

## Employment Law Update Jane McCafferty

### INTRODUCTION:

1. This paper considers recent developments in the case law which are likely to affect local authority employers. Legislative changes effected by the Equality Act are considered in Holly Stout's paper, delivered in the next session.
2. The past year has seen important judgments delivered in the following areas of employment law which are of particular relevance to local authority employment in the current political climate of funding cuts and a move away from the provision of services by the public sector: -
  - 2.1 Collective redundancy consultation;
  - 2.2 TUPE – consultation, collective agreements and the Cabinet Office Statement of Practice;
  - 2.3 Compromise agreements;
  - 2.4 Employment status;
  - 2.5 Industrial action;
  - 2.6 Working time/holiday pay.

### COLLECTIVE REDUNDANCY CONSULTATION – WHEN TO START?

3. The EU Collective Redundancies Directive 98/59 contains minimum standards for informing and consulting with workers' representatives in the event of collective redundancies. This Directive is implemented domestically by TULRCA 1992.
4. The important questions of (a) when the obligation to begin consultation on collective redundancies is triggered and (b) the subject matter of this consultation are necessarily linked. Does the employer have to consult on the reason for the redundancies? If so, the obligation to begin consultation would appear to be triggered at an earlier stage, i.e. before the decision which creates the need for redundancies has been taken. The recent case law on these two linked questions is difficult to reconcile.

5. On the issue of when the duty to consult is triggered, a recent preliminary ruling from the ECJ has brought some clarity on the question. *Akavan Erityisalojen Keskusliitto AEK ry v Fujitsu Siemens Computers Oy* [2009] IRLR 944 established that an employer is required to start the consultation procedure once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies had been taken, but not before. The duty to consult is not triggered by an employer merely contemplating a decision that is likely to lead to collective redundancies, because the factors shaping the consultation will not yet have been clarified. However, consultation must be started once a strategic or commercial decision compelling the employer to contemplate or plan for collective redundancies has been taken. Where that decision was taken by the employer's parent company, the duty to consult only arose when the subsidiary employer in which redundancies were contemplated had been identified. Furthermore, the consultation procedure must be concluded by the subsidiary before any decision is made by the parent company to terminate employment contracts. Applying this to the local authority context, a decision made by central government on funding cuts could, in one sense, be said to result in local authorities nationally being compelled to make redundancies but unless and until the consequences of that decision by the central government 'parent' has been identified by the local authority, the duty does not arise.
6. In contrast, there is as yet no clarity on one aspect of the *extent* of consultation. The established position in domestic law (section 188 of TULCRA 1992) was that employers are not required to consult about "the reasons for the redundancy, including whether or not a plant should close" (see *R v British Coal Corporation and another ex parte Vardy* [1993] IRLR 104). This was reversed – again in a coalmining context – by the EAT in *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area)* [2008] ICR 163, where Elias P held that "the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals and that in turn requires consulting over the reasons for the closure".
7. *UK Coal* was followed in *United States v Nolan* [2009] IRLR 923, where the USA was found to have fallen short of the *UK Coal Mining* consultation standard. On the facts of *Nolan*, the United States government had decided to close an army base, notified the MOD of its decision and then, one month later, begun consultation. The EAT held that there was no principle of law that established or suggested that the *jus imperii* nature of an act affected the construction of a statute engaged by it, rather than the court's jurisdiction in relation to the act. The EAT noted that the USA could have avoided the consequences of a breach of section 188 by either (a) claiming state immunity for its decision to close the army base or (b) established a defence under section 188 (7) there were special circumstances rendering compliance with section 188 (2) (a) not reasonably practicable.

