



ANNUAL MEETING : THURSDAY 10 JULY 2008

MEMBERS' BRIEFING NOTE

1. Trade Unions Ballot for Strike Action on Local Government Services pay offer

Unison's NJC Committee have voted to reject the pay offer of 2.45% and ballot for strike action. 54% of people voted on a 27% turnout to reject the offer in Unison's consultative ballot. Timetable – the ballot is completed and the first strike days are set for 16 and 17 July.

Details of the employers offer as follows:

- 2.45% on all spinal column points, plus an additional £100 on SCPs 4, 5 and 6;
- The NJC will seek to complete by 31st December 2008 the review of the national agreement agreed as part of the 2007 settlement; and
- The NJC will seek to agree by 31st December 2008 the pay settlements effective from 1st April 2009 and 1st April 2010.

Unite (T&G) announced the result of their strike ballot on 26 June. There was a 75% Yes vote. In Northern Ireland NIPSA have also voted to strike with a 60% Yes vote.

These strikes are planned for the same days as Unison, 16th and 17th July.

2. Craft workers' pay updates

The Employers are disappointed that UCATT rejected the employers' offer of a pay increase of 2.45% without giving its members the opportunity of a consultation process to consider the offer in detail. A meeting was held in June to give both Sides of the JNC the opportunity to set out their positions. The unions (UCATT in particular) are against any such precondition being made – and are totally opposed in principle to any form of Job Evaluation being applied to Craftworkers..

The employers have nonetheless already conveyed to the Trade Union Side that the offer as set out in their letter of 14 April is final and represents the absolute limit of authorities' affordability. A copy of the letter can be found at: <http://www.lge.gov.uk/lge/aio/206474>.

3. Subsistence Allowances for 2008/9

The new rates can now be found on the Resource Centre section of SEE's website.

4. TUPE protections for staff moving to new unitary councils

On 7 May the Local Government Minister, John Healey, published the framework which the Government intends to put in place for the transfer and appointment of staff to the new unitary councils. The framework centres on the Government's commitment to TUPE protection for staff transferring to the new unitaries

The creation of nine new unitary councils in Bedfordshire, Cheshire, Cornwall, Durham, Northumberland, Shropshire, and Wiltshire from 1 April 2009, will reduce the number of councils in those areas by 35, providing opportunities to overhaul local services. The government has said that it expects all nine new councils to deal constructively with the trade unions and to ensure staff are kept involved and informed as detailed plans are developed. A copy of the written ministerial statement can be found at: <http://www.communities.gov.uk/news/corporate/779558>.

5. **Identity cards to be issued for some foreign nationals present in the UK**

The UK Borders Act 2007 granted the Border & Immigration Agency power to make identity cards compulsory for all foreign nationals who are subject to immigration control in the UK. Pilot stages have begun in Croydon and as part of this all customers are now subject to biometric testing.

Identity cards will be introduced for all foreign nationals on a rolling basis throughout the next few years and will replace the stickers and immigration status documents currently used. It is hoped that by 2012 the cards will be issued to foreign nationals who are already settled in the UK. The new identity cards will include digitalised photographs, fingerprints and biometric information on individuals and will stand alone as evidence of an individual's identity. It is also hoped that the new identity cards will make it easier for employers and sponsors to check whether individuals are entitled to work and study in the UK.

6. **Age Discrimination Retirement Procedure**

Authorities should be aware of the case of **Plewes v Adam Pork Produce** when retiring employees. This is an employment tribunal decision, and therefore does not set a precedent; however, it highlights a potential inconsistency between the drafting of the retirement provisions in the Employment Equality (Age) Regulations and the way that retirement works in practice.

