Published by Thompsons Solicitors

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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 74 Oct/Nov 2002

Unfair dismissal protection Hitt again

Sainsburys Supermarkets Ltd v Hitt [2002] EWCA Civ 1588

In the recent case of Sainsburys Super-markets Ltd v Hitt the Court of Appeal have clarified, beyond doubt, the scope of the reasonable responses test in unfair dismissal cases. It permeates every aspect of the test.

At the heart of issue of employment protection is the question of the function of the Employment Tribunal in judging employers' behaviour. The more rigorous the role, the greater the likelihood of an employee succeeding in their claim. For this reason trade unionists have long objected to the "range of reasonable responses" in unfair dismissal cases which prevents a Tribunal asking itself if it would have dismissed an employee, but merely whether the employer's actions were within the band of responses open to a reasonable employer. If the option of dismissal was within the band, the dismissal will have been fair.

But the concept of unfair dismissal is more complex than that – it involves a number of stages and considerations. The employer must show a potentially fair reason to the Tribunal before a consideration of whether dismissal was fair in any particular case. The issue in **Sainsburys Supermarkets Ltd v Hitt** was whether the reasonable responses test is considered only at the stage of considering whether it was reasonable to dismiss for a given reason, or whether it applies also to the investigation into the suspected misconduct (or whatever the reason might be). The position was unclear enough from the earlier cases for the Court of Appeal to set it all out in detail and in very clear terms.

In this case Mr Hitt was suspected of theft. A missing box of razors was found hidden in Mr Hitt's locker. It was accepted that Mr Hitt had the opportunity to take them. He denied that he had, and said they must have been planted on him. The bakery manager also had a key to Mr Hitt's locker as did others. The Employment Tribunal concluded that there had been inadequate investigation. Sainsburys should have investigated all their staff with a key fitting Mr Hitt's locker who could have been near his locker at the relevant time. Sainsburys should also have ascertained the whereabouts of the bakery manager at the time of the theft to eliminate the possibility that he had put the razor blades in Mr Hitt's locker. Without a full investigation into those matters, the dismissal was unfair.

The Court of Appeal has overturned the decision. The Tribunal had substituted their opinion as to what was a reasonable and adequate investigation with their own. They should have applied the objective standard of the reasonable employer as to what was a reasonable investigation.

The range of reasonable responses test – alternatively described as the need to apply the objective standards of the reasonable employer – applies both to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances and well as to reasonableness of the decision to dismiss. The Court of Appeal held that on this analysis, the only conclusion which a reasonable tribunal could reach is that the investigation was reasonable.

THOMPSONS SOLICITORS

Does justice delayed mean justice denied?

Teinaz v London Borough of Wandsworth [2002] IRLR 721(CA)
Andreou v Lord Chancellor's Department [2002] IRLR 728 (CA)
The Silver Fund Investment.Com Ltd v S C James EAT/1169/01 (EAT unreported)

How Employment Tribunals exercise their powers to grant adjournments of hearing dates is a fraught issue. In a large number of cases postponements are sought, often shortly before the hearing date. Applicants are often cynical of an employer's motives: justice delayed is justice denied, if lawyers are involved costs will increase and the stress and uncertainty of unresolved litigation remains.

Sometimes it is the applicant who seeks an adjournment – perhaps because the stress of the proceedings and the fear of confronting former employers and colleagues or because a hoped for settlement offer did not materialise. Sometimes either side want more time to prepare the case.

These three recent cases consider the two reasons most often used for a postponement request: witness availability and the medical condition of the applicant. The cases also considered the quality of the information required by the tribunal. In all three cases – as is also frequently the case – the tribunal had refused a postponement request made at relatively short notice.

The Tribunal has a wide discretion – the Regulations simply say that a Tribunal Chairman may postpone the day or time fixed for, or adjourn, any hearing and vary any such postponement or adjournment (Rule 15(7) Employment Tribunals (Constitution and Rules of Procedure) Regs. 2001. All the rules of procedure are informed by the Tribunal's overriding objective which is to deal with cases justly. Dealing with a case justly includes ensuring that a case is dealt with expeditiously and fairly as well as ensuring that the parties are on an equal footing; saving expense; and dealing with the case in ways proportionate to the complexity of the issues. So the presumption in the overriding objective is generally against a postponement being granted.