8. Of particular importance to local authority employers in the current political climate was the EAT's clear message that the obligation to consult applied to both public and private sector employees. Redundancies in the public sector might result from decisions taken for political and other non-commercial reasons, but those reasons were not excluded from the consultation requirements of section 188. This approach will throw up difficult issues for local authority employers when collective redundancies are the result of decisions taken at central government level. In Nolan, the public authority taking the decision to close was also the employer. That will not be the case where central government strategic decisions lead to redundancies in local government. The EAT's approach suggests that one solution would be to rely on the 'special circumstances' defence when arguing that it is not possible for the employer to consult on the reasons for a strategic decision taken by a different body.
9. The Court of Appeal heard the appeal from the EAT's decision in Nolan in March 2010; judgment is still awaited.

## **TUPE – CONSULTATION, COLLECTIVE AGREEMENTS AND THE CABINET OFFICE STATEMENT OF PRACTICE**

10. The duty to inform and consult in the context of a TUPE transfer has also been the subject of recent judicial consideration. In the current climate of a move towards the state doing less and a 'Big Society' doing more, the scope of local authorities' duties to inform and consult before a TUPE transfer will have particular impact. The last year has produced a series of cases of important cases on the content of the regulation 13 TUPE duties to inform and consult.

*Does the transferee/or have to get it right?*

11. The starting point is the Court of Appeal's guidance in Royal Mail Group v The Communications Workers' Union [2009] IRLR 1046. The case involved a dispute as to the effect of the TUPE Regulations in a franchising situation. The claimant's position was that employees would transfer automatically unless they declined. The transferor asserted that although the franchising was a transfer of an undertaking for the purposes of the 2006 Regulations, it would not operate to transfer any employment contracts to the transferee because it either redeployed employees to another office or they accepted voluntary redundancy. The claimant brought four test cases before the employment tribunal on the basis that there had been no proper provision of information or consultation in accordance with regulation 13 of the 2006 Regulations.

12. The defendant submitted that, inter alia, the only obligation was for it to inform and consult on what it believed the legal, economic and social implications of the transfer to be even if those beliefs were incorrect.
  
13. The issue in the Court of Appeal was what was the scope and nature of the statutory obligation on employers to inform and consult appropriate representatives of any affected employees with regard to the effect of a proposed relevant transfer under regulation 13 of the 2006 Regulations. The Court of Appeal held the language of regulation 13(2) was not the language of strict liability or warranty and it was not only in relation to measures that consultation was contemplated. Warranty of the accuracy of the subjects of regulation 13(2)(a) could not have been contemplated. Moreover, under regulation 13(2)(b), economic or social implications were highly unsuitable aspects to be the subject of some warranty as to accuracy as opposed to matters on which the employer should express a genuine view. Regulations 13(2)(c) and (d), were matters for the genuine belief of employers. There was, however, an obligation on the employer to consider the legal implications. If the employer did not do so, he could not defend his view as being genuine. The Court of Appeal concluded that the EAT had been correct to find that the language of regulation 13(2)(b) of the 2006 Regulations obliged the employer to describe what he genuinely believed to be the legal, social and economic implications of a transfer of an undertaking.
  
14. The effect of the Court of Appeal's decision will perhaps most acutely felt in local authority Legal Services departments! A genuine belief in the legal, social and economic implications of a TUPE transfer is not a 'get out of jail free' card; in order to rely on a genuine belief the legal implications must be considered.

*Which 'measures' trigger the duty?*

15. The duties to inform and consult are separate duties with different contents; the purpose of the regulation 13 (2) duty to provide information is to assist the union/employee representatives in engaging in voluntary consultation with the transferor before the transfer – see Cable Realisations Ltd v GMB Northern [2010] IRLR 207.
  
16. The definition of qualifying measures which trigger the duties to provide information and to consult was recently considered by the EAT in Todd v Strain (unreported, EAT UKEATS/0057/09/BI, 16 June 2010, Underhill P). The EAT held that changes to pay arrangements following a TUPE transfer were 'measures' in connection with the transfer and the

transferor's failure to inform and consult the workforce about them was in breach of the duty to inform and consult appropriate staff representatives about the measures envisaged in connection with the transfer contrary to regulations 13(2) and 13(6) of TUPE. Although the arrangements were administrative, they were not an inevitable consequence of the transfer. Furthermore, TUPE did not prescribe that a measure's effect must be disadvantageous to employees in order to trigger the requirement to consult. This case is a cautionary tale for local authorities in that it involved the transfer of staff in the social care sector and the measures concerned were, at least arguably, *de minimis* or the inevitable consequence of a change of employer.

