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Give us a break

Curr -v- Marks & Spencer plc [2002] EWCA Civ 1852

We previously reported the case of Curr -v- Marks & Spencer in the Employment Appeal Tribunal (June 2002, LELR 71 p8), a case concerning the status of an employee during a career break. The EAT had concluded that during a four year career break, although there was no contract of employment, there was continuity of employment. The period of absence from the workplace was a continuing arrangement preserving continuity. The main practical importance was that employment rights dependent on a period of service would not be lost during a career break, such as unfair dismissal protection and redundancy entitlement.

The Court of Appeal disagrees and has overturned the EAT's judgment.

Under the career break scheme for managers at Marks & Spencer, Ms Curr resigned and received her P45 and commenced a four year break. She was guaranteed a management position on her return. During the four years she had to keep in touch with Marks & Spencer, not take up any other paid employment without their consent, and to work for a minimum of two weeks each year.

Four years after her return to work Ms Curr was made redundant and received a redundancy payment based on four years service, not her whole service with the store of 25 years.

The Court of Appeal examined the position from two angles: whether Ms Curr's employment contract subsisted during her four year break, and whether the break was "an arrangement" that would span the gap, as held by the EAT.

There was mutuality of obligation during the career break, the Court of Appeal held, and it was a contract, but it did not constitute a contract of employment.

In order to be an arrangement sufficient to preserve continuity (section 212(30(c) Employment Rights Act 1996) it is necessary to look at all the circumstances and in particular the terms of the arrangement. There must be mutual recognition that the ex-employee, although absent from work, is to be regarded as continuing in the employment of the employer. Ms Curr was not regarded as continuing in employment during the break. The scheme conferred the option to be re-employed in a management position on her return.

This case is disappointing and misses the point of career breaks which is to enable women to pick up where they have left off, status and rights in tact, after a period with their children. The protection of accrued employment rights during the break is important and enables the schemes to be used with confidence by women with small children. This ruling may reduce the attractiveness of the career break schemes, leaving women to struggle on in their infants' early years, or change career.

The ruling highlights the importance of the contractual terms of career break schemes. Continuity of employment is a legal term that cannot be redefined by the parties, but the contractual terms in any particular scheme can be whatever the parties decide. A clear contractual right to return, contractual redundancy provisions incorporating pre- and post- break service can be included in the scheme itself.

THOMPSONS SOLICITORS

No absolute freedom to party

Whitefield -v- General Medical Council [2003] IRLR 39 Privy Council

When the Human Rights Act 1998 came into force many readers had hopes of being able to use the right to respect for private and family life to protect workers from employers who imposed conditions such as random alcohol and drug testing. A recent decision by the Privy Council in Whitefield -v- General Medical Council is a reminder of the limits of the right to private life.

The case concerns a doctor whose fitness to practice was considered by the Health Committee of the Professional Conduct Committee of the General Medical Council, to be seriously impaired because of severe depressive illness and harmful use of alcohol. The Committee imposed a series of conditions which Dr Whitefield was required to meet in order to ensure his continued registration. He challenged a number of the conditions imposed on him. In particular, he argued that the conditions to abstain absolutely from the consumption of alcohol; to submit to random blood testing and urine tests and to attend Alcoholics Anonymous breached his right to respect for private and family life under Article 8.

Article 8 of the European Convention on Human Rights provides that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Dr Whitefield argued that the effect of the absolute ban on alcohol deprived him of the enjoyment of social drinking such as on family occasions. He contested that the ban could have been restricted to the consumption of alcohol for a period before a session of work and during working hours.

The Privy Council found that there was no authority to support the proposition that an absolute ban on drinking alcohol is per se an interference with the right to respect for private life under Article 8 (1).

In considering Article 8 (2) they took into account the ECHR's decision in **Bruggeman and Scheuten -v- Federal Republic of Germany (3 EHRR 244)** which found that "the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life, or into close connection, with other protected interests." As such, the Privy Council considered that Dr Whitefield's right to an unrestricted social life must give way to the wider public interest in ensuring that he does not present a risk to patients. Therefore the absolute ban on alcohol was a condition which pursued a legitimate aim, namely the protection of patients' health, which was necessary and proportionate to that aim.