In **Silver Fund** a respondent witness's holiday, which "made him unable to attend" the Tribunal, had cut no ice and the case went ahead. No evidence of the witness' unavailability was given. An identical request for a postponement was made at the start of the hearing which was also refused and the Respondent's representative withdrew from the hearing. The Tribunal found in the Applicant's favour and also ordered £5,000 costs against the Respondent. The employer appealed. The Employment Appeal Tribunal found that there was not even an arguable case and the case was stopped from even going to a full hearing.

In **Teinaz**, however, the Court of Appeal criticised a Tribunal for failing to accept medical evidence which had given a clear diagnosis of severe stress. The doctor's certificate stated that Teinaz should not attend the tribunal hearing due to severe stress but the Tribunal doubted the accuracy of the Doctor's letter and decided that Teinaz had rather chosen to stay away from the hearing without directing further medical evidence to be provided.

Crucially, the Court of Appeal went on to say that a party whose presence is needed for the fair trial of his case, but who is unable to be present through no fault of his or her own, will usually have to be granted an adjournment, however inconvenient that may be to the other parties and the tribunal.

But not always. In **Andreou,** a case referred to in **Teinaz**, the Court of Appeal did not overrule a Tribunal's decision to refuse a postponement. Ms Andreou had been diagnosed with stress/anxiety by her GP shortly before a hearing which had been listed six months previously for a 10 day hearing, and the report did not address the issue of whether the applicant was fit to attend the hearing, and if so, when she would be able to do so. The Tribunal had also taken the effect of a further delay on the Respondent witnesses into account in reaching their decision.

The moral is that if you need a postponement, present as much cogent information at the earliest opportunity – full medical reports, copies of holiday bookings etc. Time will tell if the effect of **Teinaz** will be the more ready granting of postponements.

Robin Thompson: trade union lawyer

21 November 2002
Robin Beauchamp Thompson, solicitor: born London 15 September 1924; married (one son, one daughter); died London 31 October 2002.

The trade-union lawyer Robin Thompson devoted his life to the struggle for workers' rights, including health and safety and legal protection at work. Tony Benn called him "one of the most important figures of his generation".

The elder son of the radical lawyer WH Thompson and suffragette Joan Beauchamp, he was born in 1924. Before the Second World War he studied engineering at Loughborough College and joined the Army (REME) in 1943. He was stationed in India and destined to be part of the intended invasion of Malaya, but Japan capitulated. He contracted dengue fever and spent Christmas 1945 billeted on a film set in Poona. Thompson was profoundly moved by the poverty and struggle in India and made lifelong friendships during his time there and in the Army.

WH Thompson died in 1947 and Joan had been seriously injured during a flying-bomb raid. Robin and his brother Brian were urged to join their father's firm; both started the month after his death. Robin qualified as a solicitor in 1950 and became sole principal of a firm with 70 staff in various locations and a political tradition. He was joined the following year by Brian and together they formed the most influential legal partnership the trade unions have known.

Robin and Brian were very different people but complemented each other: if Brian was the intellectual force of the partnership, Robin was its organisational genius and forged relationships with nearly every union. Together the brothers broke new ground in recovering compensation for injured workers, defending trade unions from the attacks of employers and governments, and advancing the interests of working people.

Thompsons pioneered much of the litigation concerning industrial diseases, defended the miners, firefighters and printers and strove to reform the law. Robin was a member of the Winn committee which reported to the Lord Chancellor on personal-injury procedure and produced a widely admired minority report. He was a founder of the Trial Lawyers for Public Justice and a life member of the Association of Trial Lawyers of America. He was respected by the legal establishment but never part of it.