17. However, the EAT drew what will prove in practice to be a very fine line between measures which trigger the regulation 13 duties and those which don't. Per Underhill P at paragraph 20 -

*Administrative arrangements of this kind are usually necessary in the context of a transfer, and it is not at all clear that there was any, or any but the most trivial, disadvantage to employees. Nevertheless, at any rate in two of the cases, there were arrangements made by the Appellant (no doubt with Care Concern, but it is the Appellant's involvement which is relevant) which affected the employees; and the Regulations do not prescribe that any effect must be disadvantageous in order to trigger the requirement to consult. We have considered whether the effect in question was so trivial as to be de minimis, but we do not think that such a conclusion could be justified in view of the Tribunal's express finding, at least in relation to the "tax rebate", that the changes in their payment arrangements caused worry among the staff concerned. It is not difficult to imagine how any change to the payment arrangements with which employees are familiar, and all the more so in the context of a change of employer, is liable to be unsettling; and part of the purpose of the duty to consult must surely be to enable transitional arrangements of the kind adopted here to be explained to employees and for them to be reassured, if this be the case, that they will not in any way be prejudiced by them. The sums involved were no doubt small, but it must be borne in mind that many of the employees in question were low-paid.*

18. This raises the bar for local authority employers in an outsourcing; they must first identify measures which might appear to be trivial or administrative and comply with the regulation 13 duties if they are to avoid the joint and several liability for a protective award.

*Who is an 'affected employee'?*

19. "Affected employees", within the meaning of regulation 13 TUPE are those employees of a transferor who were employed in the part to be transferred. The definition does not extend to all those in the transferor's workforce who might apply for a vacancy in the future in the part transferred; UNISON v Somerset CC [2010] IRLR 207.

### **Is TUPE dynamic?**

20. Does a TUPE transfer bring down the guillotine as of the date of the transfer or is the effect 'dynamic' in that events post-transfer will take effect for the transferring employees. This issue arose in Alemo-Herron v Parkwood Leisure Ltd [2010] IRLR 298 (CA) in the context of outsourcing.

21. The issue was whether a transferee on a second generation outsourcing was bound by a pay increase negotiated after the transfer by the local government collective bargaining machinery, where the contracts of employment expressly incorporate the collective agreement? When the case was before the EAT, the "dynamic" approach previously adopted in a number of UK cases, was applied with the result that the transferee was bound by the post-transfer pay increase. However, this approach went further than the approach adopted by the ECJ which had previously held that it was permissible for rights to be crystallizing (and therefore subsequently unchanged) at the point of transfer.

22. When Alemo-Herron went to the Court of Appeal, the EAT's decision was overturned. The Court of Appeal rejected the 'dynamic' approach that domestic law had hitherto taken on this question, in deference to the 'static' approach set down in Werhof v Freeway Traffic Systems GmbH and Co KG [2006] 2 CMLR 44, where the ECJ held that a clause referring to a collective agreement could not have a wider scope than the agreement to which it referred. Rimer J observed that "but for the decision in Werhof , I would regard the claimants' case [that regulation 5 of TUPE accommodates contractual terms with 'dynamic' effects] as unanswerable". This was therefore a case of the ECJ coming to the rescue of employers. Transferee employers can (for the moment) be less fearful of background collective agreements concluded before they entered the picture.