Regulation 30 of the Employment Equality (Age) Regulations provides that an employer will not discriminate against an employee on the grounds of age if he dismisses him for retirement at or over the age of 65. Mr Plewes' contract contained a clause which provided that the normal retirement date was the day before the employee's 65th birthday. Mr Plewes did not want to retire, but his request to continue working was rejected. He brought a claim that he had been discriminated against on the grounds of age and unfairly dismissed. The employer's defence that they had complied with the statutory retirement procedure failed due to the fact that the contract had terminated the day before Mr Plewes' 65th birthday, whereas the default retirement "exemption" in the regulations only applies to retirement **at or over** age 65. The dismissal was therefore discriminatory and the employer was unable to justify it. The tribunal awarded compensation of over £36,000.

It is common practice, when an employee retires, that their last day at work is the day before their 65th birthday and they will usually be eligible to draw their pension from the day of their birthday. Employers should take care to ensure that their documentation and any notice they provide to their employees does not put them in the same position as the employer in this case. It would be advisable to provide that the employee's employment will terminate on the day of the employee's 65th birthday. This could provide that termination occurs at one second past midnight. This is based on the fact that provisions in the Pensions Act 1995 (paragraph 1(5) of Part 1 of Schedule 4), which define when a person attains state pension age, provide that a person attains a given age at the commencement of the relevant day. Therefore, providing that a person's contract terminates just after the commencement of the date they become 65 the requirements of the age regulations should be satisfied and, at the same time, this should mean that an

employee would not be required to work on their 65th birthday. However, this would mean that the date of leaving would be the 65th birthday (even if no pay was paid for that day as work ceased at 1 second passed midnight) and so the pension could not then commence until the following day.

7. Equal Pay Comparator

In **Highland Council v TGWU and others**, a number of women employed by the Council raised a grievance, complaining that they were not paid the same as men who were doing jobs rated the same or lower than them. However, when the women subsequently brought employment tribunal proceedings, the list of male comparators was different.

The EAT upheld an appeal from the Council on the basis that an employer is entitled to know whether or not the grievance could give rise to employment tribunal proceedings because if he does not follow the statutory procedure he could be penalised by the tribunal. In the absence of the actual comparator to be relied upon at the employment tribunal, the employer is not in a position to respond in a meaningful way to the grievance.

Although this is a welcome decision for employers, in reality it just postpones the process. An employee prevented from proceeding with their tribunal claim by this judgment will either seek to alter the claim to incorporate the comparators they will seek to rely upon, or instigate a new statutory grievance. At best, it might encourage employees and their advisors to think about their claim in more detail and identify the comparators at an earlier stage, rather than submitting a premature claim without any real understanding or concern about its prospects of success.

8. Employer's benefits package held not to be discriminatory on grounds of age

The Tribunal recently considered a complaint that an employer's provision of a fund to employees, from which they could purchase items from a flexible benefits package, was discriminatory. This claim was brought on the basis that one of the benefits available for employees to purchase was a private medical insurance scheme, the premium for which was calculated by reference to the employee's age and gender.

The Claimant, Mrs Swann, was 51 years of age at the date of joining the scheme. She claimed that because the premiums under the PMI scheme were age related and more costly for an older employee than a younger employee, the scheme was discriminatory. The majority of the Tribunal agreed that the issue to be considered in this case was the provision of the fund of money to purchase items within the flexible benefits package. It was not disputed that the provision of these funds to employees was unaffected by the employees' ages. Accordingly the Tribunal found that the employer, GHIL Insurance Services UK Ltd, had not discriminated. However, the Tribunal stated that as this was a novel case, it should also go on to consider the alternative argument put forward by Mrs Swann - which was that the treatment which should be considered was not the allocation of the fund but that the PMI scheme was discriminatory as the calculation of the premiums was age related. In this respect the Tribunal acknowledged that the method of calculation of the premium was age-related and therefore amounted to less favourable treatment on the grounds of age. However, the Tribunal considered this treatment to be justified on the basis that GHIL was experiencing a high turnover of staff and it genuinely believed, having taken advice from a specialist consultant, consulted with staff and carried out a survey, that the PMI scheme would achieve the legitimate aim of effective recruitment and staff retention. The treatment was therefore justified and GHIL's benefits package was not discriminatory on the grounds of age.