The firm grew, opening offices in England, Wales and Scotland, but remained loyal to its roots: only acting for working people and never for employers or insurance companies. Robin Thompson was particularly proud of a clause of the partnership deed he drafted and which remains today:

The principal object of the practice shall be to assist Trade Unions and their members. It shall not be an object of the Partnership to earn for the Partners the maximum income which in general practice they are capable of earning.

Despite this, or perhaps because of it, the firm created and attracted some of the best lawyers available. Opportunities were given which would not have been available in traditional law firms, the firm recruiting from the ranks of trade-union activists.

Brian died in 2000. Robin retained in retirement a keen interest and involvement in the firm. In his later years he suffered from poor health and declining eyesight, but he was still as entertaining, mischievous and sometimes as cantankerous as ever. Always a source of historical insight, anecdote and – when he wanted to be – wisdom.

Rodney Bickerstaffe

Developing a charter of workers' rights

by Carolyn Jones, Director of the Institute of Employment Rights

REVIEWING THE SITUATION

The Government's review of the Employment Relations Act, 1999 is currently underway. As are consultation procedures around the Information and Consultation Directive, the Temporary Workers Directive, the Agency Workers Directive and the European proposals for the extension of protection against discrimination. Work is also being done on proposed amendments to the TUPE Regulations and the Working Time Regulations as well as the thorny issue of employment status and entitlement to statutory employment rights.

Such activity suggests that employment law is high up the political agenda. But is the work hitting the target? Has the government delivered 'fairness at work'? Has the past and proposed legislation moved us on from the position where workers complain that they work the longest hours, for the lowest pay with the fewest rights and the shortest holidays in Western Europe? Current disputes suggest not.

Will the possible amendments to existing legislation bring us in compliance with our international obligations? One would hope so. Britain's trade union laws have been repeatedly found to be in breach of those obligations, most recently by the ILO in June 2002 and the European Court of Human Rights in July. Recent suggestions, however, that the Government might consider a further layer of anti-strike legislation in response to the firefighters claim for fair pay will do nothing to simplify our laws. Such a move would no doubt attract yet more condemnation from the ILO for the complex nature of our strike laws and our failure to protect basic rights of freedom of association.

INDIVIDUAL AND COLLECTIVE RIGHTS AT WORK

In a timely and authoritative report, the Institute of Employment Rights considers some of these issues in a 176 page book entitled A Charter of Workers' Rights. As the title suggests, the book promotes regulation of the employment relationship as the most effective way of delivering fairness at work, economic efficiency and social justice. The idea that we can rely on management prerogative delivering a 'trickle-down' concept of fairness is rejected. Rather the book promotes new or improved rights on issues including working-time, training, health and safety, all aspects of equality (race, sex, disability, sexuality, religion and age) transfer rights, protections for those facing redundancy or unfair dismissal and a section on pensions.

But the emphasis of the work is on collective rights and the role of trade unions in the workplace. In a modern society, it is argued, there should be no questioning or resentment towards workers fully participating in rule-making processes. Indeed workers should be positively encouraged to get actively involved in decisions which significantly impact on their lives. It is the workers who best understand how sites and services operate to maximum performance. Whether it is in health, education, transport or the fireservice – the best way to modernise a service is to ask those at the front-line of delivery how the service could best be improved. One of the main objectives of the Charter is therefore to consider how to promote effective procedures for collective bargaining at local, sectoral and national levels.