23. However, the dynamism of TUPE has not been wholly rejected. The EAT in Worrall v Wilmott Dixon UKEAT/0521/09/DM (unreported, 9 July 2010, Silber J) held that although the rights of parties under collective agreements had to be considered at the time of a transfer of undertakings, that did not mean that subsequent changes to the collective agreement effected by statute could be ignored. In this case, the employee had been transferred out from local authority

employment in 2001 but sought to claim a contractual entitlement to an equivalent pension benefit to his added years benefit. The added years benefit had been abolished for local authority employees by the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006. Essentially, the employee was trying to 'freeze' his contractual entitlement as of the date of transfer put himself in a better position than he would have been in had he remained in local government employment (and a better position than local government employees!). The EAT rejected this approach.

24. Silber J held that the added years benefit had not been incorporated into the contract but, in any event, TUPE was not 'static' as to post-transfer legislative changes. The decision of the Court of Appeal in *Alemo-Herron*, following the decision in *Werhof v Freeway Traffic Systems GmbH & Co KG* went no further than preventing parties from being bound by "future changes to collective agreements" which were very different from statutory prohibitions on making payments and the reasoning in those cases did not support a contrary conclusion. There was no reason of principle why an employer who was a transferee under TUPE was outside the scope of statutory provisions and immune from such provisions. While the rights of the parties under collective agreements had to be looked at at the time of the transfer that did not mean that subsequent statutory changes could be ignored.

#### ***Cabinet Office Statement of Practice***

25. Another notable recent judgment has had the effect of limiting the scope of the TUPE protection. *Law Society of England and Wales v Secretary of State for Justice* [2010] IRLR 407 (QB) involved the transfer of functions from the Legal Complaints Service to the new Office for Legal Complaints. Akenhead J decided that there was no transfer of an economic entity which retains its identity, and thus no transfer of an undertaking. Of wider interest was his finding that, if there had been a transfer of an undertaking, it would have fallen within the (rarely operative) "Henke" exception under regulation 3(5), as this had been a transfer of administrative functions between public administrative authorities. This may be thought a surprising conclusion, given that the Law Society is not a public sector organisation. According to Mr Justice Akenhead, however, it is sufficient that LCS is "a body which has exercised public authority" in that it carries out "regulatory functions". There is little case law on the scope of the Henke exception, but this is a very wide construction indeed.
26. Finally, and despite his finding that the LCS is a public administrative body, the judge went on to hold that the transfer fell outside the Cabinet Office Statement of Practice because this only

covers reorganisations and transfers from one part of the public sector to another. “LCS falls more obviously into the category of a private sector body which is discharging a public interest function”, the judge concludes. Akenhead J declined to grant a declaration that the COSOP applied which he described as “simply a statement of practice put out by the Cabinet Office as representing the Government’s approach and policy. That is not to belittle it but it is not binding in law; it is not a statute or statutory instrument and does not in itself give rise to any enforceable rights”.

27. A distinction must be drawn with the COP (Local Authority) as this is statutory guidance to which local authorities are required to have regard by section 101 (1) (b) LGA. Further, one reason given by Akenhead J for refusing to grant a declaration was that the claim was being heard in the general list of the Queen's Bench Division and not in the Administrative Court. Nevertheless, the approach taken by the judge may have ramifications for ‘reorganisations’ of public sector functions into private sector organisations as part of a drive towards the provision of services by a ‘Big Society’.

### **COMPROMISE AGREEMENTS**

28. The Court of Appeal’s decision in *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] IRLR 786 is of interest not only as confirmation that the Court of Appeal is (a) the most merits-minded tribunal in the country and (b) that the view the Court of Appeal may take of the ‘merits’ of a particular case is difficult to predict.
29. The legal issue was whether the High Court judge was correct in dismissing the appellant’s claim to enforce the terms of a compromise agreement providing for payment of £250,000 upon termination of her employment as the trust’s chief executive following an outbreak of the *C.diff* bug in its hospitals. The Health Secretary had then instructed the trust to withhold the severance payment and she was only given her pay in lieu of notice. At first instance, the judge accepted the argument that the agreed payment for loss of office was ultra vires because it was “irrationally generous” in that it was considerably in excess of the maximum that could be awarded as unfair dismissal compensation.
30. The Court of Appeal did not agree that the payment was irrationally generous or that the trust had been wrong, in initially fixing the sum, to have regard to the costs, direct and indirect, of meeting a tribunal claim, and to the employee’s long service and the difficulties she would have in obtaining alternative employment. Giving the leading judgment, Lord Justice Laws acknowledged that

