days when they were not assigned to a client organisation. An exception would also be possible where collective agreements stipulated the working conditions of temporary agency workers and provided an adequate level of protection. Clauses which restricted or prevented an agency worker taking up a permanent post with a client company at the end of an assignment would be null and void. Agency workers would be entitled to be informed of any permanent vacancies in the client company.

In July 2002 the DTI issued a consultation paper on the potential impact of the Directive in the UK. It estimated that there are around 700,000 agency workers in the UK as a whole, of whom some 290,000 might be expected to benefit from this proposal. (See www.dti.gov.uk/er/agency/directive.htm) At a meeting in June 2003 the EU Council failed to reach a political agreement on the proposed Directive and it now remains to be seen whether the Commission can find a way to overcome the stiff resistance which the proposal has met from some Member States. In July 2004 the UK Government controversially indicated that it would be dropping its opposition to the draft Directive. This was one of a number of concessions on workers' rights made to the trade unions at the Labour Party National Policy Forum.

2.6 TUPE Developments

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 (EC 77/187). 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 Acquired Rights Amendment Directive (98/50/EC) contained a new definition of the "transfer of an undertaking" and provided Member States with a variety of options for reform of their transfers legislation, including its extension to pension rights. A consultation paper on reform of TUPE was published by the DTI in September 2001 (see www.dti.gov.uk/er/tupe/consult.htm) The new proposals included:

- Clarification of when the transfer of labour-intensive operations such as cleaning, catering and security would fall within the scope of the legislation
- An obligation on the outgoing employer to inform the incoming one of the employment rights of staff
- Clarification on the circumstances in which employers can lawfully make transfer-related dismissals or changes in terms and conditions of employment, including clarification of the “economic, technical or organisational reason” defence
- 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. When a genuinely insolvent business (which includes wound up businesses but not those in administrative receivership) is transferred 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.

The pensions issue was dealt with separately. The Department for Work and Pensions issued a Green Paper entitled “Security, Simplicity and Choice, Working and Saving for Retirement” in December 2002. Following this, sections 257 and 258 were inserted in the Pensions Act 2004. Section 257 applies to an employee who has been transferred under a TUPE transfer and who had actual or contingent rights in relation to an occupational pension scheme immediately before the transfer. If the scheme was a money purchase scheme, it must have been a scheme in relation to which the transferor was required to contribute, contributed voluntarily, or would have been required to contribute if the employee had become an active member. Under section 258 the transferee is required to secure that the employee is, or is eligible to become, an active member of the occupational pension scheme in relation to which the transferee is the employer and, if it is a money purchase scheme, to make “relevant contributions” to it. “Relevant contributions” are defined as an amount which equals the employee’s contribution, subject to an upper limit of 6% of basic pay. Alternatively, the transferee must make such contributions to a stakeholder pension scheme of which the employee is a member. Where the scheme offered by the transferee is not a money purchase scheme, it must satisfy a standard provided for in the Pension Schemes Act 1993 and the overall value of the benefits available to the

employee must be at least equal to the benefits enjoyed while a member of the transferor's scheme.

Draft regulations to implement these provisions were published for consultation on 6th December 2004. The consultation period ran until 21 January 2005 and the government intends that the implementation date will be 6th April 2005. The regulations will be known as the Transfer of Employment (Pension Protection) Regulations 2005

The Consultation Document on the draft regulations is available at:

http://www.dwp.gov.uk/publications/dwp/2004/eppr/eppr_2005.pdf

2.7 Working Time - Road Transport Sector

The Department for Transport published draft regulations and guidance on new working time proposals for the road transport sector in November 2004. The new measures aim to transpose the sector specific Road Transport Directive (No. 2002/15) which comes into force in March 2005. They will provide extra protection for commercial drivers and crews of heavy goods and public service vehicles. The Consultation paper published in November sets out:

- Who will be affected by the regulations
- What counts as "working time"
- Details on weekly working time limits and how to calculate them, and
- Advice on working at night, rest and breaks, and information and record keeping

The new regulations will be known as the Road Transport (Working Time) Regulations 2005. They will:

- Introduce an average 48-hour week for mobile workers
- Allow a four-month reference period for calculating the 48-hour week, which can be extended to six months if a collective agreement is in place. Reference periods are fixed by the calendar, running April-July; August-November and December-March.
- Permit a maximum of 60 hours in any single week
- Allow night workers to work no more than 10 hours in every 24-hour period
- Define "night time" as a period between midnight and 4am for drivers and crews of goods vehicles and 1am to 5am for drivers and crews of passenger vehicles

- Identify the enforcement authority (DVTA-NI). Enforcement will be in response to complaints. The approach will be to educate employers and workers rather than to look to prosecute. However, where evidence exists that the rules are being systematically broken, examiners will be at liberty to check working time records at an employer's premises.
- Compel employers to monitor working time and do what they can to ensure limits are not breached. Records must be kept for 2 years. If no employer exists, the Agency, Employment Business or even the worker himself/herself must monitor working time.
- Mobile workers will remain subject to the limits under EU Drivers Hours Rules

The deadline for implementation of the Directive in the UK is 23 March 2005, although self-employed drivers will not be covered until March 2009. The proposals can be accessed at:

<http://www.dft.gov.uk>

PART 3 - CONSULTATION PAPERS; CODES; REPORTS; RECOMMENDATIONS

3.1 Working Time

Revised Guidance

From August 2003, the Working Time Regulations were amended to apply in full to all non –mobile workers in road, sea, inland waterways and lake transport; to all workers in the railway and offshore sectors; and to all workers in the aviation sector who are not covered by the sectoral Aviation Directive.

Mobile workers in road transport currently have more limited protection. Those subject to European drivers' hours rules 3820/85 are entitled to four weeks paid annual leave and health assessments if they are night workers (also from 1 August 2003). Mobile workers not covered by the rules will be entitled to an average 48 hours per week, four weeks' paid holiday, health assessments if night workers and adequate rest.

