# CASE BULLETIN

UNISON North West

Spring 2013

*Issue 3 - Please circulate to all Branch Officers and Stewards*

## News in Brief

***A week's pay – Tribunal limits***

Activists should be aware that the limit for a week's pay at the employment tribunal has risen to £450. This is for dismissals on or after 1st February 2013.

***Reduction in collective consultation time***

For mass dismissals of 100 employees or more employers have been required to consult with recognised trade unions for a minimum of 90 days before dismissals take effect. In an effort to speed up the sacking of workers the Government have cut this to 45 days.

In addition the expiry of a fixed term contract as agreed in the contract will no longer count. Those on fixed term contracts to be dismissed as redundant before the end of their contract would still be included.

This took effect on 6th April 2013.

***Disability and Redundancy***

Branches are advised to examine carefully situations where a member with a disability is selected for redundancy and that member has scored particularly low on a health or sickness related criteria. Employers who do not for example discount disability related sickness could be leaving themselves open to legal challenge.

***Coming up in Summer 2013***

The revised settlement agreement process will be put into place. Such discussions will become inadmissible in any subsequent unfair dismissal claim.

Employment Tribunal Fees will be introduced as well as the new employment tribunal rules (An outline of fees was covered in CASE Bulletin issue 1).

***Coming up in Autumn 2013***

Reforms to the 2006 TUPE regulations may include the repeal of the concept of a service provision change. Under this contracting out, contracting in and retendering were expressly brought within the scope of TUPE.

The government is also looking to make it easier for employers to vary terms and conditions and dismiss staff who are currently protected by TUPE. It is likely that the Government will amend TUPE to say that a variation/ dismissal for reason of the transfer itself would still be void/automatically unfair but that a variation/dismissal for a reason connected to the transfer would not.

## Inside this issue

# A Key Benefit of Membership - 100 % Compensation

The government's devastating attack on access to justice for injured people means that from 1 April, if you're injured in an accident (at work or otherwise) or develop a work-related disease in England or Wales, only trade union members and their families will continue to benefit from a free, independent and specialist legal service.

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act became law last year, in spite of massive opposition from the trade unions, victim support groups and civil rights organisations. The Act ripped up the current arrangements that enable genuinely injured people to get legal representation without the risk of having to pay from their own pocket if their claim is unsuccessful.

This is because the guilty party, usually the employer or their liability insurer, will no longer have to pay the insurance premium that the injured person takes out to cover the cost of things like medical reports and court fees should they lose.

So unless a case is going to be very straightforward and won't require lots of investigation and reports (which is rare in work-related accidents and disease cases), non-union solicitors are unlikely to take it on because of the risk of not getting paid.

Lawyers will also be allowed to deduct up to 25% from their clients' compensation to cover some of their costs, because they will no longer be able to claim them from the losing side. So getting 100% compensation may be a thing of the past.

Although many lawyers may continue after 1 April to promise no deductions from compensation, they are likely to refuse to take on risky cases that they cannot be sure will succeed.

Or they may agree to take on a complicated claim, but only if the claimant is able to pay up front for fees, investigations and medical reports.

UNISON has always said that members and their families who are injured because of the negligence of someone else and successfully claims compensation should receive it in full.

An injured person doesn't have to accept being referred to a law firm provided by an insurance company, just because they may have legal expenses insurance added onto their household or motor policies. They have a right to genuinely independent legal advice, not to be told what their claim is worth by a lawyer who has been given the case by an insurance company.

That is why UNISON has been working closely with Thompsons since LASPO became law, in order to work out ways in which claims can still be supported.

To benefit from this service, members and their families with personal injury claims should contact UNISONdirect on 0845 355 0845 for more details or contact their branch in the first instance.

**Note – Due to recent changes you must advise members on completion of the form to post it to our solicitors direct. This applies to form PI stock number 0838 and Form PI (non-work) stock number 1595. Branches must not post forms for the member to head office or the lawyers. Stress claims can still be sent by branches.**

## Branch Training – dates for the diary

The following training events have been arranged for branches;

- **Tuesday 21st May - Gujaret Hindu Centre, Preston**
- **Wednesday 22nd May - Quaker Meeting House, Liverpool**
- **Friday 24th May - Arena Point, Manchester**

The events will include a Legal Services Update, Employment Law Reform Update, Capability Dismissal (Overview of Key Principles) and Case Studies.

This information has been previously sent to branches and two representatives from each branch are invited to attend. Applications are to be sent to Val Rothwell at Arena Point by Friday 26th April.

# Landmark case - Collective Consultation Agency Workers

A recent (Feb 2013) employment tribunal decision is one of the first to test new duties requiring employers to provide information on the agency workers they engage during transfers and collective redundancies.