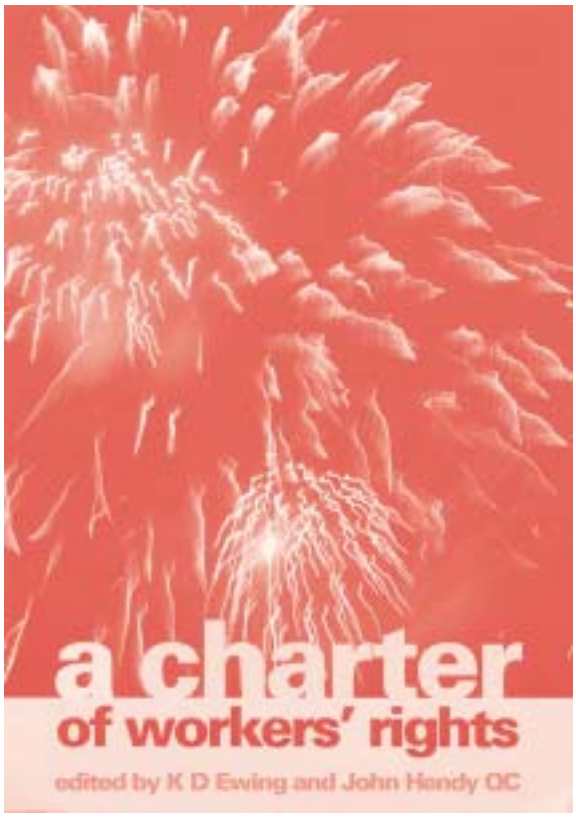
The Charter discusses proposals for extending rights of representation both individually and collectively. It suggests methods of simplifying and improving the recognition procedures and suggests the introduction of an unfair labour practices clause. It looks at the duties of ACAS and the role of contract compliance measures in promoting collective bargaining structures.

Similarly the Charter highlights the need for wider freedoms for workers to act together for mutual support as a prime means by which the imbalance of power between worker and employer can be addressed. To this end, the Charter makes a number

of recommendations including simplifying and extending the right to strike, suspending the contract of employment during disputes (a practice common throughout Europe), simplification of the balloting provisions, the right to take solidarity action and to peaceful assembly at any workplace and the removal of the use of injunctions without full trial.

INTERNATIONAL STANDARDS

The Charter and more particularly the summary which accompanies it clearly identifies those many international human rights treaties, principles and standards which the UK has voluntarily ratified (and in some cases recently reaffirmed) but which we increasingly breach. The book argues that these laws should be implemented into domestic law in a similar way as the European Convention on Human Rights was transposed into UK law through the Human Rights Act, 1998. In that way workers can enjoy their protection and enforce them against employers who seek to gain competitive advantage by intensification of work rather than through investment and innovation.



A Charter of Workers Rights is available to trade unions and IER subscribers for £12.00 (£30 others) from IER, 177 Abbeville Road, London SW4 9RL. Tel 020 7498 6919; ier@gn.apc.org. Details of all IER publications can be found at www.ier.org.uk

A CHARTER OF WORKERS' RIGHTS

1 **dignity and fair terms** Every worker has the right to dignity at work, to a fair wage and to just conditions of work.

2 **health and safety** Every worker has the right to a safe and healthy working environment.

3 **non-discrimination** Every worker has the right not to be discriminated against and to be treated with equality in equivalent circumstances.

4 **job security** Every worker has the right to security of employment (whether in relation to closures, redundancies, transfers or otherwise).

5 **income security** Every worker has the right to fair income security in retirement, sickness and unemployment.

6 **union membership** Every worker has the right to form and join a trade union for the protection of his or her occupational, social and economic interests, and not to be discriminated against on grounds of union membership, participating in union activities, or union representation.

7 **union autonomy** Every trade union has the right to uphold its own rule-book, to spend its funds and to conduct its activities including industrial action in accordance with its rules, free from employer and state interference.

8 **industrial action** Every worker has the right to take industrial action for the protection of his or her occupational, social and economic interests (or those of any other worker) without being in breach of contract, and without threat of dismissal or discrimination.

9 **union representation** Every worker has the right of individual and collective representation by a trade union, including the right to collective bargaining and to participate in decisions at work.

10 **effective remedies** Every worker has the right, from the outset of his or her employment, to effective remedies to enforce his or her rights, including adequate rights for workers' representatives to inspect and to obtain information.

Whistle blowing: follow the tune

ALM Medical Services Ltd v Bladon [2002] IRLR 807 CA.
Sim v Manchester Action on Street Health (unreported) EAT/0085/01
Parkins v Sodexho [2002] IRLR 109 EAT
Aspinall v MSI Mechforge Ltd (unreported) EAT/891/01

The Public Interest Disclosure Act 1998 has now been scrutinised for the first time by the Court of Appeal which has used the opportunity to lay down some important general principles in whistleblower cases.