The Lordships also applied this reasoning to Dr Whitefield's objection to random testing. Whilst they accepted that any medical treatment (including the taking of samples) without consent is an interference with an Article 8 (1) right they considered that random testing was lawful under Article 8 (2) in that it was necessary and proportionate.

This case is a reminder of the limits of Article 8 since the Courts will always consider whether any act infringing on an individuals right to respect for private and family life is proportionate to the protection of the rights and freedoms of others. There is a balance to be struck.

EMPLOYMENT TRIBUNAL WEBSITE

Did you know that you can download Originating Applications, (ET1 forms) Notices of Appearances, etc from the Employment Tribunal's website?
www.employmenttribunals.gov.uk

Showing that words can hurt too

Thomas -v- Robinson [2003] IRLR 7

This case considered the law relating to racial harassment. An Employment Tribunal found that the Applicant, who is of black Afro-Caribbean origin, was discriminated against because of a racially insensitive remark made to her by a white work colleague. The employer appealed to the Employment Appeal Tribunal (EAT) on both procedural and substantive issues. Firstly on the basis that they had not been permitted to cross examine the Applicant which meant they had not had a fair hearing and secondly, that the Tribunal had erred in law by failing to address whether the Applicant had suffered any detriment as a result of the remark made by the work colleague.

The EAT upheld the employer's appeal. They found that it was an error of law to reach a conclusion without considering whether the Applicant had suffered some detriment as a result of the remark. The EAT acknowledged that the very act of abusing someone in respect of their race is in itself less favourable treatment on racial grounds. However, the EAT held that it is not simply the end of the matter, because the Applicant must show that the employer has subjected her to "any other detriment" as required by Section 4 of the Race Relations Act 1976.

The EAT viewed the expression "harassment" as consisting of two elements. The first being the targeting of the person being harassed. The second is the causing of distress to the individual. A Tribunal which is considering whether an employee has been discriminated against should therefore consider both whether the language has been used and whether the employee has suffered a detriment as a result.

Under the consultative draft Race Relations Act (Amendment) Regulations, there is now a new specific definition of racial harassment. The Act provides that "a person subjects another to harassment … where, on the grounds of the other's race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of (a) violating the other's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other". The Act then goes on to provide that conduct shall be regarded as having the effect specified in paragraphs (a) and (b) if and only if having regard to all the circumstances it should reasonably be considered as having that effect.

The EAT, however, suggests that there are some working environments in which racial abuse is given and taken in good part by members of different ethnic groups. In such cases the mere making of a racist remark will not be regarded as a detriment.

In reality this is an oversimplification. Individuals may only appear to take such harassment "in good part", yet feel humiliated and outraged. It is as if the EAT considers that turning the other cheek means that the first cheek does not hurt, which in reality is rarely the case.

The case is a reminder of the importance of establishing every part of a claim for discrimination – to ensure that each part of the definition has been made out and that what might seem obvious to the advisor, may not be obvious to the Tribunal. It is extremely important to ensure that the Tribunal has evidence on which to make a finding of detriment. This will involve the Applicant giving evidence of how he or she felt about the comment or behaviour in question and there maybe contemporaneous evidence too. Such as where there have been internal proceedings - for example a grievance hearing or letter in which the offence or distress is mentioned. Another possibility is where colleagues have witnessed the comments and seen the distress caused, and perhaps seen through an Applicant's attempts to brush it off or put on a brave face. Or evidence from colleagues of the Applicant complaining privately or describing their feelings, even if the issue was not taken formally to management at the time. All these will add to the Applicant's credibility and enable a Tribunal to see the harm caused by comments and behaviour that might otherwise seem inoffensive when recounted in the quiet and neutral surroundings of an Employment Tribunal.

Striking a Dynamic victory

Davis -v- Friction Dynamics (Employment Tribunal, Unreported Liverpool ET, case no. 6500432/02)

In 1999 the law was changed to provide a little more legal protection from unfair dismissal for dismissed strikers and workers taking other forms of industrial action. The new law was a welcome improvement from the previous situation, where workers only had protection if there were selective dismissals during the first three months of industrial action. All an employer needed to do was either dismiss everyone taking part in the industrial action, or wait three months to selectively dismiss. But the new law was criticised for not going far enough. There was no change to the common law rule that industrial action is a breach of the contract of employment and the new rights not to be unfairly dismissed were limited and hedged with qualifications.

