Up the workers?

Recent industrial action by Royal Mail workers, Tube workers and, more locally, Birmingham's refuse worker's together with prospective threatened action by worker's unions in other sectors have put industrial relations law under the spotlight. Norman Rea outlines the key legal provisions to be aware of and explains some of the tricky detail behind the headlines.

In this day of over-regulation and ever-increasing legislation, there is still no statutory definition of 'industrial action' in this country, AND there is no so-called 'right to strike'.

'Strike action', or 'strike', is a work stoppage caused by the mass refusal of employees to perform work, usually to promote employee grievances and, sometimes, to put pressure on governments to change policies. It is one of the most powerful weapons available to workers and unions to promote their economic and social interests. It is the most controversial form of 'collective action' in the event of an industrial dispute and is often a last resort of workers' organisations, taken after proper ballot, in pursuit of their members' demands.

Although I have said there is no statutory definition of 'industrial action'- 'strike' has been defined as:

(a) the cessation of work by a body of employed persons acting in combination; or
(b) a concerted refusal, or a refusal under a common understanding of any number of employed persons to continue to work for an employer in consequence of a dispute....

This must be done to compel the employer to accept the employees' views on bargaining positions or for showing sympathy with other workers.

Industrial action – this may take many forms, including a work to rule, a go-slow, or an overtime ban. The ultimate, of course, is a complete cessation of work i.e. strike. The question of what is and is not 'industrial action' in any particular set of circumstances is a question of fact for the employment tribunal.

Breach of contract - it should be remembered that a cessation or refusal to work is a breach of the contract of employment for which the worker can be dismissed. However, workers are protected if they take industrial action after a properly held ballot is conducted by their Union. Any dismissals for such 'official action' are considered to be automatically unfair.

There are technically complicated legal rules for determining the proper conduct of a ballot and the calling of 'official industrial action'.

We have all seen recent news bulletins where the Union ,and it's advisers, have got it wrong and have had to climb down in order to avoid members being fairly dismissed without protection and to preserve it's funds from being 'taken' by the aggrieved Employer.

What is 'taking part'?
This is a problem area for Employers as regards employees who are on holiday or sick when the action occurs, or who feel unable to go into work because they are afraid to cross picket lines. However, it is vital to know who is 'taking part' because the employer must be careful (at least with official action) to treat all those taking part in the same way. Again, participation is a question of fact. The burden of proof lies on the employer.

Union position
Organising a strike or other industrial action will usually involve the commission of one or more of the so-called 'industrial torts'.

These are as follows:
- Inducing a person to break a contract.
- Interfering with trade or business or a contract by unlawful means (or inducement of such interference)
- Intimidation – This involves threatening to induce a breach of contract or to interfere with a contract.
- Conspiracy.

Union protection – statutory immunities.
I have already said that industrial action or strike is a breach of contract, and where there is a breach, there is usually a remedy. Anyone organising a strike or other industrial action would be liable to legal proceedings by employers or others such as their customers and suppliers who incur loss by such action.

However, in circumstances where the action is 'in furtherance of a trade dispute' and the union has complied with the special balloting provisions and has given due notice to the employer, then (and only then) are they given special protection from legal liability.

Secret ballots
A trade union will have no immunity unless it first holds a properly conducted secret ballot. The union must take such steps as are reasonably necessary to ensure that the relevant employer receives certain information in advance of the intended opening day of the ballot.

Timing is critical if the proposed industrial action is to be protected by the law. Some part of the action must be induced and start to take place within four weeks of the date of the ballot.

Compensation
When the statutory immunities do not apply, and it all goes horribly wrong, then Employers and others (as mentioned above) who have suffered loss by the action may take civil proceedings in the courts against the responsible union or individual. It is still necessary to prove that an unlawful, unprotected act has been done or is threatened and that they are party to a contract which will be (or has been) broken or interfered with by the unlawful act.

Additionally, someone deprived of goods or services because of the unlawful industrial action can also bring proceedings to stop this happening.

Clearly, the union's position is precarious. They must be careful to get every step right. If the union get it wrong, there is no limit on the amount of damages which may be awarded against it, and its funds may be seized by the courts.

Injunctions
Where there is no immunity, the most important remedy for an Employer, in the context of industrial action, is an injunction granted by the court.

An interim injunction will restrain the union from taking or continuing industrial action pending a full trial of the action. In practice, interim injunctions are effective in trade dispute cases as they often determine the outcome of the case.

Norman may be contacted on 0121 746 3300 or by email n.rea@sydneymitchell.co.uk.

