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CONTENTS

1 CONTRACTUAL TERMS **2** TIME OFF FOR DEPENDANTS
3 HUMAN RIGHTS **4** HEALTH AND SAFETY
6 EUROPEAN LAW **8** COLLECTIVE RIGHTS

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An implied term to notify changes

Glendale Managed Services v Graham and others [2003] IRLR 465

In this recent case the Court of Appeal holds that there is an implied contractual term, if and when the employer intends to depart from the normal situation to inform employees of the departure – here in connection with pay.

The facts in this case were familiar in local government contracting out. Darren Graham and his colleagues were employed by Southend-on-Sea Council in their leisure centres. Their statement of main terms and conditions stated "During your employment with the authority, your rate of pay, overtime and other payments … will normally be in accordance with the National Joint Council for Local Government…

"Any changes that subsequently may be made in your terms and conditions will be separately notified to you or otherwise incorporated in the documents to which you have access."

There was then a TUPE transfer of the leisure centres, from the council to Glendale who became the employer. Thereafter, Glendale did not honour the next two NJC agreed pay increases. Mr Graham and his colleagues supported by the GMB, brought employment tribunal claims for unauthorised deductions in respect of the non payment of the pay rise. The Employment Tribunal upheld the claim.

Glendale appealed to the Employment Appeal Tribunal where their appeal was dismissed. So they appealed further to the Court of Appeal.

The Court of Appeal upheld the decision of the Employment Tribunal that Glendale were contractually obliged to pay the NJC rates following the TUPE transfer and that no notice had been given to the employees that Glendale intended to depart from the agreed NJC rates.

The Court of Appeal took a robust view of how statements of particulars should be construed. Lord Justice Keene said "I do not accept that one should construe the wording [of the particulars] as if it were an agreed term in a written commercial contract between two companies. The task of interpretation has to be undertaken bearing in mind that these are the employer's particulars of employment which provide evidence of the agreement between the employer and employee and no more."

The Court of Appeal went on to say that where a contract provides that the NJC rates will normally be paid, there is an implied term in a contract of employment that the employer must inform the employee if and when there is to be a departure from the normal situation. Lord Justice Keene reiterated previous case law "that there will normally be an implied term in contracts of employment that an employer will not treat his employees arbitrarily, capriciously or inequitably in respect of matters of pay. I see that as being simply one part of the more general obligation not to destroy the mutual trust and confidence between employer and employee".

The case has wide reaching implications, not just in the context of TUPE transfers. The introduction of such an implied term could catch employers who change normal pay rise or bonus arrangements without informing employees of the change. Could this also apply to non pay related benefits? On the reasoning of the Court of Appeal there is no reason why it should not have a wider application.

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Dismissed for attending a dying father

MacCullogh & Wallis Ltd v Moore, EAT, IDS Brief 740, September 2003

Are employees really protected by the new rights under family friendly legislation? Ms. Moore was employed by a company, MacCullogh and Wallis, from the 23 May 2000 until she was sacked on the 26 January 2001. She therefore had less than one year's service at the time of dismissal.

She brought a claim in the Employment Tribunal, which she won, alleging the reason she was dismissed was in breach of 57(A) of the Employment Rights Act, 1996. This is the law which gives an employee the right to take unpaid time off work in certain circumstances to care for, or make arrangements for, a dependant. If an employee is dismissed for exercising this right, Section 99 of the Employment Rights Act 1996 states the dismissal will be automatically unfair.

However Ms. Moore's employers appealed to the Employment Appeal Tribunal. The EAT upheld the appeal stating that the Tribunal had failed to make the necessary findings to decide whether Section 57A could actually apply. It was particularly concerned with the requirement of the employee to give notice, when exercising the right.

So what were the facts?

Ms. Moore informed her employer on Wednesday 10 January 2001 that her father, who had been recuperating in hospital from a car crash in Ireland, was dying. Her employer agreed she could go immediately to be with him. However the company became sceptical as to whether Ms. Moore had gone to Ireland and insisted she contact them.

On Friday 19 January Ms. Moore phoned the company and explained she intended to be off work until Friday 26 January when she would contact the company again. The company told her she would be dismissed unless she returned to work on Monday 22 January.

Meanwhile the company rang the hospital and were told that her father's condition was not life threatening.

When Ms. Moore did not attend work on the 22 January the company sent her a letter of dismissal which reached her on Friday 26 January.

However, unknown to the company her father's condition had indeed deteriorated and he died the day after she received her letter of dismissal, on Saturday 27 January.

Both the Tribunal and the EAT agreed that attending a dying parent could fall within Section 57A 1(a)(b). That subsection provides that an employee is entitled to time off to take action which is necessary to make arrangements for the provision of care for a dependant who is ill or injured. The definition of dependant includes a parent (Section 57A(3))

However the EAT said the Tribunal must ask itself a number of questions regarding the "relevant" date, i.e. the date when the request for time off was refused. In this case the EAT said the relevant date was Friday 19 January, not Monday 22 January. The Tribunal should have considered on this date whether Ms. Moore was covered by the section and if she was, whether she had complied with the proper notice requirements. The EAT sent the case back to a differently constituted Tribunal to make a final decision.

