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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Season's greetings to new discrimination protection

On 2 December 2003, for the first time ever in the United Kingdom, there will be specific statutory protection against sexuality and religious discrimination in employment. The celebrations will be marred by the shortcomings in the new legislation, which trade unions are rightly challenging in the courts, but this does not detract from some of the very real improvements contained in the legislation.

So far already this year we have had a strengthening of the Race Relations Act with the introduction of the Race Relations Act (Amendment) Regulations 2003 on 19 July, which gave statutory form to protection from harassment, post employment protection and improved the burden of proof, as well as widening the definition of indirect discrimination. On the same day the Sex Discrimination Act (Amendment) Regulations 2003 were implemented, bringing the police within the legislation and prohibiting post-employment discrimination.

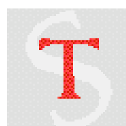
The Equal Pay Act (Amendment) Regulations were also effective from 19 July this year to bring the law in line with European court judgments on time limits and arrears of pay. No longer will employers be able to benefit from concealing pay inequality, or avoiding liability where there is a stable employment relationship – even if the contractual position is a little murky.

The new rights and new forms of protection against sexuality and religious discrimination come into force in December this year. Similar in structure to existing equality legislation direct and indirect discrimination will be unlawful as will victimisation and harassment. A religion or belief is defined as "any religion, religious belief, or similar philosophical belief" which leaves scope for argument that less obviously religious beliefs will be included, such as humanism and atheism. Sexual orientation is defined as orientation towards members of the same sex, the opposite sex or both – which should cater for most tastes. Manifestation of religion or sexual orientation will be covered, as will discrimination by association.

There is however a gaping hole in the sexual orientation regulations which TUC affiliates are challenging through the courts as an improper implementation of the Framework Directive. Anything which prevents or restricts access to benefits by reference to marital status is exempt from the regulations. Since same-sex partners cannot marry, the exemption constitutes a licence to discriminate in this area. Also of great concern is the last minute introduction of a clause enabling employment for purposes of an organised religion to apply a sexual orientation requirement, which is also being challenged as outside the scope of the Directive.

Still to come are the amendments to the Disability Discrimination Act 1995, which will be in force in October 2004. These will bring the DDA more into line with other anti-discrimination legislation and remove the reviled small employer exemption and most of the other exemptions. It will also introduce the now familiar provisions of a statutory definition of harassment, provide a shifting burden of proof and prohibit direct discrimination (with no justification defence). The final aspect to be introduced in compliance with the Equality Framework Directive will be the age discrimination provisions in 2006, discussed in detail last month.

The task ahead will be to use the new regulations, flawed though they are, as an important tool in the trade union armoury in achieving genuine freedom from discrimination in the workplace.



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Losing a chance

Virgin Net v Harper EAT [2003] IRLR 824

The fall out from the decision of the House of Lords in Johnson v Unisys Limited [2001] IRLR 279 continues. In Virgin Net the EAT has decided that an employee who was summarily dismissed cannot bring a claim for damages for the loss of the opportunity to claim unfair dismissal where, if she had been given the proper amount of contractual notice, she would have been able to bring a claim of unfair dismissal. This decision overrules to an extent the decision of the EAT in Raspin v United News Shops Limited [1999] IRLR 9 that had allowed an employee to recover damages in a claim for wrongful dismissal reflecting the loss of the chance to recover compensation for unfair dismissal.

Raspin was a case where an employee was dismissed both without notice and in breach of a contractual disciplinary procedure. The employee was therefore prevented from being employed on the date when she would have qualified for the right to bring an unfair dismissal claim.

Similarly **Virgin Net** was a case in which if the employee had been given the correct amount of contractual notice, she would have qualified to bring an unfair dismissal claim. Sally Harper was employed by Virgin Net from 4 April 2000. On 1 November she entered into a permanent contract. Under the terms of the contract there was a three months notice provision on both sides. There was also a term which allowed the contract to be terminated summarily in the event of serious misconduct.