Given the political significance to the trade union movement of the law change, it is slightly surprising that only now are the first cases coming to the Tribunal to test its provisions. Let's hope that it's because employers have accepted the new position and are not dismissing their workers who are taking industrial action.

Compliance with the law was certainly not the position adopted by the employer in **Davis -v- Friction Dynamics**, one of the first tribunal decisions on the new provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 which sets out the limited unfair dismissal rights to workers engaged in "protected industrial action". The section only gives protection to official industrial action which complies with the labyrinthine rules on trade disputes, giving of notice, postal balloting, calling action and the like. It then gives workers the right to bring an unfair dismissal complaint either if:

(i) the dismissal takes place within the period of eight weeks beginning when the action started

or

(ii) where dismissal takes place later, if the employer has failed to take reasonable procedural steps to resolve the dispute.

BINGO

In **Davis** the workers at a factory were faced with unilateral management action to remove the workers' contractual rights to have their terms and conditions determined by a collective bargain. The employer also took steps to remove union involvement at the workplace. The workers balloted for industrial action and a strike was called. On the first day of the strike the employer wrote a letter to each of the strikers, stating that "You have taken industrial action and by doing so have repudiated your contract of employment". A manager had consulted a text book before writing this letter, adding the word "bingo" against a passage indicating that the whole of a striking workforce could be sacked without anyone being able to claim for unfair dismissal (the same manager deleted the word on the document which went to the tribunal, not realising that the applicants had already copied it). Such is

the practice of enlightened management in the 21st century.

After this the employer imposed holidays and refused to allow the workers to return to work. Some meetings took place, in which ACAS was involved. It was confirmed by various witnesses, including an MP, that the American managing director, Craig Smith, viewed the strikers as "history". Eight weeks after the strike began, the employer sent further notices to the strikers sacking them all.

Against this background the tribunal considered s.238A of the 1992 Act. Perhaps remarkably given the impenetrability and complexity of the provisions on calling lawful industrial action, the workers here complied with the many duties on balloting etc., and this was unchallenged by the employers.

STUNNING VICTORY

The case was a stunning victory for the workers and their union, the TGWU, represented at the tribunal by John Hendy QC and Michael Ford of Old Square Chambers. The tribunal found in the applicants' favour on two grounds. The letter written to the employees on the first day of the strike was an unambiguous letter of dismissal, so that the workforce was dismissed during the eight week period and the dismissal was unfair. In the alternative, it held that the employer failed to attend meetings and deliberately sought to obstruct settlement talks, so that it had not taken reasonable procedural steps. The significance of this failure was that it extended the period of protection from dismissal for the striking workforce beyond the eight week period.

WHAT ABOUT THE FUTURE?

So far so good. But it should be clear that the decision turns, of course, on its facts. Perhaps foolishly, the employer sacked the whole workforce on the first day of the strike and then did not take care to appear as if it were trying to settle the dispute. Other, better advised employers may take more care to delay dismissals and to erect the necessary facade during the eight week period. After that, and so long as the procedural steps are reasonable, the whole workforce can be sacked, and unfair dismissal protection is lost – even though the workers have complied with every single one of the many legal duties on taking legal action. But this case demonstrates that Tribunals may be astute to a pretence of negotiation by an employer. The meetings held, even ACAS' involvement, did not amount to reasonable proedural steps.

UK LAW STILL LAGS FAR BEHIND

After a long review the government has indicated that the law will not be changed; UK law continues to lag far behind that of other European countries, international labour standards and the minimum level of respect that workers are entitled to expect. The "right" to strike in law remains illusory: a "right" whose existence is determined by the employer.

However, until the law is extended to provide greater protection, this case proves how even the existing law can be used to gain redress for sacked strikers.

Labour law and the EU

The European Union's Charter of Fundamental Rights, proclaimed at the summit at Nice on 7 December 2000, includes provisions on freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), protection of personal data (Article 8), non-discrimination (Article 21), equality between men and women (Article 23), and protection in the event of unjustified dismissal (Article 30).