Age discrimination is the only form of direct discrimination for which a defence of justification is available. Whilst many practitioners and employers feared that Tribunals would apply this defence narrowly, it appears that provided employers can establish that they have made all reasonable efforts to offer their employees a benefit package that is most advantageous to staff, then they will be in good stead to rely on the defence.

9. Court of Appeal decision on the burden of proof for unfair dismissal

The Court of Appeal has held that it is for the employer to prove that it had a potentially fair reason for dismissing an employee and even when the employee asserts a different reason for the dismissal the burden of proof does not pass to them.

Dr Kuzel was dismissed by her employers, Roche Products Ltd. Dr Kuzel issued a claim for unfair dismissal asserting that she was dismissed because she had made a number of protected 'whistle blowing' disclosures. Roche maintained that her dismissal was in fact for 'some other substantial reason', namely a breach of trust and the breakdown of the working relationship.

The case went to the Court of Appeal who found unanimously in favour of the decision of the original Tribunal. The Court rejected Roche's submission that it was for Dr Kuzel to show that her dismissal was a result of her whistle blowing. Just because the Tribunal did not accept the employer's potentially fair reason for the dismissal it does not mean that the Tribunal has to accept the reason put forward by the employee. In other words, it is open to the Tribunal to conclude that the real reason for the dismissal was not put forward by either side.

It is therefore now clear that the burden of proof in unfair dismissal cases is placed firmly on the employer's shoulders. The employee can challenge the evidence provided by the employer and can provide his/her own evidence as to why the dismissal took place but ultimately the burden will not pass to them. The employer will still have to show that there is a potentially fair reason for dismissal as ultimately it is they that should know the reason for the dismissal as it was their decision to dismiss.

10. Dismissal for IVF Treatment

In **Mayr v Backerei und Konditorei Gerhard Flockner OHG** the ECJ held that it was unlawful sex discrimination to dismiss a woman due to the fact that she was undergoing IVF treatment.

Ms Mayr was employed as a waitress by Flockner from 3 January 2005. She began IVF treatment which included hormone treatment for about one and a half months and a follicular puncture (removal of eggs) was then carried out on 8 March 2005 and the eggs were fertilized. They were due to be transferred into her uterus on 13 March. She was certified as sick by her GP from 8 to 13 March. On 10 March 2005 she was dismissed with notice.

She claimed that the notice had no legal effect as, under Austrian law, a woman is protected from dismissal from the date she becomes pregnant, and she argued that this occurred when her eggs were fertilized on 8 March. The Austrian court referred the matter to the ECJ and asked whether a woman who was undergoing IVF treatment, where the eggs had been fertilized, but not yet implanted, was protected by the Pregnant Workers Directive. The court held that if the reason for Ms Mayr's dismissal was the fact that she was undergoing IVF it was necessary to establish whether that affected both sexes alike, or whether it applies exclusively to one of them. The treatment in question, namely a follicular puncture and the implant of eggs after their fertilization directly affects only women. Therefore, the dismissal of a female worker essentially because she is

undergoing this important stage of IVF treatment constitutes direct discrimination on the grounds of sex.

This case establishes that the dismissal of a woman due to the fact that she is undergoing this stage of IVF treatment is unlawful sex discrimination. The case raises wider questions as to the scope of protection for women undergoing such treatment. For example, dismissing a woman for needing time off work to undergo this stage of treatment would also probably amount to unlawful sex discrimination.

There is also the issue of whether any leave is paid leave, sick leave or unpaid leave. Although we will have to wait for another case before the legal position is clear in respect of this issue, NJC guidance recommends that authorities make reasonable time off arrangements for employees undergoing such treatment (Green Book Part 4.5 paragraph 1.1). Authorities should consider the issue and determine the extent to which paid leave is appropriate taking into account the other reasons for which paid leave, including sick leave, is provided.

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June 2008