discretionary decisions of a public body are constrained by *Wednesbury* reasonableness, but emphasised how unusual it is for a public body to seek to escape from a contractual obligation it entered into by arguing that it could not rationally have done so. In this case, it was for the trust and not the judge to decide “what financial prudence might require”. He added that “the constraint of rationality will not close the door on some degree of generosity for the sake of good relations and mutual respect between employer and employee.” Lord Justice Sedley (in a characteristically forcefully expressed judgment) commented that if a public body can renege on an agreement on grounds that it did not have power to make it, “every financial decision [would be] open to scrutiny by the courts on the motion of anyone with a sufficient interest.”

31. Of practical application to local authority employers is not only the caution against relying on their own ultra vires act (the subject of judicial caution since *Hinckley and Bosworth Borough Council v Shaw* [2000] LGR 9) but the Court of Appeal’s sanction of lawfully having regard to the costs of meeting a tribunal claim, maintaining good relations etc when agreeing a termination payment.

## **EMPLOYMENT STATUS**

32. The perennial problem of employment rights for atypical workers has again been considered in 2010. The judicial pendulum continues to swing back and forth, highlighting some of the problems the Agency Workers Regulations 2010 are intended to address and the remaining gaps in protection. NB the implementation of the 2010 regulations has been delayed until 1 October 2011.
33. In *Muschett v HM Prison Service* [2010] EWCA Civ 25, an agency worker brought claims for unfair dismissal, wrongful dismissal and discrimination (sex, race and religion) against both his agency and the prison service with whom he had served for four months. The factual finding of an absence of mutuality of obligation was fatal to his claims at both ET and EAT levels (bearing in mind that the question under s.78 of the Race Relations Act 1976 Act was whether he could be said to have been under a contract “personally to execute any work or labour”). The same finding defeated his claim to be a ‘contract worker’, defined under s. 7 of the RRA as someone who is ‘employed’ by one person but supplied to work for another. Given that the 2010 Regulations define ‘agency worker’ in very similar terms, this case arguably highlights the weakness of the protection they are likely to offer.
34. The issue of employment status has returned to the Court of Appeal and is due to go before the Supreme Court, In *Autoclenz v Belcher* [2010] IRLR 70 the contract between the parties provided that Autoclenz had no obligation to provide any work; Mr Belcher had no obligation to do any

work; and Mr Belcher was entitled to send along a substitute. Despite these provisions, the Employment Tribunal nevertheless concluded that Mr Belcher was a “worker”. The Court of Appeal upheld the decision stating that a contract could be a “sham” even if the Tribunal was not satisfied that both parties intended that the terms should be misleading; the Tribunal was entitled to look at whether the written terms represented the “true intentions” of the parties; the Tribunal could take into account how the contract was performed; the fact that an employee or worker had been paying tax as a self-employed person does not estop them from later contending that they were not truly self-employed; and it did not matter how often or how clearly the contract made the point that it was not intended to create an employment or “worker” relationship: what matters is reality. On 21 December 2009 the Supreme Court granted leave to appeal.

35. The obvious difficulty with the *Autoclenz* approach is that it allows for the status of the individual (and the attendant rights and obligations) to be determined post hoc on the basis of findings of fact on the ‘reality’ (or an employment tribunal’s perception of ‘reality’) contrary to the express basis on which the parties have recorded their arrangements in writing, to the Revenue etc.
36. However, there is a limit to the ability to reconstruct a ‘reality’ which never was by adducing factual evidence after the event. In *Beattie v Leicester City Council* (UKEAT0386/09/SM, unreported, 20 January 2010), the EAT considered an argument that members of the support staff in voluntary aided schools had an implied contract with the local authority which had issued their contractual and taxation documents. They argued that by implication, the authority and the schools’ governing bodies had agreed, in accordance with the School Staffing (England) Regulations 2003 regulation 24, that the authority was their employer. The EAT held that it was not sufficient simply to show a “factual substratum” which supported the inference of such an agreement. The claimants failed to show that there was an implied agreement between the LEA and the governing bodies which displaced the statutory presumption (under under the Education Act 2002 s. 36(1) (b)) that they were employed by the governing bodies.