On 22 January 2001 there was an incident involving Ms Harper and a junior manager. There was a disciplinary hearing and Ms Harper was given a formal written warning for misconduct. She appealed. Meanwhile her manager had second thoughts about the original penalty and summarily dismissed her on 2 March. Ms Harper did not therefore have the necessary one year's service to bring an unfair dismissal claim. She was told she would be paid her three months notice but this was not paid.

Ms Harper brought a claim of wrongful dismissal for her notice period and also for the loss of a chance of recovering compensation for unfair dismissal. The Tribunal awarded compensation for her notice pay and also for the loss of chance. The total compensation awarded was £25,000: the maximum recoverable for a breach of contract claim under the Employment Tribunals Extension of Jurisdiction Order 1994.

Virgin Net appealed against the loss of chance decision but not against the notice pay decision.

The EAT said it was impermissible to allow a claim for loss of chance to circumvent the statutory qualifying period as set out in the Employment Rights Act 1996. Quoting the words of Lord Millett in **Johnson** they said to allow such a claim would "be a recipe for chaos". They decided following **Johnson** that an applicant cannot recover, by way of damages for breach of the contract of employment, loss flowing from the fact and manner of the dismissal itself. Turning to Raspin the EAT suggested that as far as the decision rested on events unconnected with the dismissal, the failure to follow the contractual disciplinary procedures has arguably survived **Johnson**. However the EAT did not resolve the issue because they did not need to. Commentators have suggested that their comments are inconsistent with **Johnson** and wrong.

What is now clear following **Virgin Net** is that claims for loss of the chance of claiming unfair dismissal where an employee does not have the necessary qualifying service cannot succeed. Claims for wrongful dismissal relying on breaches of contractual disciplinary policies may still succeed. Advisors need to be careful to check whether disciplinary policies are contractual or not before advising wrongful dismissal claims based on the **Raspin** exception. Many disciplinary policies are not contractual so care is needed.

The case is being appealed to the Court of Appeal.

Employers to mind their ******* Ps and Qs

Horkulak v Cantor Fitzgerald International (IDS Brief 743, October 2003)

This recent case is a timely reminder to employers that just because they pay employees lots of money, does not mean that they can treat them anyway they like.

Mr Horkulak was a senior city employee earning close to half a million pounds a year. He took a constructive dismissal claim in the High Court arguing that his employer had breached the implied contractual term of mutual trust and confidence, in that his employer, Cantor Fitzgerald International had, without reasonable and proper cause, conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between itself and the employee.

After Mr Horkulak's promotion to the position of senior managing director in August 1999 he was subjected to regular bullying. The Judge found that Mr Horkulak's manager dictated to employees, instead of having discussions with them. He regularly employed extreme foul language as part of his dictatorial style. He swore at Mr Horkulak and threatened him with the sack on a number of occasions. Finally, on the 28 June 2000, Mr Horkulak's manager told him over the telephone that he had prepared a bonus schedule incorrectly, and he was a "stupid motherfucker" and used other abusive expressions. It was in response to that final conversation that Mr Horkulak resigned.

CFI tried to justify the language used on the basis that the words used, were "common currency between Mr Horkulak and his manager". It also tried to argue that the manager's conduct was acceptable, bearing in mind his frustration at the alleged repeated and serious shortcomings in Mr Horkulak's performance.

The Judge rejected such arguments, finding that the use of foul language was not incidental or meaningless, and that Mr Horkulak, though he had sometimes used foul language himself, was still entitled to proper treatment in accordance with his contract. He went on to find that whilst Mr Horkulak's manager was entitled to express disapproval of Mr Horkulak's performance, he should have done that through discussion, rather than threats couched in foul language. The manager was not entitled to "assert his authority by the use of foul and abusive language which gave no chance for the claimant to respond to any criticism".

The Judge therefore found that the manager's deliberate course of conduct had breached the term of mutual trust and confidence. The legitimate demands arising from what was a difficult and demanding work place had to be balanced by a system of fair enforcement. Mr Horkulak left work because his role and status as a senior manager and employee had been severely undermined.