Contact us

Sydney Mitchell LLP
Aspley House
35 Waterloo Street
Birmingham
Tel: 0121 698 2200

Sydney Mitchell LLP
Chattock House
346 Stratford Road
Shirley, Solihull
Tel: 0121 746 3300

Sydney Mitchell LLP
Shakespeare Building
2233 Coventry Road
Sheldon
Tel: 0121 700 1400

email:
enquiries@sydneymitchell.co.uk

website:
www.sydneymitchell.co.uk

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Sydney Mitchell scoop two top legal awards

Sydney Mitchell LLP successfully walked away with the Law Firm of the Year (five to 15 partners) award at the Birmingham Law Society Awards which were held on Thursday 24th March 2011.

The 10th Awards ceremony was held at the ICC, Birmingham with special guest speaker Lord Paddy Ashdown. Sydney Mitchell was up against four other short-listed local firms in the battle to win this prestigious award.

It was a double celebration as Employment Consultant at the firm, Norman Rea, was awarded Legal Executive of the year. Norman has been a Fellow of ILEX for 32 years and is a founder member of the Birmingham & District branch, of which he has been Chairman for several years.

Commenting on the win, Senior Partner Div Singh said, "Winning this award is a great honour for the firm and is a reflection of the dedication and hard work of all our staff. We are lucky to have a fantastic, loyal client base and want to extend our thanks to them also. This award will help to further enhance the firm's profile and excellent reputation within the West Midlands area."

Against a backdrop of a difficult economic climate, the firm grew and increased its turnover by 19% per cent in 2010. On top of this Sydney Mitchell continued to build on its strong market presence by achieving listings in the 2010 Legal 500, for all their ten main departments.

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email:
enquiries@sydneymitchell.co.uk

website:
www.sydneymitchell.co.uk

legal awards 2011 Birmingham Law Society Winner Law Firm of the Year 5 to 15 partners

The Legal 500 United Kingdom 2010

Retirement? What retirement?

A major change in Employment Law for 2011 is the government's decision to abolish the default retirement age of 65 from October 2011.

The question of retirement has been a hot topic since 2006 when the Age Discrimination legislation was brought into force. The new Regulations introduced a default retirement age of 65 (DRA), which meant employers could no longer force workers to retire before then unless they could justify it. However it also meant that they could automatically retire workers at that age, without paying any sort of compensation, as long as they followed a proper process.

This latter consequence caused social uproar and resulted in the Heyday case, commenced by the Heyday Membership Association within Age Concern. They sought to argue that the default retirement age was in itself age discriminatory against the older worker and a lengthy legal battle ensued going all the way to the European Court of Justice. Whilst the case was ultimately ruled in favour of retaining the DRA, the media interest and publicity over the issue created a serious incentive for the government to consider ditching it.

And so here we are in 2011, and the government has announced that from October 2011 the DRA will be defunct and transitional provisions for the phasing out of the DRA will commence from 6th April 2011. During the transition, employers will not be able to issue workers with new notices to retire however those already in existence will be allowed to continue provided the following applies:

1. A notification of retirement was issued by the employer prior to 6th April – the last possible date to provide the necessary 6 months notice is 30th March;
2. The date of retirement is before 1st October i.e. 30th September or before and
3. The requirements of the statutory retirement process are met.

Any retirement to be commenced between 30th March and 6th April will be subject to short notice provisions.

After October 2011 no worker can be compulsorily retired on reaching 65 unless it can be objectively justified.

What will this mean for employers in practice?

Whilst for many the removal of the DRA is seen as a beneficial development, for employers it is likely to lead to a number of difficulties in managing the workforce. Not only will they have to factor in older employees into their business plans, but there will be a knock on effect on policies and procedures, career advancement for all staff and performance management. Should they fail to address these issues and make changes where needed, they could face claims of unfair dismissal and discrimination.

Employers Checklist

On a final note employers should remember certain key points about this change:

1. Workers will retire as and when they want to and if they are forced to do so against their will without objective justification they are likely to complain to a Tribunal!
2. You cannot discriminate against any worker on the grounds of age
3. The changes will apply to all employers in all industries and of any size
4. State pension age and entitlements will not be affected

If you are not sure how to deal with the changes or need guidance, Sydney Mitchell is here to help. Our team of dedicated Employment solicitors is on hand to talk you through any actions you may need to take as a result of the abolition of the DRA, and can advise you on all aspects of Employment Law.

Please contact the team on 0121 698 2200 or visit our website www.sydneymitchell.co.uk

Council Worker Wins Appeal in Cut Finger Compensation Case

A Council worker's claim that gloves issued by his employer were inadequate to protect him from injury has been upheld by the Court of Appeal.

Steven Threlfall was working for Hull City Council in May 2006 when he sustained a serious cut to his left hand while clearing debris from the garden of a council property. The injury occurred when he picked up a black plastic bag of rubbish, even though he was wearing gloves issued by his employer.