## **INDUSTRIAL ACTION**

37. A detailed consideration of the recent case law on industrial action is beyond the scope of this paper but, against the background of the TUC’s recent calls for industrial action against public spending cuts, local authorities may have to consider the legality of ballots and industrial action in the new political climate.
38. In general, after an initial spate of recent decisions where technical objections found favour, the Court of Appeal adopted a more purposive approach to the construction of the legislation. However, many points of statutory construction remain unresolved and the Court of Appeal’s

approach in the BA case (see below) is perhaps best explained by an examination of which side's interests were at stake. The authorities can be reconciled to an extent by the analysis that, where the statutory provision is aimed at protecting the employer's interests, the courts will adopt a restrictive approach. By contrast, where the employer is relying upon a failure to comply with a provision aimed at protecting the interests of union members, a more lenient approach has been adopted.

39. NB and despite the TUC's rhetoric, disputes with the government are not covered by the definition of 'trade dispute' in section 244 TULRCA unless the government is the employer; LB Wandsworth v NASUWT [1993] IRLR 344. Similarly, 'political' disputes will not be covered by the definition of 'trade dispute' – at least not if that is the predominant motive (Associated British Ports v TGWU [1989] IRLR 291; Mercury Communications v Scott Garner [1984] Ch 37).
40. In Metrobus Ltd v Unite the Union [2010] ICR 173 the Court of Appeal held that the statutory ballot and notification requirements for pursuing industrial action are Article 11 compliant.
41. In British Airways v Unite the Union (2009) EWHC 3541 (QB) an interim injunction was granted in respect of the first round of industrial action by cabin crew because the ballot on strike action failed to comply with the statutory requirements where it included the votes of a substantial number of Union members who would no longer be employed at the time of the strike.
42. However, on an application for an interim injunction to restrain a second round of industrial action, the Court of Appeal dismissed the application, holding by a majority that by providing the results of a ballot on industrial action by cabin crew on its website, on union notice boards in crew report centres and via news sheets, a trade union had taken such steps as were reasonably necessary to comply with its statutory duty to provide information.
43. Notice of a ballot must state the date of the ballot and must contain lists of the total number of employees concerned, the categories to which they belong and the workplaces at which they work; sections 226A(2A) - (2C) TULRCA. There is still no requirement that the union supply to an employer a list of names of those who are to be balloted (see section 226A(2G) TULRCA). However, the expectation is that the union will make reasonable efforts to provide information which is reasonably accurate – this is the combined effect of section 226A(2D) – information must be as accurate as reasonably practicable in the light of information in the possession of the union – and the decision of Blake J in EDF v RMT (2009) EWHC 2852 QB - the union cannot simply point to inadequacies in its information and say that that is the best that it can do. The expectation

is that it will make reasonable efforts to obtain information in order to satisfy the statutory obligation.

## **WORKING TIME/HOLIDAY PAY**

44. The saga continues...

45. In *HM Revenue and Customs v Stringer* a reference was made to the ECJ on whether workers who are on sick leave for most or all of the leave year remain entitled to paid annual leave. In *Schultz-Hoff v Deutsche Rentenversicherung Bund; Stringer v HM Revenue and Customs* [2009] ICR 932 – which combined the Stringer reference with a German case raising similar issues – the ECJ held that workers who are off sick for all or part of the leave year are entitled to paid annual leave under the Directive and cannot be excluded from the right to a payment in lieu of unused leave, calculated at their normal rate of remuneration, if their employment is terminated. It is for national law to determine whether workers are permitted to take annual leave during periods of sick leave but, if they are not, they must be given the opportunity to exercise the right at another time.

