Employment Bulletin

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CASE LAW UPDATE

Industrial Action – High Court clarifies who is entitled to vote in a ballot

In *London Underground Ltd v Associated Society of Locomotive Engineers and Firemen [2011]* the High Court considered an application for an interim injunction by London Underground Ltd (LU) to prevent industrial action relating to a dispute with the Associated Society of Locomotive Engineers and Firemen (ASLEF) over payments to drivers on Boxing Day.

LU applied for an interim injunction to prevent the strike going ahead on 26 December 2011, arguing that ASLEF's balloting procedure had been flawed because:

- Having balloted its members for a mandate to strike on Boxing Day, ASLEF had called for strike action on three additional days, on which its members had not been consulted and on which they had not voted.

- A significant number of those members balloted were not due to work on 26 December 2011 and so ASLEF could not have reasonably believed they would take part in the industrial action. These included employees who worked from depots that were closed on Boxing Day and those who worked from depots that were open but who were not scheduled to work.

Section 227(1) of the Trade Union and Industrial Relations (Consolidation) Act 1992 sets out those entitled to vote in a ballot as "all the members of the trade union who it is reasonable at the time of the ballot for the union to believe will be induced by the union to take part or, as the case may be, to continue to take part in the industrial action in question, and to no others."

The High Court refused to grant the injunction. It held that the ballot for strike action had not been limited to Boxing Day. Further, the Court held that entitlement to vote was not restricted to those who would actually take the industrial action by withdrawing their labour in breach of contract. It included those who would associate themselves with the industrial action in some way, for example by joining picket lines, without actually being in breach of contract themselves because they would otherwise have been absent from work, for example, on annual leave. ASLEF had therefore been correct in balloting employees who worked from depots that were closed on Boxing Day as well as those employees who were not scheduled to work.

Requirement to sign opt-out for overtime not a detriment

The Employment Appeal Tribunal's decision in *Arriva London South Ltd v Nicolaou* provides comfort to employers whose employees regularly work overtime and who may have been concerned about the risk of criminal penalties where employees have refused to opt out of the 48-hour week.

Section 45A of the Employment Rights Act 1996 protects employees from being subjected to a detriment by their employer for refusing to waive a right conferred by the Working Time Regulations 1998 (WTR). Regulation 4(1) of the WTR provides that an employee's working time must not exceed an average of 48 hours a week, unless the employee agrees in writing not to be bound by this limit (an "opt-out agreement"). An employer must take all reasonable steps to ensure that this limit is complied with and breach of that obligation imposes criminal sanctions on the employer.

Mr Nicolaou had been employed by Arriva London South Ltd since 1998 and regularly used to work overtime on rest days. When asked to sign an opt-out agreement, he refused. In 2008 Arriva introduced a policy that any worker who had not opted out would not be offered overtime. When the policy was enforced in 2009, Mr Nicolaou claimed that denying him the opportunity to work overtime subjected him to a detriment contrary to section 45A of the Employment Rights Act 1996, for having exercised his rights under the WTR.

On appeal the EAT concluded that Arriva had withdrawn Mr Nicolaou's ability to work on rest days because it needed to enforce its policy, which was reasonable and necessary to ensure compliance with its statutory duty under the WTR. The necessary

link between Mr Nicolaou's protected act (i.e. his refusal to opt out) and the treatment complained of had not been established; it was irrelevant that the withdrawal of overtime working amounted to a detriment from the employee's viewpoint.

This Employment Bulletin aims to introduce you to legal issues and is not a substitute for taking appropriate specialist advice in individual cases. We will be happy to assist - please contact one of the team for help.

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