The regulations were also amended, with effect from 6 April 2003, to provide enhanced rights for adolescent workers.

Because of these amendments the DTI guidance on the Working Time Regulations has recently been revised and updated. It is available at:

www.dti.gov.uk/er/work_time_regs/wtr0.htm

European Commission Review of the Directive

In August of this year the OECD reported that UK workers continue to work the longest hours in Europe. The average in the UK is 43 hours per week compared to 39.6 hours in Germany and 38.8 hours in France. It is therefore perhaps timely that in January 2004, the European Commission announced that it was to undertake a consultation exercise on how the EC Working Time Directive should be revised for the future. The consultation exercise focused on the issue of the “opt-out” clause, which allows individuals to waive their rights under the Directive, and on the definition and calculation of working time. Accordingly it invited responses on four main issues:

- The extension of the reference period for calculating average weekly working time from the current four months to six months or one year.
- The definition of working time following the recent European Court of Justice rulings relating to time spent on call (SiMAP and Jaegar)
- The use of the individual opt-out by the UK and other Member States
- Measures to improve the balance between work and family life and how to ensure the best balance between these measures

The deadline for responses to the consultation was 31 March 2004. The UK government responded on 27th February, making clear that it wished to retain the opt-out. The response is available at:

www.dti.gov.uk/er/work_time_regs/com_response.doc

Feelings in the United Kingdom are running high. In May, the TUC sent the Commission an analysis of the UK government’s submission claiming that its case for retaining the opt-out had “seriously misrepresented the situation” in British workplaces. The British Chambers of Commerce, supporting the continuation of the opt-out, said that the Working Time Regulations are the single most expensive burden on business, having cost £10 billion since their introduction five years ago. In June, the government launched a consultation on the current operation of the individual opt-out and ways to improve its application. This is a preliminary consultation paper designed principally to inform the government’s thinking and to

assist it in its negotiations at European level. It does not contain any proposals for legislation.

It seems that the European Commission is now considering four options:

- Tightening the conditions under which individuals can opt-out of the 48-hour limit on the working week
- To allow derogations from the limit on the basis of collective agreements between employers and employees (only)
- To retain the possibility of an individual opt-out in cases where no collective agreement can be reached
- To provide for the gradual removal of the opt-out altogether (judged unacceptable by the UK government)

3.2 The Annual Report of the Industrial Court 2003-04

The Industrial Court is the body responsible for considering claims for recognition and de-recognition of trades unions under the statutory procedures. The Court's annual report for the year 2003-04 was published at the end of June 2004. During the period under review, the court was called upon to consider only four cases.

The Court accepted an application by ATGWU in respect of Polypipe (Ulster) Ltd and made a decision in respect of the appropriate bargaining unit. Ultimately the parties were able to conclude a semi-voluntary recognition agreement.

Unison submitted an application in respect of a bargaining unit consisting of Court Service officials employed under a contract let by the NI Court Service and secured by Maybin. Following an exercise to verify membership, the Court concluded that there was already in existence an agreement (with GMB) which covered workers within the bargaining unit proposed by Unison and Unison's application was not accepted.

An application was made by Amicus in respect of employees of Newfields Industrial Support Services. Following investigation by the Court, it appeared that only three out of a total of nineteen workers in the proposed bargaining unit would support recognition. The application was not accepted.

The decision to accept an application by ATGWU in respect of workers at J E McCabe Ltd was subject to judicial review proceedings. Mr. Justice Weatherup concluded that he would not interfere with the decision of the Industrial Court to accept the application but suggested a number of improvements that could be made to the Court's procedures particularly in respect of the verification of petitions and other communications from workers in the bargaining unit, and the copying of the Case Manager's report to both parties at each stage of the decision-making process.

3.3 Family-Friendly Policies

One of the cornerstones of the Labour government's employment policy has been the introduction of a series of measures designed to improve the work-life balance. These have included the introduction of improved maternity leave and pay; rights for adoptive parents; paternity leave; parental leave; and the introduction of the right to request flexible working hours. A number of recent reports have indicated how these new rights have been bedding down.

The Office of National Statistics carried out a survey of almost 3,500 employees over a four-month period, in relation to requests for flexible working. It found that:

- 58% of parents with children under 6 years were aware of the new flexible working rights
- employees in sales and customer services were most likely to request flexible working
- female employees with children under 6 were more likely to request flexible working than their male counterparts
- 43% of employees requested flexible working for childcare reasons
- 77% of requests for flexible working were fully accepted by employers and 9% were partly accepted or a compromise was reached

On this subject it is interesting to note that the Labour Relations Agency is proposing to introduce a new flexible working arbitration scheme, pursuant to Article 84A of the Industrial Relation (NI) Order 1992. The scheme will provide a voluntary alternative to an Industrial Tribunal action for the resolution of disputes arising out of an employee's application for a change in his or her terms and conditions of employment. It is hoped that the scheme will come into operation shortly.

Figures released by the Department of Trade and Industry reveal that only one in five eligible fathers is using their entitlement to paid paternity leave. The Department had forecast that in the first year of new fathers being eligible for a fortnight's paid leave, 80% of the 400,000 workers affected would take it up. Figures for the year to April 2004 indicated that only 79,000 used their entitlement.

In April 2004 the Secretary of State for Trade and Industry, Patricia Hewitt, launched a debate on employers' and parents' views on the operation of the family-friendly policies. At a conference on "Working with Fathers" in London she reported a series of round table discussions to be held throughout the country. She suggested that the following measures were being actively discussed:

- extending Statutory Maternity Pay so that women are entitled to a full year's paid leave following the birth of a child
- offering fathers one month of paternity leave paid at a rate of 90% of full pay
- extending parental leave and flexible working provisions to carers of elderly or disabled relatives

She confirmed that no legislative proposals were envisaged to be in force before 2006.