The new requirements came in as part of the Agency Workers Regulations 2010 that came into force from October 2011. The regulations amended S188 of the Trade Union and Labour Relations (Consolidation) Act 1992 and the Transfer of Undertakings (Protection of Employment) regulations 2006 to require that the details of agency workers be provided in addition to information on employees during collective redundancy situations, collective bargaining situations or prior to a transfer of an undertaking (a TUPE transfer).

The Employment Tribunal ruled that Barnet Council was in breach of S188 and regulation 13 of TUPE by failing to provide UNISON with the information on agency workers. The employment judge described the refusal to provide the information as a "serious" and an "important failure".

Substantial protective awards were made to the affected staff.

## Employment Tribunal Deadlines

If a member does not submit a claim within the specified time limit then they have lost their right to do so. Put the date of incident clearly in the box on the CASE Form. Please bear in mind the time limits below (list not exhaustive);

- **Unfair Dismissal** – 3 months less one day. Members who start employment on or after the 6th April 2012 will need 2 years service before being able to pursue such a claim. If employment began prior to this date only 1 years service is need.
- **Discrimination** – 3 months less one day from the last act of alleged discrimination
- **Unlawful Deduction of Wages** – 3 months less one day from date of last deduction
- **TUPE** –failure to consult – 3 months less one day starting with the last of the dismissals or the transfer date.

If a CASE form is submitted and legal advice is required then branches must be aware that it can take 2-3 weeks for Thompsons to prepare formal advice. Branches should not always wait for appeal processes to conclude before submitting CASE Forms. Appeals can take weeks/months to complete and the time limits begin counting down, for example, from the date a member is dismissed.

***It is absolutely vital that these time limits are adhered to. Please ensure that you always bear these time limits in mind when dealing with cases and contact your Regional Organiser if you're unsure. It is better to be safe than sorry!***

# Knowledge is Power

Under section 181 of the 1992 Trade Union and Labour Relations (Consolidation) ACT (TULRCA), an employer has a duty to disclose to trade union representatives information without which they "would be impeded in carrying out collective bargaining" and information which it would be in accordance with good industrial relations practice to disclose".

The Act does not lay down what sort of information should be provided to reps however ACAS have published an approved code of practice which provides examples of the types of information which may be disclosed. It is by no means exhaustive. Although the code of practice is not a legal document, unions can use the code to back up a request for information and a refusal to disclose information may count against an employer.

In addition there are other areas of the law which grant trade unions right to information, for example there is the duty to inform and consult under TUPE and collective consultation arising under S188 of TULRCA.

# Landmark case - Ongoing Parity for Privatised Workers

The Advocate General of the Court of Justice of the European Union, today backed UNISON's claim that privatised workers should continue to benefit from increased pay and conditions negotiated at their previous workplace, setting an important legal precedent.

Over the past seven years, UNISON has argued that 24 members transferred from the London Borough of Lewisham to Parkwood Leisure, were entitled, under their contracts of employment, to continue to benefit from nationally agreed pay and terms negotiated by the local government pay body.

The Alemo-Herron & Ors v Parkwood Leisure Ltd case, which has been waged through the Employment Tribunal, the Employment Appeal Tribunal, the Court of Appeal, the Supreme Court and now the Court of Justice of the European Union, sets important legal principles both in the UK and through EU member states.

The union will now await the final decision of the Court of Justice of the European Union, which will be followed by a decision in the Supreme Court. If both courts back this ruling, TUPE (Transfer of Undertaking Protection of Employment) will again provide ongoing protection for employees, rather than a one-off protection at the time that they are transferred.

The UK government is already consulting over limiting the law in this area, as a part of its continued attack on employment rights, which the union is campaigning against.

# Disclosure and Barring Service

These are the new regulations for the disclosure of information about people who work for, care for and provide services to vulnerable people, including children. It is also the process for barring people who pose a risk to vulnerable people from working with them.

***So what has happened that I need to know about?***

The coalition agreement signed in 2010 included a commitment to review the existing vetting and barring scheme, and the criminal records regime, and to reduce their scale to "common-sense levels".

To achieve this, the Home Office set up a cross government project to develop the Protection of Freedoms Bill, which received royal assent in May 2012. The majority of the changes in the act came into effect on 10 September 2012.

***What are the key changes?***

The Independent Safeguarding Authority (ISA) will merge with the Criminal Records Bureau (CRB) to form the Disclosure and Barring Service (DBS).

An end to registration and continuous monitoring. This means there will no longer be a requirement for staff working with vulnerable people to register with the Disclosure and Barring Service and removes the £64 charge for registration.