Mr Horkulak was awarded £1m in damages. This related to the salary and bonuses which he would have received from the date of his dismissal to when his fixed term contract had been due to expire, less his earnings since dismissal. The Judge rejected CFI's argument that Mr Horkulak should have mitigated his loss by finding alternative employment earlier than he did. He found that the relapse which Mr Horkulak suffered at the beginning of 2001, in relation to alcohol and cocaine abuse would have been unlikely to have occurred if CFI had acknowledged the wrong it had done and accepted liability for his constructive dismissal. In those circumstances it was not open to CFI to argue that he had failed to mitigate his loss.

Whilst this case involved a highly paid employee, the finding that regular use of foul language does not necessarily remove it's power to offend, applies to any group of employees. Further, it is a clear indication that if employers have concerns about the performance of an individual, they should raise those concerns in a proper and constructive manner, rather than trying to force a change through the use of foul language and threats of dismissal.

The short shrift given to the employer's arguments on mitigation can also be relied on in dismissal cases in the Employment Tribunal.

Altogether now

Equality and employment rights brought together

Many years ago, our slogan in the trade union movement was "keep the law out of industrial relations" and "negotiate d o n 't legislate". These slogans reflected our view, powerfully endorsed by the Donovan Commission, that voluntary collective bargaining backed by a wide ranging immunity from the civil law were all that we needed for a powerful trade union movement which would protect workers from bad bosses. And indeed, this so-called golden formula, had been an effective base for trade union growth – both in terms of membership and influence – although in retrospect, it had not helped us in organising in sectors where the threat of industrial action was not potent – small firms outside print, most of the private services sector, part timers – in many cases areas where growing numbers of women were working.

Today those slogans have a quaint, historical feel. The recessions of the 1980s took their toll on manufacturing industry in the UK and unions lost thousands of members. The rise of individual litigation, much of it requested by the trade union movement either here or in Europe, coupled with a succession of acts of parliament designed to weaken trade union involvement in the workplace left us, by 1997, relying heavily on individual rights to achieve fairness at work. The employment laws of New Labour, especially on the minimum wage and those arising from joining the European Social Chapter, have perpetuated this. Legislation to restore the role of collective bargaining, such as statutory union recognition, have been very welcome, but limited in scope. Even the new legislation on information and consultation provides individual rights, though we regard it in practice as collective legislation, with its triggers and percentages and emphasis on processes. In addition, there has been a welcome growth of race and gender awareness in the movement and, more recently, awareness of other important issues such as sexuality and disability as workplace issues. Legislation on issues such as these is based largely on individual rights.

This new emphasis means that the law is as important a protector of workers, as collective bargaining, if looked at across the workforce as a whole. Some employers may be wondering whether the price they paid for a reduction of union power was too high, as they face soaring legal costs and regular outings to the employment tribunals. Readers of this journal will know what important issues these are. Work is where nearly all adults now spend most of their lives. Work now encompasses the majority of women as well as men, whether full time or part time. Work is essentially a highly ordered activity. The way in which work is organised largely determines how society is ordered.

All these changes have produced a very different trade union movement with great challenges in terms of ensuring a significant extension of union membership. The TUC has to change to reflect what is happening in the world of work. It also has to reflect the aspirations of the trade union movement. In order to survive and flourish, we need to attract far greater numbers of young workers, women and black workers and we need to demonstrate our commitment to making both the workplace and the union an environment where workers are free to express their sexuality, are free from harassment and are not excluded by reason of disability.

One big change at the TUC has been the appointment of two women to senior posts, with Frances O'Grady as deputy general secretary and Kay Carberry as assistant general secretary joining Brendan Barber, the new general secretary. Another change was the merger of the employment rights section of the Organisation and Services Department with the former Equal Rights Department, to form the Equality and Employment Rights Department. I was given the great privilege of being appointed to head the new department last June, having formerly been the TUC's Senior Employment Rights Officer. The new department has key strategic objectives for the coming year, set out in resolutions carried at our Congress and also at our four equality conferences - Women, Black Workers, Lesbian Gay Bisexual and Transgender, and Disability. The rest of this article highlights the priorities of the new department for 2003/4.