3.4 Regulation of Employment Agencies

The Department for Employment and Learning proposes to update the legislation regulating the conduct of employment agencies and businesses in Northern Ireland. Existing regulations, which seek to protect the clients of such businesses, both work seekers and hirers, date largely from 1982. The industry has expanded dramatically since then and it is widely recognised that the current legislation no longer meets the needs of all those involved in this important sector.

In 1999 a consultation exercise was carried out in both Great Britain and Northern Ireland seeking initial views on an overhaul of the legislation. Taking account of these responses and also the new Conduct of Employment Agencies and Employment Business Regulations 2003, which came into force in Great Britain on 6 April 2004, the Department has drafted revised regulations. The main features of the proposals include:

- requirements that the suitability of work-seekers for vacancies be established and that terms and conditions be agreed

- tightening on the controls on client accounts and clarification of requirements to keep records
- tighter restrictions and greater clarification relating to charges and fees

3.5 Homework and Telework developments

In July 2004 the Department for Employment and Learning launched its on-line guide to Telework. Modelled largely on DTI guidance, it provides a useful starting point for parties who are proposing to set up a telework arrangement or who would like to review their practices. The guidance deals with a range of subjects, including the employment conditions, data protection and privacy issues relating to teleworkers as well as addressing matters relevant to health and safety and the organisation of telework. The guide is available at: <http://www.delni.gov.uk/docs/pdf/ACFACF.pdf>

The Health and Safety Executive in Great Britain has also published a number of Good Practice Case Studies on Homeworking which highlight, as the title suggests, examples of good practice when employing homeworkers, with a particular focus on health and safety. The Guide also contains sample risk assessments for different sectors, which may be helpful to employers. Those sectors are:

- Sewing and textiles
- Packing, assembly and finishing
- Electrical and electronic
- Business services and working with computers

The guide can be downloaded from

http://www.hse.gov.uk/research/hsl_pdf/2004/ras04-08.pdf

3.6 Common Commencement Dates for New Legislation

Following a recommendation from the Better Regulation Taskforce the DTI announced (on 14 January, 2004) that there are to be two set commencement dates for new domestic employment regulations in Great Britain. The two dates are 6 April (when tax changes are usually brought into effect) and 1 October (when the minimum wage is up-rated). Beginning this year, the DTI is publishing an annual statement of forthcoming employment regulations every January.

At present there appear to be no plans in Northern Ireland to work to the same two dates. This is because it is often the case that Northern Ireland waits to see the final form of legislation in GB before progress can be made on corresponding NI

regulations. Almost inevitably, Northern Ireland lags behind on implementation, often bringing into force similar regulations after a number of months or even years!

PART 4 - SIGNIFICANT CASELAW DEVELOPMENTS

4.1 Definition of “worker”

Redrow Homes (Yorkshire) Ltd v Wright, Redrow Homes (Northwest) Ltd v Roberts CA, [2004] EWCA Civ 469

W and R were bricklayers working for companies within the Redrow plc group. W worked at a site in Yorkshire in a two-man bricklaying team. His pay was paid into his bank account on a weekly basis after deduction of tax. Redrow provided the bricks, mortar, a fork-lift truck and driver and normally one labourer per site. W provided his own hand tools. In addition, he was given a set of drawings and was subject to Redrow’s building programme. Apart from this requirement and allowing for the normal working hours when the site was open, W could regulate his hours of work to suit himself.

R worked in one of two gangs of bricklayers, each comprising four men. His terms and conditions were similar to W’s except that in respect of payment, he received a valuation sheet and was paid on a weekly basis. Both men were employed under contracts which were entitled “Official Order” and accompanied by “Conditions of acceptance of order” in which they were referred to throughout as “the contactor”.

Two separate claims were brought against Redrow relating to holiday pay entitlement under the Working Time Regulations. The issue was whether the applicants were “workers” within the meaning of the regulations. The two tribunals hearing the claims ruled that the applicants were workers and therefore enjoyed a statutory entitlement to paid holidays. In both cases it was decided that there was an intention that the work be performed personally and in W’s case it was also decided that Redrow was not a customer of a business undertaking carried out by W. On appeal the two cases were heard together and the EAT upheld the tribunals’ decisions.

Redrow appealed to the Court of Appeal which began by considering the question – was there an obligation to work? Redrow contended that W and R were self-employed contractors and not workers within the meaning of the regulations, as they were under no obligation to perform the work personally. They argued that Condition 6, which stated “the contractor must at all times provide sufficient labour to maintain

the rate of progress laid down...” plainly contemplated that W and R could employ other individuals to carry out the work they were contracted to do. The Court noted that the tribunal had had regard to the fact that in practice the contract had been performed personally throughout the period of engagement and had concluded that it was the parties’ expectation that this would be so.

It was not clear whether Condition 6 was actually a term of the applicants’ contracts. The contract was clearly intended to cover a wide range of situations, from contracts with substantial contractors to contracts with individual men. The Court found that Condition 1 stated that the conditions only bound W and R “in so far as they are applicable” to their contracts. In the Court’s view it had not been intended that Condition 6 should be included in W’s and R’s contracts so as to permit others to do the work they had contracted to do. On the contrary, the parties had intended, at the time the contracts were made, that W and R should be obliged to do the work personally. Moreover, the scheme for payment, and the fact that Redrow chose to contract with each bricklayer individually, pointed strongly to the fact that the contracts were contracts to do the work personally. The decision that W and R were workers was correct and the appeals were dismissed.