The Charter breaks new ground by including in a single list of fundamental rights not only traditional civil and political rights, but also a long list of social and economic rights. However, although the EU Charter was approved by the European Council, it was limited to a political declaration. It was not given a formal legal status. In the second "Convention on the Future of Europe", a Working Group has recommended that the Charter be incorporated into the EU Treaties. If so, it will have an impact not only on the EU's institutions, but also on the Member States through the doctrine of supremacy of EU law.

First, as with equal pay for men and women (Article 141 EC), the European Court of Justice (ECJ) could attribute binding "direct effect", vertical and horizontal, to provisions of the Charter which were considered sufficiently clear, precise and unconditional.

Secondly, the doctrine of "indirect effect", which requires national courts to interpret national laws consistently with EC law, would apply with great force to the rights guaranteed in a Charter incorporated into the Treaty.

Thirdly, the violation by the EU or a Member State of a fundamental right guaranteed by the Charter in the Treaty would very likely constitute a breach of EU law giving rise to liability under the Francovich principle.

Fourthly, the competences of the Community and the Union are frequently a subject of litigation between those seeking to extend, or to limit them. It is likely that the ECJ will prefer to give an expanded interpretation of the powers and tasks of the Community and Union where these are necessary in order to safeguard the EU Charter rights.

Finally, social rights guaranteed by the Treaty would put pressure on the Commission to make proposals for their implementation. The ECJ's view of fundamental rights is that they need not necessarily seek the lowest common denominator or minimum standard, as in **Case C-84/94**, where the Court rejected the UK's challenge to the Working Time Directive.

THE CASE LAW OF THE ECJ

Up to 20 August 2002, there were 26 citations of the Charter before the European courts, including 5 in judgments of the European Court of First Instance. Every one of the eight Advocates General of the Court has referred to it in one or more Opinions, as has the Court of First Instance.

For example, the Opinion of Advocate General Tizzano in **BECTU, Case 173/99**, on 8 February 2001, states of the EU Charter (paragraph 28): "…we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved…'. He describes the EU Charter as "the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right". In its decision of 30 January 2002 in Case **T-54/99**, the Court of First Instance twice refers to provisions of the EU Charter.

The Advocates General do not base the existence of a right on the Charter. They use the Charter as confirming the status of a fundamental right by referring to the Charter's content, not its formal status. The Advocates General are unanimously sending a

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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

clear message to the judges of the European Court to engage in a process of judicial recognition of the EU Charter. So far, the message has been ignored by the Court. At least four arguments may explain this.

First, the uncertain legal status of the Charter, in particular, the non-integration of the EU Charter into the Treaties is the main reason. A second, disputed, argument is that many provisions of the Charter cannot be used on their own as the basis for judicial review. A third argument is that for the Court to enforce fundamental rights based on the EU Charter would be regarded as the Court's assuming a controversial constitutional role. Finally, a more prosaic reason may be the Court's decisional procedures, which require unanimity. The eight Advocates General are free to give their own individual views. The judges of the Court have to produce a single judgment. One or more judges in the Court may be resisting a reference to the Charter. The question is whether, and how long, can this last.

The dynamism shown by the Court over the past 30 years as regards the recognition of fundamental rights as general principles of Community law, allows for the hope that the same judicial dynamism will eventually be applied to promote the fundamental rights in the EU Charter.

However, there are limits and drawbacks to relying on judicial recognition of fundamental rights. The ECJ's case law emerges slowly, and depends on haphazard claims brought before it. The Court's dilemma may be resolved by other EU institutions, and social actors, taking up the burden of enforcing fundamental social rights.

FUNDAMENTAL TRADE UNION RIGHTS

The inclusion of fundamental trade union rights in an EU Charter incorporated into the EU Treaty may well confer on them a constitutional status within national legal orders. The ECJ may interpret the Charter trade union rights consistently with the law in most Member States, which often exceeds the protection of UK law, or consistently with international labour standards, where, again, the UK often falls short.

For example, trade union collective action has often been restricted, allegedly to protect public and/or essential services. The ILO's Freedom of Association Committee has established international standards on collective action in public/essential services. Relying on Article 28 of the EU Charter (right to collective action), trade unions could promote challenges to more restrictive national laws. Again, Article 12(1) of the Charter on freedom of association could be interpreted as guaranteeing rights which go beyond what is provided in some national laws, for example, regarding interference in a union's internal affairs, rights to recognition by an employer, access to union members at the workplace, or to take part in union activities.