The EAT appeared to suggest that an employee's protection against dismissal is lost if the employee requires more time off than he or she originally anticipated and he or she fails to contact his employer again to give further notice. This appears to be a very restrictive interpretation of the legislation.

This case follows on the heels of **Qua v Ford Morrison, LELR 78, March 2003** which also found that not all the requirements of the right had been met. There is a real concern that an overly mechanistic and narrow view of the legislation has been taken rather than consideration of the spirit and intention behind the creation of this family friendly legislation. This tendency by the EAT is particularly unfortunate given that the legislation is to protect people in times of family crisis and misfortune, when it is hardest to concentrate on dotting the "i"s and crossing the "t"s.

Assaulted at work? Sue the employers

Dubai Aluminium Co Ltd v Salaam [2003] IRLR 608
Mattis v Pollock [2003] IRLR 603

Until recently there was very little chance of successfully suing an employer for a deliberate assault by an employee. The law of vicarious liability only applied in respect of acts committed in the course of employment. Not surprisingly, employers were able to argue successfully that they do not employ people to assault other employees or members of the public, and therefore normally the only recourse to compensation would be a claim to the Criminal Injuries Compensation Authority.

However, the law has changed significantly and dramatically in the last three years. A line of cases of the highest authority now make it much more likely that an employer will be held responsible for assaults which occur at work.

In **Fennelly v Connex Railways ([2001] IRLR 390)** the Court of Appeal found the rail company liable for the actions of a ticket inspector who had assaulted a passenger. The Court said that the incident arose as a direct result of the ticket inspector performing his duties and it could not realistically be divorced from the performance of the job itself.

In 2001 the **House of Lords in Lister v Hesley Hall Ltd ([2001] IRLR 472)** marked a fundamental reappraisal of liability in a case involving sexual abuse by a warden at a residential school. The Court found that the actions of the warden were sufficiently connected to the work he was employed to do (monitoring children in dormitories at night), and the employers were held to be liable.

This was now been followed by another important House of Lords case, this time not involving personal injury but instead dishonesty: **Dubai Aluminium Co Ltd v Salaam.** The House of Lords have held that it was not necessary for there to be a duty owed by the employer to the victim in order for there to be a finding of vicarious liability. Lord Millett said that vicarious liability may arise even if the act of the employee is "an independent act in itself". He underlined that the mere fact that the employee was acting dishonestly or for his own benefit is seldom likely to be sufficient to show that an employee was not acting in the course of employment.

The effect of these lines of authority has now been highlighted graphically by the decision of the Court of Appeal in **Mattis v Pollock (T/A Flamingos Nightclub).**

In this case a nightclub doorman, who had become involved in an argument with a customer, was chased away from the club by a group of four or five people. The group of people gathered at the corner of the street about 100 yards away from the club. The doorman went away and returned with a knife, got hold of Mr. Mattis and stabbed him in the back shouting "I'll teach you to fuck with me".

The High Court decided that the employers of the doorman were not liable. However, the Court of Appeal has reversed this saying that the stabbing represented the unfortunate culmination of the unpleasant incident that had started within the club and could not be treated in isolation from earlier events. Although the doorman's behaviour included an element of personal revenge, the Court found that at the moment that Mr. Mattis was stabbed, the responsibility of the employers for the aggressive actions of the doorman had not been extinguished. One factor that influenced the Court was that they found that the club had employed the doorman knowing and approving of his aggressive tendencies. The Court of Appeal found the employers were vicariously liable for the attack on the grounds that they had authorised and expected the

Crunch time for Working Time

This month's guest author is Brian Bercusson, Professor of law at King's College, London University and Director of the European Law Unit of Thompsons Solicitors.

Landeshauptstadt Kiel v. Norbert Jaeger, Case C-151/02

November 2003 is the 10th anniversary of the Working Time Directive (Council Directive 93/104/EC of 23 November 1993, as amended by Directive 2000/32 of 22 June 2000). One key element of the Directive is the limit placed on weekly working hours: "the average working time for each seven-day period, including overtime, does not exceed 48 hours" (Article 6 of the Directive). This was transposed into UK law in Regulation 4 of the Working Time Regulations 1998. The maximum hours requirement was of particular concern to the UK because working hours in the UK were then the longest of any EU Member State. In 1992, nearly half of the seven million male workers in the EU working 48 hours or more a week were employed in the UK.