South East Sheffield Citizens Advice Bureau v Grayson EAT [2004] IRLR 353

The issue here was whether the CAB had more than 15 employees and thus fell within the scope of the Disability Discrimination Act 1995. Ms Grayson was employed by the CAB as a home visiting and outreach development worker. She developed rheumatoid arthritis but, despite frequent requests, the CAB failed to make reasonable adjustments to cater for her disability. At the tribunal hearing it was accepted that there were only 11 paid employees but Ms. Grayson argued that seven voluntary advice workers should also be treated as employees for the purposes of the Act. If she was right, then the tribunal had jurisdiction to hear her complaint.

The tribunal found that the volunteers were employees, there being mutuality of obligation in that the volunteer had a usual weekly commitment of at least six hours per week, and in return, the CAB would provide training, supervision and an indemnity against expenses and negligence liability.

The EAT disagreed. The relationship was not consistent with that of a contract of service. If the volunteer quit, no breach of contract claim could be lodged by the CAB as there was no contractual obligation to volunteer to do the work. The phrase “usual

minimum commitment” only indicated what the CAB might reasonably expect of its volunteers. Nor could the provision of training, supervision, experience and the indemnity against expenses be viewed as consideration for a minimum work commitment. The work itself was unpaid and expressly stated to be voluntary.

The tribunal had erred in holding that the volunteers were employees. The CAB was entitled to take advantage of the small business exemption.

NB This exemption was removed by statute from 1 October 2004

4.2 Atypical Workers

Two cases under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 have now been decided. In **Webley v Department for Work and Pensions** CA, December 2003 (Case 0033/04) Ms Webley was employed on a fixed-term contract at a job centre from 4th February to 3rd May 2002. Thereafter she remained in the same employment on a succession of fixed-term contracts, the last of which expired on 17 January 2003. Following termination of her employment Ms. Webley brought tribunal proceedings claiming discrimination contrary to the regulations. She claimed that she had been discriminated against because comparable permanent employees on the same grade and carrying out the same duties would not have had their contracts terminated at 51 weeks. She claimed that DWP was carrying out a policy of appointment for 51 weeks to avoid having to comply with the Civil Service Commissioners Recruitment Code which stipulates an open competition process for appointments of one year or more.

The EAT held that the non-renewal of a fixed term contract might in some circumstances amount to less favourable treatment under the regulations. To hold otherwise would mean that a claimant whose employment ends on the non-renewal of his or her fixed term would invariably be precluded from bringing a claim under the regulations.

On appeal, the Court of Appeal allowed the Department’s appeal against the decision of the EAT. Lord Justice Wall commented that once it is accepted that fixed-term contracts are lawful, “the termination of such a contract by the simple effluxion of time cannot, of itself, constitute less favourable treatment by comparison with a permanent employee. It is of the essence of a fixed term contract that it comes to an end at the expiry of the fixed term”.

Allen v National Australia group Europe Ltd EAT 29.7.04 Case 0102/03 On 9th December 2002 Mr. Allen commenced employment as a project manager. Clause 1 of his contract stated that his employment was for a fixed term, expiring on 31 July 2003. The contract stated that either party could terminate the contract by giving one week's notice. On 30th January 2003 the employer dismissed Mr. Allen with notice for a reason relating to his performance.

Mr. Allen claimed that he had been treated less favourably than a comparable permanent employee in that he was not given access to the company's "Performance Improvement Procedure". The tribunal decided at a preliminary hearing that Mr. Allen was not a fixed term employee because of the right to terminate the contract with notice.

The EAT noted that the regulations define a fixed-term contract as "a contract of employment that... *in the normal course*, will terminate.....on the expiry of a specific term." (Reg.1(2)) Clause 1 of A's contract expressly provided that it would terminate on a fixed date and that in itself satisfied the definition of a fixed-term contract. The ability of the parties to bring the contract to an end at an earlier date did not make any difference. Even if the notice provisions were frequently invoked before the expiry of the fixed term, it was still the normal course for the parties to continue working with each other until the expiry of the fixed term.

A significant decision in relation to agency workers is the case of **Brook Street Bureau v Dacas** [2004]IRLR 358 CA. The employment agency offered a contract to Mrs. Dacas, which stated that the "agreement shall not give rise to a contract of employment". She worked as a cleaner at a hostel run by Wandsworth Council for four years until she was dismissed. Her wages were paid by the agency. Otherwise, her terms and conditions of employment were indistinguishable from those of any other council worker. When she submitted a claim for unfair dismissal against both parties to an Employment Tribunal it was held that she was employed by neither the agency nor the Council. The EAT ruled that she was not employed by the Council but that she was employed by the agency. The agency appealed against this finding. In the Court of Appeal Sedley, LJ said that "the conclusion of the employment tribunal that Mrs. Dacas was employed by nobody is simply not credible" On the other hand, The Appeal Court took the view that the agency was not the employer because there was no mutuality of obligation. That left the Council. The majority of the appeal

judges held that there was a contract between Mrs. Dacas and the Council, implied by their conduct and the circumstances surrounding the work done. In the dissenting judgement it was noted that the council did not have any obligation to pay Mrs. Dacas: the agency had that obligation. The outcome of this decision seems to be that end users who take on agency workers will be found to be the employer provided there is control and some degree of mutuality of obligation.

4.3 Implied Terms – Duty Of Trust And Confidence

The necessity for trust and confidence is just one of the terms implied into contracts of employment. Neither the number of implied terms nor their exact contents is written in stone and it is inevitable that there will be attempts to impose new duties and abandon old ones as the nature of society changes. In the case of **Crossley v Faithful & Gould Holdings Ltd** [2004] IRLR 377 the Court of Appeal was asked to consider whether a contract of employment contained an implied duty on an employer to protect the employee's economic wellbeing. The allegation here was that the employer had failed to warn Mr. Crossley that if he went ahead with his proposed resignation, he would not be entitled to any benefits under the permanent health insurance scheme that was in place. Mr. Crossley was a senior employee and managing director of the firm who had been suffering from depression.