Guest author Sarah Veale is head of the TUC equality and employment rights department

Equal pay is and will remain a key priority. Recent figures show that the gender pay gap has not narrowed significantly. Much of this is due to occupational segregation and there is still a long way to go to achieve equal pay for work of equal value. The TUC will continue to campaign for compulsory pay audits but will also be working to ensure that all unions make it a priority to put equal pay on the bargaining agenda. On the theme of women's income, the TUC will make women's access to decent occupational pensions another key priority this year; many women still lose out because of child rearing responsibilities, or because they earn too little to be able to benefit from company schemes.

The activities of the BNP in the community and within a growing number of unions is alarming and will be challenged forcefully. One matter which must be addressed by the government is the legal restrictions on unions who want to exclude these racists from their organisation. We welcome all the work which Thompsons are doing with us and affiliated unions on this issue. The TUC has also entered a new partnership arrangement with the CRE, which will greatly improve our work together in handling cases and developing a strategic approach to improving workplace diversity.

A great step forward was made by the government and the EU when they agreed to introduce legislation to protect workers who are discriminated against on grounds of their sexuality and we warmly welcome this and will work hard to promote it and make it work effectively. It should herald a culture change by employers. It was disappointing however that the government decided to weaken the legislation by allowing discrimination to be practised by religious organisations and by leaving pension schemes free to use marriage as a determinant of access to occupational pension scheme benefits for partners. The TUC is currently backing a group of unions who are challenging the regulations in the courts on these two issues.

The TUC has been campaigning for a new Disability Bill to strengthen the current legislation and ensure that there is better protection for all disabled workers, including those who have conditions which have not yet manifested themselves. Access to employment is, we believe, a major factor in ensuring equality for disabled people. We have collected thousands of signatures on a petition for a Bill which we will be presenting to the government shortly.

The proposed legislation on age discrimination, though generally welcome, will be a great challenge to the union movement. We are particularly concerned about the proposed default retirement age and the proposed levelling down of statutory redundancy pay.

The employment law agenda is as full as ever. We are organising a series of briefings and education courses for union reps on the new rights to information and consultation. We regard these new rights as presenting great opportunities for extending our influence in workplaces where there is a union presence but no recognition, or where unions are recognised for some parts of the undertaking but not all. We will need to ensure though that existing union agreements are compliant with the new laws and strong enough not to be undermined by employers or challenged by disaffected groups of workers.

We hope that the review of the Employment Relations Act will produce helpful amendments to the current recognition laws, which certainly need an overhaul. We are optimistic that the government will act to protect workers against unfair labour practices during recognition campaigns and will also enforce the important decision taken by the European Court of Human Rights in the Wilson and Palmer case, so that union members can be fully and effectively represented by their union in the workplace. We remain disappointed though about the narrowness of the Government's proposals. The legislation will continue to exclude small firms from the recognition provisions and do little to extend protection for workers taking part in lawful industrial action. This is unacceptable to the TUC and we will continue to put pressure on the government to promote collective bargaining as an alternative to individual dispute resolution by amending existing legislation where necessary.

We have serious concerns about the draft dispute resolution regulations and about the proposed new employment tribunal procedures. In particular, we cannot support the exclusion of informal warnings from the statutory minimum procedures and we believe that section 30 of the Employment Act, which provides that the new procedures will be an implied term in employee's contracts, must be commenced with the rest of the legislation. There is a real danger that these regulations will actually produce more, not less litigation, as there will inevitably be disputes about whether and how the new procedures have been used.

Other big issues, such as reform of TUPE and the working time opt out are covered by another department in the TUC but we will all be working closely together in Congress House towards our goal of making fairness at work a reality.