In **ALM Medical Services Ltd v Bladon**, the Court of Appeal has held that in a protected disclosure case, where the employee has not served the qualifying period needed to acquire the general right not to be unfairly dismissed, "the critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence." While this may appear to be a statement of the obvious, it is suggested that there was good reason to make it: the whistle-blowing provisions within Part IVA Employment Rights Act 1996 require both parties and tribunals to focus at an early stage on the different factual issues which arise in this type of case, in contrast to those which arise in "standard" unfair dismissal claims. The process is very different from a range of reasonable responses test applicable in unfair dismissal.

So what are the requirements of the protected disclosure provisions? First, an employee must prove that he made a specific disclosure relied upon. It is suggested that this means that he must show to whom, when and where such a disclosure was made.

Secondly, an employee must prove that the disclosure made was a disclosure qualifying for protection within s.43B(1) ERA, which requires, in respect of each disclosure that:

- the disclosure was a disclosure of information;
- the disclosure was made to the employer;
- the applicant had a reasonable belief when making the disclosure that it tended to show one of the matters within s.43B(1);
- the disclosure was made in good faith.

The different elements of the second requirement demonstrate that the requirements for statutory protection are carefully drawn, because the aim is to balance the promotion of the public interest with the respective interests of employers and employees.

The intricate nature of the second requirement means that particularly careful drafting of the IT1 is required in Whistleblowing cases. A cautionary tale is provided by **Sim v MASH** EAT/0085/01, in which it was held that no claim under s.103A ERA (automatic unfair dismissal) or s. 47B ERA (victimisation) had in fact been brought by the use of the following words in the IT1:

"I believe I was dismissed for reasons which may be contrary to the PIDA 1998 and were concerned with financial probity and safeguarding the health and safety of employees and clients of MASH."

Applicants should also consider whether the subject matter of the disclosure is a qualifying disclosure within s.43B(1). It may be that a broad and purposive interpretation of the subjects within s. 43B(1)(a) – (e) will be adopted by tribunals. In **Parkins v Sodexho Ltd** [2002] IRLR 109, the EAT held that s. 43B(1)(b), which defines a qualifying disclosure as including "any breach of information which, in the reasonable belief of the worker making the disclosure, tends to show…that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" was drawn very broadly and included obligations arising out of the contract of employment. Mr. Parkins complained that there was a lack of adequate supervision on site, which breached his contract of employment; this complaint was held to be a qualifying disclosure.

This month's guest author is Tony Ross, barrister at Coram Chambers specialising in employment and discrimination law.

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

Thirdly, an employee must prove causation ie. did the disclosure lead to dismissal or victimisation.

In many cases, the evidence will focus on the issue of causation of the dismissal or detriment suffered by the employee. In **Aspinall v Mechforge Ltd** EAT 891/01, the tribunal found that the steps taken by the employer were caused by a perceived breach of confidentiality. The worker had arranged for a video to be taken of how a particular hoist worked to further a personal injury claim, but the video also revealed a secret production process. The EAT held that, for there to be detriment under s.47B ERA "on the ground that the worker has made a protected disclosure", the protected disclosure has to be "the real reason, the causa causans, the motive of the treatment complained of", borrowing the words of Lord Scott in **Chief Constable of West Yorkshire v Khan** [2001] ICR 1065, the leading case on causation in victimisation cases brought under s. 2(1) Race Relations Act 1976.

The EAT appeared to hold that the same test of causation applied where the claim was that the reason or the principal reason for dismissal was the making of a protected disclosure, although it is not clear why this necessarily follows in the absence of the same statutory wording in s.103A ERA.

On the issue of causation, **Bladon** arguably underestimates the importance of establishing what are the employer's procedures, and why they have been breached. Applicants should always look for breaches of any procedures implemented by the employer prior to dismissal. An employer is unlikely to advertise his motive for dismissal where a protected disclosure has been made. By analogy with the principles on the drawing of inferences established in cases brought under the RRA 1976 (such as **Anya v University of Oxford** IRLR [2001] 377), it can be argued that the tribunal could infer that the reason or the principal for dismissal was the protected disclosure relied upon, where it is proved that there is an unexplained breach of (or complete non-compliance with) a procedure relied upon by the employer.