In the High Court the judge found that Mr. Crossley's decision to retire had not been prompted by his employer, but had been made "on his own initiative and on the basis of medical advice". He also found that since Mr. Crossley had been an experienced and senior employee with access to advice from the firm's insurance advisor, he could have been expected to familiarise himself with the scheme's terms. He should have been aware of the consequences of resigning. The judge concluded that in the circumstances there had been no breach of contract. Mr Crossley appealed.

In considering whether a general implied term obliging all employers to take reasonable care in respect of their employees' wellbeing, the Court considered what is the test for an implied term in a contract of employment. Dyson LJ stated that "rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations". Despite suggesting a rather wider and more flexible test for the creation of an implied term the court went on to reject Mr. Crossley's claim on two grounds. Firstly, it would involve "a big leap to introduce a major extension of the law

n this area” when the House of Lords had comparatively recently (in the Scally and Spring decisions) declined to do so. Secondly, such a term “would impose an unfair and unreasonable burden on employers”.

The case is the latest in a line of decisions which illustrate how the courts are reluctant to develop the law of contract by imposing additional duties on employers to protect the economic wellbeing of employees. Employers are not their employees’ financial keepers. Unless an employer assumes the responsibility of giving financial advice, employees are unlikely to be able to claim that the employer should have pointed out the small print to certain rights and options they have by way of financial benefits.

4.4 Whistleblowing

The Public Interest Disclosure Act 1998 protects those who disclose information about certain kinds of wrongdoing against dismissal or other detriment by their employer. A dismissal will be automatically unfair if the reason for the dismissal was that the worker made a “protected disclosure”. This means that the disclosure must concern one of a specified number of matters, for example that a person has failed to comply with a legal obligation to which he or she is subject. Secondly, the disclosure must be made in good faith – the employee must reasonably believe that the information disclosed is true or substantially true and must not stand to make any personal gain from the disclosure. Disclosure can only be made outside the organisation in a limited number of circumstances, for example, where the employee reasonably believes that he or she will be subjected to a detriment if they raise the matter with the employer. In addition, external disclosure can only be made where it is reasonable in all the circumstances.

In **Street v Derbyshire Unemployed Workers Centre** 2004 EWCA Civ 964 the Court of Appeal considered what is meant by good faith and whether it could be vitiated by personal antagonism, with the result that the protection afforded by the Act is lost.

Ms. Street was employed by a not-for-profit centre providing assistance to the unemployed. In May 2000 she wrote to E the treasurer of the local authority alleging corruption against H the centre’s co-ordinator. She referred to a secret account, foreign trips and H’s instructions to her to do work for other organisations. She refused to meet with E to discuss her concerns. An independent investigation was

carried out into the allegations but Ms. Street declined to co-operate. H was exonerated and Ms. Street was criticised for failing to co-operate. She was described by the investigator as at best misguided and at worst malicious. Following disciplinary proceedings she was dismissed for gross misconduct and breach of trust. She initiated tribunal proceedings claiming that her dismissal was automatically unfair. The tribunal held that the disclosures were not protected as they had not been made in good faith. They had been motivated by personal antagonism towards H. In reaching its decision the tribunal took account of her subsequent failure to co-operate with E or with the investigation. The EAT agreed with the tribunal's decision that she had not been automatically unfairly dismissed.

On appeal the Court of Appeal was asked to consider whether it was appropriate to examine the underlying motive behind disclosures when determining the "good faith" issue. Ms. Street argued that since the tribunal had found that she had believed the truth of her allegations they had in effect accepted that she had acted honestly or with honest intention ie in good faith. The Court preferred the employer's submission that by including the notion of good faith as an additional condition, Parliament clearly intended something above and beyond belief in the truth of the information. The Court went on to hold that a tribunal should only find that a disclosure was not made in good faith where they took the view that the dominant or predominant purpose for making the disclosure was for some ulterior motive. The EAT had found that personal antagonism towards H was Ms. Street's dominant and perhaps her sole motivation. The protection of such disclosures was not within the stated purpose of the Act – to protect those "who make certain disclosures of information in the public interest".

The decision may deter workers who have mixed motives from making disclosures. It is to be remembered however, that although such individuals may not be able to claim that their subsequent dismissal is "automatically unfair" they could still bring an "ordinary" claim for unfair dismissal.

Kraus v Penna plc EAT [2004] IRLR 260 is a further case on protected disclosures under the Public Interest Disclosure Act, this time dealing with internal disclosures, within the organisation. A consultant who informed his client company, in the course of advising on a redundancy/restructuring exercise, that certain of the proposed redundancies could be in breach of employment legislation, was dismissed. He argued that his contract had been terminated because he had made a protected disclosure. The EAT ruled that Mr Kraus had not made a qualifying disclosure within

the terms of the Act. The Act specifically protects disclosures concerning breaches of legal obligations but there must be an actual or likely breach. The disclosure in question was merely Mr Kraus's belief that there was a possibility or a risk of a breach of employment legislation. Whether or not there was a breach depended on the course of action which was subsequently adopted and upon a correct interpretation of the relevant legal principles. At the time the report was prepared there was no evidence that the company was "likely to fail to comply" with a legal obligation.

This is another narrow interpretation of the protection afforded by the legislation. It has been suggested that both *Kraus* and *Street* undermine the main purpose of the Act which is to encourage workers who know of possible malpractice to come forward in the knowledge that they will be protected from victimisation and reprisal.