The implied duty of good faith and pension rights

The implied term of trust and confidence has long been accepted as part of the mutual obligations owed between employer and employee. Recently, its breadth and flexibility have been influential in a number of cases concerning pension rights. In the current climate of disappearing defined benefit schemes, the right of employees to claim damages arising from a breach of the implied term is likely to assume increasing importance, as will the need for employers to bear this duty in mind when taking steps to curtail their future pension costs.

BACKGROUND

The mutual duty of good faith owed by employer and employee governs the parties' rights and obligations during employment. It has recently been authoritatively suggested that the duty extends at least into and, perhaps, beyond a disciplinary process resulting in a termination: **Johnson v Unisys Ltd [2001] IRLR 279.** The question of whether or not the duty extends to former employees is of obvious importance in the pension scheme context when considering the duties owed by an employer to deferred pensioners. Lord Steyn's alternative formulation of the duty in **Johnson** was to call it a duty on the employer to deal fairly. Deferred pensioners could say with justification that they have not had a fair deal in recent years.

IN THE CONTEXT OF PENSION SCHEMES

The implied term was formally extended to the pension scheme context by the decision in **Imperial Group Pensions Trust Limited v Imperial Tobacco [1991] 1 WLR 589.** It was there given the short form of 'the implied obligation of good faith.'

In **Imperial**, the context was the employer's power to consent, or to withhold its consent, to an amendment to the scheme proposed by the trustees. It was held that this was not a fiduciary power, but nonetheless one which had to be exercised within the limits of the implied obligation of good faith. This preserves the entitlement of an employer to take into account its own interests, even where those interests conflict with those of active and pensioner members: **National Grid Co. Plc v Laws [1997] OPLR 207.**

The duty as formulated in **Imperial** was endorsed by the House of Lords in **Malik v Bank of Credit and Commerce International SA [1998] AC 20. Malik** also confirms there is no reason why damages cannot be claimed, including damages for injury to employment prospects.

DEVELOPMENT

The starting point in considering the way in which this flexible duty has been developed is the decision of the House of Lords in **Scally v Southern Health and Social Services Board [1992] 1 AC 294.**

Dr. Scally had sued his employer for damages for breach of contract in failing adequately to inform him about the availability of a contingent right, introduced by a statutory instrument, which enabled him to purchase added years of pensionable service at advantageous rates.

The Court found that it was "not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit."

The Court in **Scally** noted the limitations on its decision. The circumstances in which the implication will arise were defined with precision: (1) the terms of the contract must not have been negotiated with the individual employee but result from negotiation with a representative body or otherwise be incorporated by reference; (2) a particular term of the contract must make available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; and (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.

This month's guest authors are Richard Hitchcock and Keith Bryant, barristers from the Pensions and Employment Team at Outer Temple Chambers.

Scally was considered in **University of Nottingham v Eyett [1999] 2 All ER 437.** The scheme provisions entitled Mr. Eyett to take early retirement in July 1994 and he asked his employer, the university, to inform him of his pension entitlement if he retired on 31 July 1994. The university did this, but did not inform him that his entitlement would have been higher if he retired on the next possible date, 31 August 1994. He retired on 31 July 1994 but afterwards complained to the Pensions Ombudsman about the failure by the university to inform him of the effect of the later retirement date.

The Ombudsman upheld the complaint, even though Mr. Eyett could have discovered the position by reading the scheme booklet and even though the university was unaware of his misapprehension. On appeal, the Ombudsman argued that the university had breached the implied duty of good faith. The university contended that the implied term merely prohibited conduct calculated or likely to produce destructive or damaging consequences, and could not impose a positive obligation on the employer.

Hart J found that **Scally** did not assist the Ombudsman. He held that, where an employee proposed to exercise important rights in connection with his contract of employment, the implied term did not require the employer to warn him that there might be a more financially advantageous way of exercising that right. The Appeal was therefore allowed. However, it was observed that the principle underlying the implied term of mutual trust and confidence does not necessarily exclude the possibility that it might have positive content in appropriate circumstances.