THE NUMBERS WORKING OVER 55 HOURS PER WEEK HAD RISEN TO 1.5 MILLION

The UK therefore took advantage of the opt-out allowed for in the Directive in Regulation 4 of the Working Time Regulations 1998 which prohibits a working week in excess of 48 hours: "unless his employer has first obtained the worker's agreement in writing to perform such work". The opt-out provision was designed to give the UK the opportunity over a 10-year period to bring its working time practices more into line with those prevailing in the other EU Member States. Instead, the opposite has occurred. A TUC study of February 2002, based on analysis of the government's Labour Force Survey and a TUC-commissioned survey, reported that nearly four million persons, 16% of the labour force, were now working over 48 hours per week compared to 3.3 million (then 15%) in the early 1990s. The numbers working over 55 hours per week had risen to 1.5 million. Consequently, the proportion of workers in the UK exceeding the 48-hour weekly limit remains today the highest in the EU.

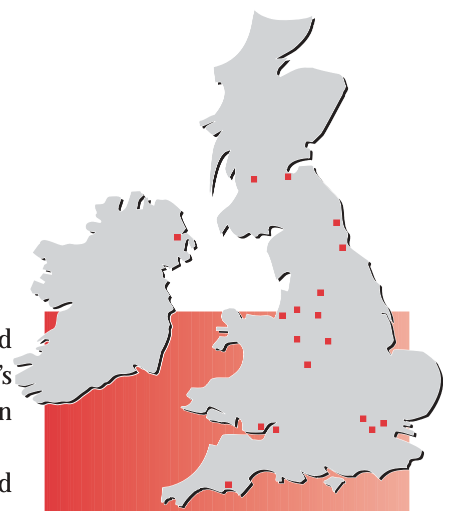
However, the paragraph in Article 18(1)(b)(i) of the Directive authorising the opt-out also required that ten years after the adoption of the Directive *"the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this point (i) and decide on what action to take"*. That ten-year deadline is now imminent and the Commission is examining what action to take regarding the opt-out.

Apart from the increasingly difficult situation in practice, over the past ten years the legal position has become more complicated due to decisions of the European Court of Justice. The first, and most important of these, concerned the UK Conservative government's complaint that the Directive was concerned with terms of employment and, consequently, the Directive was unlawful as wrongly based on the Treaty provision allowing for directives concerned with health and safety in the working environment. Rejecting the complaint, the Court interpreted the relevant Treaty provision (then Article 118a) as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in the working environment, including, in particular, aspects of the organisation of working time. The Court referred to the definition in the Constitution of the World Health Organisation (WHO), to which all the EU Member States belong, which defines health as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity **(United Kingdom of Great Britain and Northern Ireland v Council of the European Union, Case C-84/94, [1996] ECR I-5755).**

In a later case, the Court addressed the definition of "working time" in Article 2(1) of the Directive. This provides a definition of "working time" for the purposes of the Directive comprising three conditions:

- "**working time** shall mean any period during

Consult or pay



TGWU v Morgan Platts Ltd (in administration) EAT/0646/02 (IDS Brief 739 2003)

The rights of workers in the situation of collective redundancy have been criticised for their lack of punch. This case strengthens the collective rights of employees. If an employer fails to consult the recognised union or elected workplace representatives where 20 or more employees are being made redundant at the same establishment over a period of up to three months, the sanction is for the union to apply for a protective award for the affected employees under section 188 of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). If the Tribunal makes a protective award, how is compensation calculated – how long is the protected period?

The EAT in **TGWU V Morgan Platts** (in administration) says that the starting point is the maximum 90 day period, with any reductions needing to be justified by the circumstances of the case.

Under section 189 TULRCA, where the Tribunal makes a protective award, the compensation payable to each affected employee is a week's pay per week of the "protected period". The "protected period" is of such length as the Tribunal considers just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with the duty, subject to a maximum of 90 days.

In this case, without any prior warning, the Platts Mill company went into administrative receivership. 35 employees were told that their employment was being terminated with immediate effect. Before the dismissals took effect, the TGWU had not been informed of the company's problems nor of their possible effects on employees.

The TGWU applied for and were granted a protective award from the Employment Tribunal. But the Tribunal set the protected period at only 30 days even though the employees had been totally deprived of their consultation rights. The TGWU appealed.

The EAT said that the Tribunal had been wrong to use a 30 day protected period as the starting point. Instead, confirming its previous decision in **GMB v Rankin and Harrison [1992] IRLR 514**, the EAT said that the 90 day maximum protected period was the correct starting point. The Tribunal should then go on to consider whether there were circumstances to justify a departure from that 90 day maximum.

The EAT confirmed that the company had been in serious default and that there had been no consultation at all. There were therefore no reasons to justify a departure from the 90 day maximum protected period, which the EAT substituted for the 30 day protected period.

The lesson is that, when arguing over the length of the protected period, the starting point should always be the 90 day maximum. It is then for the employer to come up with reasons as to why the Tribunal should depart from that maximum. The lesson for the company is also clear – their failure to consult could cost them over £100,000. The Platts Mill company went into administration, as is often the case in failure to consult cases. The affected employees will still get their financial award however, even if the company becomes insolvent as a Section 189 TULRCA award is met from the DTI under the insolvency provisions of the Employment Rights Act 1996.

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