4.5 Stress at Work

Judgement in the first House of Lords case concerning stress in the workplace was delivered in April this year. The case – **Barber v Somerset County Council** [2004] IRLR 475 – was a sequel to the Court of Appeal's decision in *Hatton v Sutherland*, in which 4 conjoined appeals, including Mr. Barber's were decided. In that decision, the Court of Appeal overturned the earlier decision of a county court to uphold Mr. Barber's claim for personal injury (in the form of a serious depressive illness) arising from his work as a teacher. The Court of Appeal took the opportunity to issue general guidance on the principles to be applied in cases where an employee complains that the system of work, under which he or she is employed, subjects him or her to a degree of mental stress, carrying the risk of psychiatric illness.

Mr. Barber appealed to the House of Lords against the Court of Appeal ruling. He had been appointed to the post of Head of Maths at East Bridgewater Community School in January 1984. He was regarded as a dedicated and conscientious teacher. Consequent upon a restructuring of staff in 1995 he was required to take on extra duties and responsibilities. He worked long hours to meet the new challenges but towards the end of 1995 he began to feel strained. Over time his condition worsened and became acute. In 1996 he attended his doctor and took 3 weeks sick leave certified as "over-stressed/depression". In May 1996 he spoke to several members of the senior management team about his concerns that he was not coping but received variously unsympathetic and unhelpful responses. On 12th November 1996 he suffered a mental breakdown.

He brought a claim for personal injuries in the form of serious depressive illness, which was upheld in the county court where an award in excess of £101,000 was made. This ruling was appealed and heard together with three other similar cases. In Mr. Barber's case and 2 others, the appeals were allowed, with the Court of Appeal finding that the employer had not breached the duty of care they owed to the employees. The Court of Appeal also ruled that the level of damages awarded was too high and that future loss of earnings should have been calculated using a lower multiplier. This aspect of the decision was not appealed.

In the House of Lords, Lord Walker delivered the majority decision of the House. He identified the main issues as whether the Court of Appeal had been right to conclude that the evidence before the county court judge could not sustain a finding that the employer was in breach of the duty of care it owed to Mr. Barber. He concluded that the case was "fairly close to the borderline". The employer's duty to take some action arose in June and July 1996 when Mr. Barber saw, separately, each member of the school's senior management team. It continued so long as nothing was done to help Mr. Barber. He ruled that the Court of Appeal had failed to give adequate weight to the fact that Mr. Barber had been off work for three weeks, with no physical ailment or injury, absence certified by his doctor as due to stress and depression. He said that the senior management team should have made enquiries about his problems to see what they could do to ease them, instead of brushing him off unsympathetically or sympathising but simply telling him to prioritise his work. Some reduction in his workload should have been effected to ease his return. Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might have made a real difference. In any event, he stated, Mr. Barber's condition should have been monitored and if it did not improve some more drastic action would have had to be taken. He concluded that the judge at first instance had been entitled to hold that the senior management team were in a position of continuing breach of the employer's duty of care, and that caused Mr. Barber's serious nervous breakdown.

This judgement represents a further elucidation of the law in this complex area. The ruling emphasises the importance of employers taking proactive steps to address any situation where they have been put on notice that an employee's working conditions are subjecting him or her to the risk of significant mental ill-health.

4.6 Implied Term Of Trust And Confidence - Psychiatric Illness Caused By Events Prior To Dismissal

In 1909, in a case called *Addis v Gramophone Company Ltd* [1909] AC 488, an attempt was made by an employee to claim damages for the hurt caused by the manner in which he was dismissed. The attempt failed. Since those days we have seen the development of the implied term of trust and confidence. Can an employee allege a breach of this implied term as a way to sidestep the prohibition on such a claim?

In 2001 the House of Lords in *Johnson v Unisys* [2001] ICR 480 held (by a majority) that an employee could not use the implied term of trust and confidence to claim damages for psychological injury if the damage was caused by the manner of the actual dismissal. The reasoning for this was that the term of trust and confidence is concerned with the preservation of the employment relationship, not its termination. So far as losses arising from dismissal are concerned, there has been a statutory remedy for unfair dismissal since the 1970's. It would not be a proper exercise of the judicial function to develop the common law to allow damages over and above the limits set by Parliament.

Much litigation resulted from the *Johnson v Unisys* judgement, with one of the key issues being the extent to which breaches of the implied duty arising in the run-up to dismissal are caught by the limitations imposed by the House of Lords. The reason for bringing these breach of contract claims is to get around the cap on compensation in statutory unfair dismissal actions and/or the one year service requirement for unfair dismissal claims. Conflicting Court of Appeal decisions resulted from different interpretations of the "Johnson exclusion". The cases in question – ***Eastwood v Magnox Electric plc*** and ***McCabe v Cornwall County Council*** [2004] HL 35 have now been heard by the House of Lords.

In *Eastwood* successful unfair dismissal actions were brought against the employer. However, as the maximum compensatory award available at the time was £11,300, Mr. Eastwood brought proceedings in the county court alleging breach of contract and negligence. He claimed a breach of the implied term of trust and confidence resulting in psychiatric injury and consequent loss of earnings. He also claimed that the company had negligently caused his injury, leading to financial loss.

As a preliminary issue, the judge decided that Mr. Eastwood's claims in contract and tort could not proceed as they were precluded by the Johnson exclusion. The implied term and the duty of care did not apply to matters covered by the unfair dismissal legislation, including acts which took place once the disciplinary procedure started to run. The decision to strike out Mr. Eastwood's claim was upheld by the Court of Appeal.

In McCabe, a teacher was suspended in 1993 after five pupils made complaints of inappropriate sexual conduct. At an interview with the head teacher, he was given no details of the accusations and refused to accept the offer of a formal written warning as a sanction. He only heard the details of the complaints some four months later when he received a letter inviting him to attend a disciplinary hearing. During this period Mr. McCabe began to suffer from a psychiatric illness. He attended a series of disciplinary hearings, which resulted in his dismissal in 1994. His unfair dismissal action was successful, on the grounds that there had been no proper investigation and that the employer had acted in breach of the disciplinary procedures.