46. Further, Member States may not provide that the right is extinguished at the end of the leave year. 92. When Stringer returned to the House of Lords (as *HM Revenue and Customs v Stringer* [2009] ICR 985, it was decided between the parties that there was only one issue left for determination: whether a claim for unpaid holiday pay must be brought under the enforcement regime set out in the Regulations or under the Employment Rights Act 1996.

47. Their Lordships unanimously held that an alleged failure to make a payment in lieu of any unused leave on the termination of employment or to grant paid annual leave under regulations 14 and 16 can be enforced by way of a claim for unauthorised deductions from wages under the ERA on the basis that the payments fall within the definition of 'wages' in section 27 ERA. As a result, claimants have three months from the last in a series of deductions to put in a claim under ERA, as opposed to three months from the date of each deduction, as stipulated by the Regulations.

48. On the 'use it or lose it' question on annual leave, in a Spanish case (*Pereda v Madrid Movilidad SA* [2009] IRLR 959) the ECJ had to consider the sick leave/annual leave crossover from a different angle; namely, that of a worker on annual leave who falls sick and wants to take sick leave instead. The ECJ held that the Directive gives such a worker the right to take the lost annual leave at a different time. The replacement period of leave must be scheduled according to

the applicable rules of national law, having regard to the business interests of the undertaking. However, these arrangements may not exclude the possibility of the replacement leave being taken after the end of the leave year in which the leave was originally arranged.

49. Both the *Stringer* and *Pereda* decisions clearly cast doubt on whether the Working Time Regulations adequately implement the Working Time Directive: regulation 13(9)(a) expressly provides that the basic four weeks' leave (but not the 1.4 weeks' additional leave under regulation 13A) may only be taken in the leave year in respect of which it is due. To date however, there has been no indication from the Government that any review of the Regulations is planned.
  
50. The 'use it or lose it' question returned to the EAT in *Lyons v Mitie Security Ltd* [2010] IRLR 288. In that case employees were required to give one month's notice of intention to take holiday leave. Three weeks before the end of the holiday year, Mr Lyons asked to take his outstanding holiday for that year. His request was rejected because he failed to comply with the month's notice requirement. As his contract provided that holiday could not be carried over, his untaken holiday for that year would be forfeited. The tribunal rejected Mr Lyons' claim. The issue arising for the EAT was whether employers are legally obliged to ensure that the employee actually takes their statutory holiday leave within the relevant year or whether they must permit carry over?
  
51. The EAT held that "the right to statutory leave is not inalienable". Judge Ansell held that "clearly that mechanism [of giving notice of intention to take leave] must operate during the whole of the leave year and the mechanism must not be operated by an employer in an unreasonable, arbitrary or capricious way so as to deny any entitlement lawfully requested. But it does seem to us that the mechanism, if operated correctly by both employee and employer, could result ... in the loss of the right at the end of the leave year in respect of leave not taken." This is because the Regulations in their current form preclude carrying over of leave. European law requires that the leave entitlement of an employee who is off work sick has to be carried over in appropriate circumstances (see *Stringer* and *Pereda*). Why should the same principles not apply where an employee is prevented from taking their statutory annual holiday for some other reason beyond their control?
  
52. Although *British Airways plc v Williams* [2010] IRLR concerned the Civil Aviation (Working Time) Regulations 2004, (thankfully unlikely to trouble local authority lawyers overly much), the Supreme Court's reference to the ECJ raises questions of more general application. The Supreme Court referred the following questions; to what extent does European law define the

nature and level of holiday pay, and to what extent can Member States determine this calculation? Is it sufficient that under national law or collective/contractual agreements the payment encourages the employee to take the annual leave? And should the payment correspond precisely with, or be broadly comparable to, the employee's 'normal' pay? In local authority employments with shift premiums, bonuses and unsocial hours payments, the level of holiday pay as compared with 'normal pay' can be a vexed question.

**September 2010**