Published by Thompsons Solicitors

CONTENTS

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 66 January 2002

Train in vain

RMT v Midland Mainline [2001] IRLR 813 (Court of Appeal)

IT IS becoming more and more difficult for unions to conduct industrial action which complies with the strict and complex statutory balloting requirements. The changes introduced by the Employment Relations Act 1999 do not appear to have made life any easier. The courts have applied the legislation in a manner which is bound to encourage employers to head to the courts in the hope of securing an injunction.

Midland Mainline obtained an injunction preventing industrial action by RMT. The union's appeal to the Court of Appeal was unsuccessful.

RMT had balloted 91 members. The vote for strike action was 25 for, 17 against, with 49 not voting. There had been correspondence before the ballot when the employer disputed the numbers balloted. The union refused to supply a list of names. The employer refused to supply a list of employees to allow the union to check its records.

It turned out that 25 RMT members in the relevant grades had not been balloted. 11 were members in respect of whom the union had not received or recorded information about them joining the relevant grades. 10 were members the union wrongly believed to be in arrears of contributions. Three were sent ballot papers to wrong addresses and one did not receive a ballot paper by mistake.

The Court of Appeal said that the union had not complied with the legislation as it had not balloted all members who it was reasonable at the time of the ballot for the union to believe would be induced to take part in the action. It upheld the injunction.

The court said that the relevant considerations were that the union was seeking immunity from the general law which outlaws strikes; that the broad aim of the legislation is to allow those who are to be induced to take action, to vote; the legislation identifies who should be entitled to vote and restrictions on the entitlement should be construed narrowly; there is special provision for minor accidental errors and the union has a statutory obligation to keep a register of members' names and addresses.

It is not surprising that a court that takes such a negative view of the legislation will readily find that a union has not complied with the statutory requirements.

The court said that the failure to ballot the three who had not supplied updated addresses was legally excusable as the union had a system for reminding members to provide details of changes of address.

However, the court concluded that the ballot was unlawful because the union did not ballot those who it did not know were in the grades concerned and those who it believed were in arrears with contributions. This is despite the fact that the union did not call upon those members to take part in the strike. The strike notice was sent only to those who had been balloted. The court said that those who had not been balloted, even those who would have voted against action may "be induced to take action by their own feelings that this is appropriate", therefore it was not reasonable for the union to believe that those who had not been balloted would not take part and (it would seem from the judgment) would be regarded as having been induced to do so.

Continued on page 3

THOMPSONS SOLICITORS

Cop out from 'but for' test in victimisation case

Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830

SERGEANT KHAN a police officer of Indian origin had made a number of unsuccessful applications for promotion to the rank of Inspector. As a result he brought direct race discrimination proceedings against the Chief Constable of West Yorkshire Police.

Before his tribunal case was heard Sergeant Khan applied for an inspector's post in the Norfolk Police. They asked the Chief Constable for his opinion about Sergeant Khan's suitability. West Yorkshire replied that: "Sergeant Khan has an outstanding industrial tribunal application against the Chief Constable for failing to support his application for promotion. In light of that, the Chief Constable is unable to comment any further for fear of prejudicing his own case before the tribunal." A request for Sergeant Khan's most recent staff appraisals was also refused.

As a result, Sergeant Khan added a complaint of victimisation to his existing race discrimination complaint. The tribunal dismissed the complaint of discrimination in respect of the promotion but upheld the complaint that Sergeant Khan had been unlawfully victimised.

Essentially victimisation is where a person is treated less favourably by reason of having raised the issue of race discrimination – whether having brought discrimination proceedings, made an allegation of discrimination or performed any other so-called protected act. The full list of circumstances covered is set out in Section 2(1) Race Relations Act 1977.

Both the Employment Appeal Tribunal and the Court of Appeal dismissed the Chief Constable's appeal. The Court of Appeal held that the treatment afforded to the complainant should be compared with the treatment afforded to other employees who have not done the protected act. In this case, references were normally provided and if it had not been for the proceedings brought under the Act, a reference would have been provided to the applicant.