In 1997 Mr. McCabe commenced proceedings in the High Court seeking damages in contract and tort for psychiatric illness caused by the events leading up to his dismissal, including his suspension, the failure to provide him with details of the accusations during those four months, and the failure to carry out a proper investigation. The claim was struck out by the High Court on the grounds that it was excluded by the decision in Johnson.

On appeal by Mr. McCabe, the Court of Appeal took the view that the High Court was wrong to conclude that a common law claim was automatically barred because the facts involved a disciplinary process. A distinction should be made between the dismissal itself, which was caught by the unfair dismissal legislation, and conduct prior to the dismissal which caused injury compensatable in damages at common law. Mr. McCabe's claim should not have been struck out.

The House of Lords has now made it clear that it prefers the approach in McCabe. Where a cause of action accrues before dismissal, employees will not be barred from bringing claims relying on the duty of trust and confidence. The restrictive approach in Eastwood was disapproved. In that case, even events over a prolonged period leading up to dismissal were found to be part of that dismissal. The House of Lords has confirmed that a distinction must be drawn between pre-dismissal events and the

dismissal itself. Only the dismissal is caught by the Johnson exclusion. Common law claims can be brought for damages for psychological injury arising out of events prior to the dismissal.

It will only be exceptionally that an employee suffers financial loss as a result of an employer's failure to act fairly in the steps leading to dismissal. One example would be where there is financial loss as a result of suspension. Another instance is where the employee suffers financial loss due to psychiatric or other illness caused by his or her pre-dismissal unfair treatment. In such cases the employee now has a common law cause of action which precedes and is independent of a subsequent dismissal.

However, the House of Lords acknowledged that this leaves the law in an unsatisfactory state:

- The fact that dual proceedings will have to be brought to receive full compensation means that the tribunal and the court go over the same ground in deciding factual issues and leads to a waste of time, resources and additional costs for both parties
- Difficult questions of causation are bound to arise – did the damage arise as a result of the breach of the trust and confidence term or as a result of the dismissal? Did the fact of dismissal prove to be the last straw for the employee or did the onset of the illness occur even before he was dismissed?
- There will be particular difficulties in cases of constructive dismissal. A distinction will have to be drawn between losses which flow from the breach of the trust and confidence term and losses which flow from the employee's acceptance of those breaches as a repudiation of the contract (ie the actual constructive dismissal).
- An employer may now be better off dismissing an employee rather than suspending him because a claim for unfair dismissal would be subject to the statutory cap, whereas a common law claim for damages for psychiatric injury caused by the suspension would not.
- Similarly, an employee who is psychologically vulnerable is owed no duty of care in respect of the manner of his dismissal (*Johnson*) but he may be owed a duty of care in respect of his suspension.

In the light of these difficulties, Lord Nicholls called for an urgent review of the relevant law to be undertaken by Parliament and in particular for consideration to be given to the removal of the statutory cap on unfair dismissal awards.

4.7 Unfair Dismissal Compensation - Can The Compensatory Award Include An Amount For Injury To Feelings?

In the eagerly awaited decision of **Dunnachie v Kingston upon Hull City Council** [2004] UKHL 36 the House of Lords has confirmed that compensation for non-financial losses such as injury to feelings cannot be awarded as part of the compensatory award in unfair dismissal cases. Compensation for unfair dismissal is recoverable only in respect of financial loss.

Facts: Mr. Dunnachie began working for the Council's Environmental Health Department in 1986. In 2001 he resigned following a prolonged period during which he was undermined and bullied by his colleague and former line manager, a situation which the Council had failed to address. He subsequently brought a claim for unfair (constructive) dismissal which was upheld. The award of compensation included £10,000 for injury to feeling, the tribunal relying expressly on Lord Hoffman's comments in Johnson v Unisys. Indeed, tribunals throughout the United Kingdom had begun to make such awards, the amounts ranging from as little as £250 up to £10,000. (In Northern Ireland see Feargal Barr for an example of this.)

The EAT allowed the Council's appeal against this award. 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 £53,500) 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.

In February 2004 the Court of Appeal overturned the EAT's decision. The Court held by a majority that Lord Hoffman's remarks were indeed obiter. However it went on to hold by a differently composed majority that the statute nevertheless allows compensation for non-economic loss in unfair dismissal claims.

The Council further appealed to the House of Lords. Judgement was handed down in July 2004. The Law Lords restored Burton J's decision in the EAT and overturned the Court of Appeal decision. Lord Steyn, giving the view of court, confirmed that Lord Hoffman's remarks in Johnson were indeed obiter dicta and therefore not binding. As a matter of interpretation of the relevant section of the statute (section 123(1) of the Employment Rights Act 1996) the House of Lords ruled that the plain meaning of the word "loss" was economic loss. Non-economic loss was excluded and the section did not allow injury to feelings, aggravated or exemplary damages to be included in the compensatory award for unfair dismissal. The use of the phrase "such amount as the tribunal considers just and equitable in all the circumstances" in the section did not have the effect of allowing tribunals to award compensation for non-economic loss, but merely gave them a degree of flexibility in their procedures.

Although the House of Lords did not consider this, it is worth pointing out that damages for injury to feeling are available to an employee who has been subjected to a detriment short of dismissal. Under the Employment Rights Act 1996 (and the corresponding legislation in Northern Ireland) employees have a right not to be victimised by their employer by being subjected to "action short of dismissal" on various grounds, such as making a protected public interest disclosure, carrying out the functions of a health and safety representative, or employee representative, refusing to work on a Sunday and so on. It is well-established through cases such as Virgo Fidelis Senior School v Boyle (a whistleblowing case) that damages for injury to feeling are awardable if the detriment complained of comprises something other than dismissal. In Boyle £25,000 was awarded under this head. This we are left with the situation that workers who suffer detriment short of dismissal may potentially recover compensation far in excess of employees who are actually dismissed, despite the fact that dismissal is regarded as one of the severest forms of detriment which an employee or worker can suffer.