In interpreting the EU Charter, the ECJ will be sensitive to where national laws have protected trade union rights. Carefully selected cases could enable trade unions to encourage the ECJ to adopt a more expansive interpretation of the trade union rights guaranteed by the EU Charter.

A BALANCE SHEET

It is suggested that the EU Charter is a positive contribution to the promotion of trade union rights in the EU for a number of reasons. The EU Charter is an independent source of rights and is not limited to national practice in individual Member States. National provisions which reflect Charter rights may achieve higher legal ranking in the national system; perhaps even constitutional status. The EU Charter will reflect international sources of trade union rights, and may go beyond these. In the EU Charter, social and economic rights are recognised as having the same status as civil and political rights. The Charter puts pressure on EU institutions to promote a European social model.

This positive assessment should not overlook the potential risks. The EU Charter might be exploited by employers and others to re-open fundamental principles established in national systems. The challenge is to establish clearly justiciable trade union rights: e.g. trade union freedom of association, information and consultation, collective bargaining and collective action. The tasks of an implementation strategy include, first, with respect to justiciable rights, to develop effective implementation, looking to effective sanctions, preventing regressions, removing qualifications, thresholds, exclusions and modifications, and, secondly, to move more social and economic rights towards justiciability; formulating them as positive and enforceable rights; including effective sanctions.

The EU Charter opens a new chapter in the legal enforcement of trade union rights, both at transnational and national levels. All efforts should be made to persuade the Convention on the Future of Europe to secure and reinforce these rights.

Boiling down the human stock

CPL Distribution Limited -v- Todd [2003] IRLR 28 (Court of Appeal)

The Transfer of Undertakings (Protection of Employment) Regulations 1981 operates to transfer the contracts of employment of those employed in the part transferred. Who is employed in the part transferred?

This was the question the Court of Appeal addressed in the case of **CPL -v- Todd**. Mrs Todd worked as the Personal Assistant to a regional manager who became manager of the concessionary coal side of CPL's business and was then given additional duties as business acquisition manager. The concessionary coal side of the business was transferred. Neither the manager nor the PA transferred. The manager continued as business acquisitions manager with the transferor (CPL).

Mrs Todd argued that she was not employed in the part transferred and that CPL should have made her redundant. The Employment Tribunal agreed and this was upheld by the Employment Appeal Tribunal and the Court of Appeal.

The test of whether someone is employed in the part transferred was set out by the European Court of Justice in the case of **Botzen [1986] CMLR.** The question is whether the employee was assigned to the part which transferred. This was characterised by the Court of Appeal in **Gale -v- Northern General Hospital [1994] IRLR** 292 as determining whether an employee formed part of "the human stock" of the part transferred.

The Court of Appeal concluded that the Tribunal had found that Mrs Todd was assigned to work for the particular manager and that the manager was not assigned to work for the part transferred. This meant that Mrs Todd was not assigned to the part transferred.

There was evidence that the majority of Mrs Todd's typing was on the concessionary coal contract. This was not accepted as conclusive that Mrs Todd was assigned to the contract. Her duties involved matters other than typing and although the percentage of time spent on particular work was a relevant factor, it was not the only one. Other factors included the amount of value given to each part of the business by the employee; the terms of the contract showing what the employee could be required to do; and the allocation of the costs of the employee within the employer's budget. It is a question of fact for the Tribunal.

This case does not set out any new legal test, nor break new legal ground. It is, however, a useful reminder that a pure "time recording test" is not enough. In other words, it is not sufficient to show that an employee works 50% of her time on a particular part of her job. That will not of itself prove that she is assigned to that part of her job in the event of a transfer.

Tribunals must look at all the factors and will be particularly influenced by any evidence of a formal appointment or assignment to a particular department or by evidence that an employee appears in the budget of a particular department or cost centre.

This case is also a useful reminder that not all employees wish to transfer (or be regarded as transferring) as Mrs Todd successfully argued that she remained the responsibility of the transferor.