The gloves were described by the manufacturer as being of a simple design suitable for 'minimal risks only'. They were made partly of cloth and partly of leather and were not 'cut-resistant'.

At the initial County Court hearing, it was suggested that Mr Threlfall had contributed to his injury by not looking in the bag before picking it up. It did not help that he could not give a detailed account of how the injury – a cut to his left little finger tendon and artery – had occurred.

Mr Threlfall's initial appeal to the High Court failed but he was given leave to appeal further on a point of law relating to the Personal Protective Equipment at Work Regulations 1992. These require employers to ensure that suitable personal protective equipment is provided to employees who may be exposed to a risk to their health or safety while at work. As such, working conditions should be properly risk-assessed to establish what protective equipment may be required.

At appeal it was argued that the judges at the two previous hearings had not applied the Regulations correctly. It was said that the risk of cuts from sharp objects should have been recognised in advance by a proper risk assessment of the task. The Court of Appeal held that the risk assessment carried out by the Council was a general risk assessment and consequently failed to recognise that there was a risk that employees might suffer cuts to their hands as a result of contact with sharp objects that might be hidden from view. Had the assessment been properly carried out, the Council would have identified the danger and would therefore have recognised the need to consider the suitability of the protective gloves provided.

Having won his appeal, Mr Threlfall is now free to claim damages for his injury.

"It is vital that employers carry out thorough risk assessments in order to protect their employees from foreseeable injury," says Jonathan Simpson. "Failure to do so will not only increase the risk of workplace accidents but will also leave the employer open to litigation."

If you have sustained an injury, please contact our Personal Injury department in 0121 698 2200 or email pi@sydneymitchell.co.uk.

Court of Appeal Guidance on Inherited Wealth and Divorce

A recent decision of the Court of Appeal, involving the financial settlement in a 'big money' divorce, elucidates the criteria which the courts should apply in deciding financial settlements on divorce where there are considerable inherited assets, even when the sums involved are not as large as in the case in question.

The case concerned a couple who were divorced after 25 years of marriage. The Court ruled that the settlement payable by the husband, who had very considerable inherited wealth, should be reduced from £8 million to £7 million.

The decision was made after the factors listed below had been taken into account, the Court stressing that the objective in such cases is to achieve a just result.

- The fact that wealth was inherited and not earned justifies it being treated differently from wealth accumulated during the marriage;
- The nature of the inherited wealth must also be taken into account – an investment portfolio would not be treated in the same way as, for example, an ancestral home. This might be a good reason for departing from the equality principle which might otherwise apply;
- The duration of the marriage may be in point if it determines the time the wealth has been enjoyed by both parties; and
- The standard of living provided by the inherited wealth would also be in point, as would the extent to which it has been added to or depleted. In principle, the longer wealth has been enjoyed by both the parties to the marriage, the less fair it would be to 'ring-fence' it in a settlement.

There is, said the Court, no formula which applies: what constitutes a fair division of assets in each case will depend on the individual facts.

We can advise on all issues surrounding family break-up and guide you in the necessary negotiations over the division of assets.

Please contact Mauro Vinti on 0121 746 3300 or email m.vinti@sydneymitchell.co.uk

New Lease Cannot Start... ...Until Old Lease Ends

You cannot create a new lease until the old lease has terminated. That was the straightforward message of the Court of Appeal in a case in which a company asserted it had a valid lease over a builder's yard because the old lease had terminated 'by operation of law', allowing the lease to be assigned to it.

The landlord gave a lease over a builder's yard to a company which operated two businesses from the premises. The company had financial problems, which led to the appointment of an administrative receiver. A new company, called QFS Scaffolding Ltd., was formed to take over one of the businesses and it occupied the builder's yard. QFS commenced negotiations with the landlord, but no new lease was agreed. The receiver then 'assigned' the existing lease to QFS.

The landlord considered the lease to have been surrendered. For this to be the case, there had to have been conduct by the landlord or tenant which was an unequivocal indication that the lease had been terminated and would not continue. In this case, the insolvent company had vacated the premises, had turned over occupation of the premises to QFS and had not paid or acknowledged the need to pay rent.

The landlord had continued to negotiate over the lease and had drawn on the rent deposit when the rent due was not paid.

In the view of the Court, the occupation of the premises by a third party was not inconsistent with the continuation of the lease. The landlord's actions were also not inconsistent with the continuation of the lease.

Accordingly, the previous tenancy had not terminated by operation of law: it would not do so until steps were taken which demonstrated that it was terminated.

For advice on any commercial property issue, please contact Simon Jobson on 0121 746 3300 or email **s.jobson@sydneymitchell.co.uk**

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