**The full UNISON factsheet is available www.unison.org.uk/file/DisclosureAndBarringFactsheet.pdf**

The separate category of 'controlled activity' will be abolished. This was activity undertaken by people with less contact with vulnerable groups, such as those keeping children's records. This means staff previously covered by this definition will no longer be covered by the scheme.

The definition of 'regulated activity' has changed. This will result in a reduction in the number of people covered by the scheme.

This spring will see the introduction of online disclosure status check or update service. This will provide an option for individuals and organisations to subscribe to a continuous updating service. This will mean that individuals and employers will be notified if there is a change in the Criminal Records Bureau (CRB) record of an employee.

***But what has stayed the same?***

Employers and relevant bodies must still make referrals to the Disclosure and Barring Service (DBS) if they have reasonable grounds for believing an individual represents a risk to vulnerable people.

An employer must still not employ a barred individual in regulated activity.

If the DBS bars an individual, they must not engage in regulated activity.

Everybody within the pre-September 2012 definition of regulated activity will remain eligible for enhanced CRB checks.

The devolved nations are affected slightly differently.

## Taxpayer Funding of Trade Unions – More bile from Eric Pickles

If you can stomach reading beyond the insulting foreword by the Right Honourable Gentleman you'll discover Eric Pickles vision of trade unions in Local Government. You'll recall we highlighted the Civil Service proposals last issue.

The summary of the proposals;

1. Councils should save taxpayers' money by significantly scaling back the cost of trade union facility time.
2. There should be full transparency on the level of facility time given to trade unions.
3. Employees should not be spending all or the majority of their working hours on trade union duties.
4. Time off for trade union activities should be unpaid.
5. The amount of facility time should be reduced and should be limited to a set percentage of an organisation's pay bill.
6. Councils should adopt private sector levels of facility time.
7. Restrictions should be placed on the use of office facilities for trade union representatives.
8. Political material, or material which incites industrial action, should not be produced or distributed on or using taxpayer-funded facilities.
9. Councils should charge for collecting union subscriptions, or end the practice completely.
10. Councillors should declare payments and sponsorship from trade unions and ensure there is no conflict of interest.

**You can read the full document here -**

**https://www.gov.uk/government/publications/taxpayer-funding-of-trade-unions-delivering-sensible-savings-in-local-government**

# A Reminder on Compromise Agreements

***Has the member agreed the compromise agreement? If not do not send it.***

Branches should ensure compromise agreements are agreed by both the member and employer before sending to the CASE Unit. Thompsons and the CASE Unit cannot involve themselves in negotiation of compromise agreements. That should be carried out by the branch and/or Regional Organiser.

***The fee Thompsons charge is £350 + VAT.***

Branches should ensure that the employer has agreed to pay the member's legal fee of £350 + VAT. This is Thompsons fee, it is not negotiable and it is paid for by the employer and should be incorporated into the agreement.

***Compromise Agreements must be sent to the CASE Unit with a completed pro forma.***

There is a pro forma which should accompany the compromise agreement. This should be completed fully. If the compromise agreement is received without the pro forma or with an incomplete pro forma it will simply be returned to the sender.

Send completed pro forma and compromise agreements to the CASE Unit in hard copy or via email to **nwcaseunit@unison.co.uk** Please do not email to individual members of staff.

# Capability Dismissals—Useful Appeal Wording

If the member has been dismissed on grounds of capability then the following guidance may be of use in the circumstances outlined.

In cases where the medical evidence indicates that the member might have returned to work, if the employer had been prepared to wait a few months longer, and either:

- The employer is responsible for the ill health which has caused the absence

or

- The employee has fairly long service (say around 10 years plus)

The following wording could be included in appeal letters in these cases, amended as appropriate:-

"*I believe that a reasonable employer would have allowed me more time to recover before making a decision to terminate my employment. I do not believe that my absence is having any significant impact on the organisation..*

*[If possible say why it is having no impact e.g. my sick pay has expired and my work is being done by a temporary employee at no extra cost to you]*

*[I have worked for you for [x] years. You have failed to attach appropriate weight to my long service, in making the decision to dismiss me.] Delete if not appropriate.*

*[You are responsible for the ill health which has caused my absence. The Court of Appeal has made it clear that, where the employer is in any way responsible for the employee's absence, the employer should be prepared to "go the extra mile" and put up with a longer period of sickness absence.] Delete if not appropriate.*

The above should not be considered legal advice as each case will clearly be decided on its own merits but the wording may assist at an appeal. The Regional Organiser for your branch should be able to offer further guidance in the first instance.

## Contact Details

Telephone

0161 831 1624

Email

nwcaseunit@unison.co.uk

**Website:**
**www.unisonnw.org.uk**
**Twitter:**
**@NorthWestUNISON**

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