PROCEDURAL DEVELOPMENTS

The Court of Appeal in **Bladon** recommended that there should be a directions hearing in all protected disclosure cases. Apart from the obvious saving of time and costs at the final hearing, experience suggests that an interlocutory hearing will, on balance, favour Applicants for two reasons:

The actual disclosures made can be defined at the outset. Since the disclosures will then be set down in the Decision of the interlocutory hearing, a subsequent tribunal will see them before the Applicant's evidence is given. It is more likely that the evidence of the Applicant as to the making of these disclosures will be accepted if it is consistent with the stated disclosures.

The Respondent may be required to expand on their causation defence. This explanation may well open the way for requests for disclosure of specific documentation e.g. the incident reporting procedure or the disciplinary procedure. It will enable the Applicant to consider how this explanation can be rebut

REMEDIES

The other crucial distinction between so-called ordinary unfair dismissal and whistleblower cases is the unlimited compensation available under the PIDA. The statutory cap does not apply and where an Applicant can establish his or her losses, the compensation can run into hundreds of thousands of pounds.

Unfair dismissal

The DTI has published its updated guide to unfair dismissal on its website.
www.dti.gov.uk/er/individual/unfair-pl712.htm

Also, the DTI has published two more guides to the law (these are informative and helpful): one dealing with whistleblowing, the other with rights to notice and reasons for dismissal.
www.dti.gov.uk/er/individual/pidguide-pl502.htm
www.dti.gov.uk/er/individual/reasons-pl707.htm

Source of confusion

Lawrence and others v Regent Office Care Ltd [2002] IRLR 822 ECJ

The European Court of Justice has now given judgment in this case which tests the limits of equal pay law and contracting out of services.

The interface between equal pay legislation and contracting out is critical to protecting workers' terms and conditions of employment. There has been huge progress made by the creative use of the law over the past 15 years. Remember the days when the public sector was excluded from the protection given by TUPE – when only transfers in the nature of a "commercial venture" were covered by the TUPE regulations? At that time, use of the equal pay legislation was the main source of protection for women workers trying to maintain pay parity with comparable male staff employed by the same Council. The landmark victory in the House of Lords in **Ratcliffe v North Yorkshire County Council** [1995] IRLR 439 established that where market forces are tainted with sex discrimination, it is no defence to an equal pay claim. The school catering assistants' pay could not be reduced below that of their male comparators under a Job Evaluation Study in order to keep the service in-house under threat of competitive tender.

With the extension of TUPE to cover compulsory competitive tender, incoming contractors could not bid on the basis of lowering terms and conditions of the workforce on transfer. That provided a measure of protection to workers, at least on transfer to a private contractor. What the test case of **Lawrence v Regent Office Care Ltd** sought to do was establish that the comparison with male workers in local government service held good after the transfer, arguing that the workers were all employed in the same service, even if not, employed by the same employer. Some of the Applicants in the case had been dismissed by the Council and taken on on new, and reduced terms contracts by the contractors; some had transferred over straight from the Council; and some had never worked for the Council and only been employed by the contractor but on the local government service.

An Employment Tribunal had rejected the women's arguments holding that in order to make the comparison "the person who discriminates has to be in control of both the women's wage and the comparator's wage". The Court of Appeal then referred the case to the European Court of Justice.

In a particularly short and Delphic judgment which leaves more questions than it answers, the ECJ has rejected the women's claim. The court helpfully reiterates the position that equal pay rights – Article 141 Treaty of Rome – is not limited to the situation where men and women work for the same employer. It repeats that the principle of equal pay may be invoked in cases involving pay discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which the work is carried out in the same establishment or service, whether private or public.

However, where the differences identified in the pay and conditions of workers cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment, the claim falls outside the scope of Article 141. The Court does not explain what that means and we will have to await the ECJ's ruling in **Allonby** due next year, and hope for better illumination of this difficult point.