Imperial, Scally and Eyett were all considered in **Hagen and others v ICI Chemicals and Polymers Limited and others [2002] 2 PLR 1.** The pensions issue concerned whether or not members of a purchaser's pension scheme had a legitimate complaint against either the purchaser or the vendor in circumstances where the pension rights available to the members were of materially less value than those that had been available prior to the transfer. In particular focus were communications issued by purchaser and vendor regarding the pension rights for members after the transfer.

The implied duty contended for in **Hagen** was that ICI would at all reasonable times take all reasonable steps to ensure that members were made aware of the true position with regard to their pension rights. **Scally** was cited in support. The Judge rejected the contention. He referred to **Eyett**, and pointed out that the Claimants in this case had an additional problem, in that they were alleging that their employer was obliged to give them information about someone else's scheme.

THE FUTURE

The implied term has principally developed in the context of ongoing schemes. The current climate will see increasing litigation arising from attempts by employers to close defined benefit schemes and to contract out of debts arising under Section 75 Pension Schemes Act 1995: cf **Bradstock Group Pension Scheme Trustees Ltd. v Bradstock Group plc and others [2002] PLR 327.** Every element of the decision, related consultation and subsequent implementation needs to be scrutinised to see whether the implied term comes into play. Individual contractual terms, and collective agreements, may well limit the freedom of the employer to close the scheme, even for future service. In a potential dispute parties must take care that in what is done and said (and not done and not said) the implied duty of good faith is borne in mind.

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Costs alert

McPherson v BNP Paribas, EAT/0916/02

It is two years since the new costs regime in Tribunals came into force. It widened the circumstances in which costs can be claimed and increased the amount that the Tribunal itself can order, without reference to a County Court taxing master. The statistics show that Employment Tribunals are using their powers to award costs. The Employment Appeal Tribunal seems reluctant to set out firm guidelines as to how Tribunals should exercise their discretion, but generally appears very hesitant to interfere with Employment Tribunals decisions on costs. McPherson v Bank Paribas demonstrates some of the factors likely to influence Tribunals in considering a costs application.

In this case the EAT upheld a Tribunal decision ordering an Applicant to pay the costs of the entire Tribunal proceedings when he withdrew his claim for unfair dismissal and breach of contract two weeks before the hearing.

The Applicant stated that the reason for withdrawing his complaint was due to his health. Even though there were doctors letters before the Tribunal about his medical condition and the effect of stress on his health, the Tribunal did not accept that his health was the real reason, but rather that the Applicant prolonged his case in the hope of obtaining an offer which in fact never was made. He withdrew the case, the Tribunal concluded, when he realised the Respondent would not settle.

It is a chilling decision which may leave Applicants' advisors quaking. How can a similar situation be avoided? There are a number of lessons to be learnt from the case. Any medical evidence produced to support a late withdrawal on health grounds must address all the issues and be reasonably recent. It should clearly state the diagnosis and state why the Applicant is unfit to attend the hearing, specifying the date of the hearing, and ideally what the likely effect of enduring the hearing would be. The report should state whether it is likely that the Applicant will be well enough to attend in the future. In a case of a withdrawal close to the hearing, the timing must be explained as well. In this case the EAT concluded that even though his medical condition was well documented there was no medical evidence to establish that Mr McPherson was unfit to attend the hearing, and so the Tribunal was entitled to reach the conclusion that his health was not the real reason for the withdrawal.

The manner of conducting the case up till the withdrawal may also be relevant. In this case there had been two interlocutory hearings and a previous postponement and a number of orders that had not been complied with, or inadequately dealt with, by the Applicant and his advisors. The way the Applicant had conducted his case meant that the Respondents had incurred considerable costs. The Tribunal concluded that the Applicant intended to withdraw from the case long before he actually did so, and yet gave every appearance to the Respondent that he would pursue all claims vigorously, which amounted to conduct which the Tribunal found to be unreasonable.

Finally, it may be useful for the Applicant to give evidence at the costs hearing to explain his actions, as this may carry more weight than either a written statement or a representative's submissions. Otherwise it may give an impression of indifference and disrespect, which can also lead to a conclusion of unreasonable conduct

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