

Editorial

The TUPE Saga Rolls On

It was symbolically appropriate that the European Court of Justice should chose the day before the European Election (*Times European Law Report*, 9 June 1994) to rule that Britain has failed adequately to implement the 1977 Council Acquired Rights Directive and the 1975 Directive on collective redundancies, and hence was in breach of its obligations under the Treaty. The judgment was by no means unexpected, and ministers are putting a defiant face on things, but this decision, taken with several recent cases in the UK courts, has cast a shadow – both forwards and backwards – over the government's contracting out, compulsory tendering and market testing programmes.

It was of course a Labour government that signed the 1977 Directive; but Mr Waldegrave, the Minister for Public Service and Science, is now having to face up to the consequences of what his boss used to call, "being at the heart of Europe", given that transferring undertakings and employees, out of the public sector has been for so long at the heart of Conservative policy.

These rulings effectively widen the scope of the Transfer of Undertakings Protection of Employment Regulations (TUPE) – which were amended only last year (in anticipation of the ECJ ruling) by the Trade Union Reform and Employment Rights Act 1993. The Directive says, *inter alia*, that staff who are transferred from public sector to private sector organisations are entitled to retain former pay and conditions. For a

long time the Government contended that the Directive did not apply to the kinds of non-commercial activities undertaken by much of central and local government and by the NHS; but, having seen the writing on the wall some time ago, it has abandoned that line of defence.

It has been estimated that since 1977, in the context of the various privatisation and contracting out programmes, some 250,000 public sector workers have either been made redundant or have been compulsorily transferred to private firms on inferior terms of service. The Director General of the Business Services Association, John Hall, representing major companies in competition for public sector contracts, has been quoted by *The Times*, (15 June 1994) as saying that although the contracting out of blue-collar work in the last ten years has cut costs by 20 per cent, savings in future are unlikely to exceed five per cent.

Which is bad news for Mr Hall and (although he publicly makes light of the significance of the ECJ decision) for Mr Waldegrave. However, political anxiety is not confined to Britain. Other European countries share the same preoccupation with sharpening their international market competitiveness by reducing labour costs. A powerful lobby against TUPE is gathering momentum, and the Commission is working on a revised version. Meanwhile, the British taxpayer faces the strong probability of a torrent of litigation by former public sector employees, seeking retrospective compensation.

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