4.8 Upper Age Limits For Unfair Dismissal And Redundancy

In September 2004 the Court of Appeal handed down its decision in the long-running saga of **Secretary of State for Trade and Industry v Rutherford**. The Court of

Appeal has agreed with the EAT that the upper age limits for claiming unfair dismissal and redundancy are lawful 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 Court of Appeal confirmed 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 national workforce. Had the tribunal selected the correct pool it would have found no disparate impact and hence no sex discrimination. The difference between the proportion of men affected by the upper qualifying ages and the proportion of women affected, was negligible.

It will be recalled that under the EU Equal Treatment in Employment Directive, rules which prohibit discrimination on grounds of age have to be in place by 2006.

4.9 Disability Discrimination – the duty to make reasonable adjustments in the House of Lords.

In the ground-breaking case of **Archibald v Fife Council** [2004] IRLR 651, HL, the House of Lords considered in detail for the first time, the operation of the provisions of the Disability Discrimination Act 1995 (“the DDA”). Ms. Archibald had worked for the Council as a roadsweeper for two years when she suffered complications after minor surgery, which left her virtually unable to walk. Her only alternative was sedentary work, which she was anxious to obtain. The Council facilitated her by arranging for her to undertake training for office work, which she completed

successfully. The applicant was on the lowest grade of the manual pay scale and this offered a slightly lower rate of pay than the lowest rate of pay for an office-based job. Thus, when applying for an office-based job, she was treated as applying for a promotion and was required by the Council's redeployment policy to undergo competitive interviews. She attended a large number of interviews but failed to be selected for over 100 office-based positions, because, in her view she had no prior office experience, unlike other applicants. She was eventually dismissed by the Council on the grounds that she was physically unable to do her job as a road sweeper.

Ms. Archibald complained to an Employment Tribunal of unlawful disability discrimination. She contended that as a reasonable adjustment under the DDA, she should have been transferred to an office-based post, there being no dispute that she had the requisite skills to carry out such a role. The tribunal held in favour of the Council and ruled that transferring her to an office-based post without competitive interview would amount to more favourable treatment of a disabled person. This was prevented by section 6(7) of the DDA, which provides that nothing in Part 2 of the Act is to be taken to require an employer to treat a disabled person more favourably than he or she treats, or would treat, others.

Ms. Archibald took her case to the EAT and the Court of Session and lost on both occasions. Undaunted, she appealed to the House of Lords where the central issue to be decided was whether Fife Council had failed to comply with the duty to make reasonable adjustments under section 6 of the DDA and, specifically, when the duty to make such adjustments arose.

The Council argued that the duty could only arise in the context of the job which the employee had been hired to do. The duty would necessitate taking action to remove or reduce the effect of any barrier or obstacle which presented vis-à-vis the disabled employee doing **that** job. It could not, however, in their view, arise where the effect of the disability was to render the employee completely incapable of doing their present job since no reasonable adjustment could then be made which would enable the employee to carry out that job.

However the House of Lords rejected this view as being too narrow and as outside what Baroness Hale referred to as "the measure of positive discrimination entailed in

the DDA in requiring employers (in making reasonable adjustments) to take steps to help disabled people that they are not required to take for others”.

The Court also rejected the view that the Council's redeployment policy (including the requirement for Applicants for transferring from one grade to another to compete for jobs at interview) of itself placed Ms. Archibald at a substantial disadvantage vis-à-vis other persons.

The duty to make adjustments is triggered where any arrangements made by the employer, or any physical feature of premises occupied by the employer, place the disabled person at a substantial disadvantage in comparison with persons who are not disabled. The court ruled that the term “arrangements” could extend to the requirements (in terms of the component elements of the job description) of the position of road sweeper. That being the case, these “arrangements” (i.e. the duties of the road sweeping post) placed Ms. Archibald at a substantial disadvantage because having become disabled she not could perform the core requirements of her job and was therefore liable to be dismissed on grounds of incapacity. The scope of arrangements is thus very broad and in the applicant's case included the requirement in her job description that she be physically fit.

The Court took the view that in comparing the disabled person with “persons who are not disabled” as required by section 6(1) there was no requirement for a like for like comparison to be made such as would be the case under sex or race discrimination legislation.

The House of Lords noted that in setting out examples of reasonable adjustments which an employer may have to take, section 6(3)(c) expressly envisaged transferring a person to fill an existing vacancy and there were no words of limitation restricting this to a vacancy at the same or a lower grade. A transfer could be upwards as well as sideways or downwards. Accordingly a reasonable step for the Council to have taken might have been to transfer Ms. Archibald to an office position which she was qualified to do. The court noted that the employer's duty was only to do what was reasonable in the circumstances of the case. If the transfer was to a much higher grade then it might not be reasonable.

The Court rejected the view that a transfer would have amounted to more favourable treatment and would have contravened section 6(7). The opening words of the

subsection “subject to the provisions of this section...” mean that the requirement not to treat disabled persons more favourably is itself subject to the duty to make reasonable adjustments. The tribunal should have considered whether it was reasonable to allow Ms. Archibald to transfer to fill a vacant post without submitting to competitive interview. The case was remitted to the Tribunal to consider whether the Council’s actions complied with its duty under section 6(1) to take reasonable steps to prevent its arrangements from placing Ms. Archibald at a substantial disadvantage.

The significance of this case is that employers can no longer assume that the fact that a disabled person is incapable of carrying out their existing duties means that there is no duty to make reasonable adjustments. The employer will be expected to consider whether the employee could be transferred to fill an existing vacancy which he or she is capable of doing. This could include promoting the person into such a position.

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