The Chief Constable successfully appealed to the House of Lords. The Lords identified two main issues:

1 Who was the correct comparator in determining whether Sergeant Khan was treated less favourably? The wider (pro-employee) approach is simply to compare the employee who has made complaints to other employees who have not. The second and narrower approach, argued for by the Chief Constable, was that there needs to be other, more similar and closely comparable, factors also taken into account - for example if the circumstances involved a complaint to a tribunal under the RRA then a comparator may be someone who had made a complaint under some other legislation. The Lords came down in favour of the wider approach – that is a comparison between someone who had made a complaint and someone who had not.

2 Whether the reason for "the less favourable treatment" (the refusal of the reference) was that Sergeant Khan had done a protected act by bringing proceedings under the RRA against the Chief Constable. The Court of Appeal had ruled that if a reference would have been given "but for" the discrimination proceedings then it must follow that it was the fact of the proceedings that was the reason for the less favourable treatment. They said that there was no need to look further once it was established that the Chief Constable would ordinarily provide a reference and that the one difference in this case was that sergeant Khan had commenced proceedings.

The Lords disagreed with the Court if Appeal and said that the "but for" test imposed too low a threshold on the complainant. They ruled that Sergeant Khan had not been victimised because he had done a protected act. However all three Law Lords used different approaches to come to this conclusion.

Lord Nicholls says that the test is what was "the

reason" the alleged discriminator acted as he did. In this case the Chief Constable did not provide the reference because he was trying to protect his position in the discrimination proceedings rather than because Sergeant Khan had done a protected act.

Lord Hoffmann sees it as a question of causation: was the fact that he brought proceedings "a reason" why he was treated less favourably. The correct test was whether the reference was refused because of the "bringing" of the proceedings rather than the "existence" of the proceedings. If the reference would still have been refused after the discrimination proceedings had been concluded, whatever the result, then it follows that the reason for the refusal while litigation was on-going was the existence of the proceedings and not the fact that Sergeant Khan had started the discrimination proceedings.

Lord Scott suggests that it is "the real reason" that must be identified. In this case the real reason was because the Chief Constable did not want to compromise his position and not because Sergeant Khan had started the discrimination proceedings.

Whilst the House of Lords came to the same conclusion it is difficult to see a consistent test in their reasons for the decision. The "but for" test has been the standard approach to direct discrimination cases since James v Eastleigh Borough Council [1990] IRLR 288 HL. Let's hope that the implications of **Khan** will not extend beyond the narrow facts of the particular case.

Continued from page 1

This would seem to require unions to include in ballots even those who it does not intend to call upon to take action, but who may choose to do so regardless. This will be difficult, if not impossible, for unions to assess and appears to be contrary to the purpose of the legislation.

The current situation is untenable. The legal requirements have become a moving target which it is increasingly difficult for unions to hit. The law should be clarified and simplified so that industrial action which has the support of the majority of the members concerned cannot be defeated by the labyrinthine complexities of over-complex legislation. This should be addressed by the government in its forthcoming review of the Employment Relations Act 1999.

Employment Bill

LABOUR'S SECOND term of office did not promise major labour law reform. The Employment Bill, expected to be law in the Spring will introduce a mish mash of individual rights, some progressive and some less so. When the Bill has completed its passage through parliament and is set in stone we will report its contents fully. Here is a summary of its main proposals.

Dispute resolution

The bill introduces statutory dismissal and disciplinary procedures (DDPs) and statutory grievance procedures (GP), which will have contractual force. It will be automatically unfair to dismiss an employee where the statutory DDP has not been completed because the employer has failed to comply with the requirements of the DDP. This is welcome.

Much less welcome is a statutory reversal of the **Polkey** rule. An employee will not be regarded as unfairly dismissed on account of the failure of an employer to follow a procedure outside the scope of the DDPs if the employer can show that the employee would have been dismissed even if the employer had followed the procedure.

Maternity and paternity leave and pay

The Bill proposes to increase parental rights with six months' paid and a further six months' unpaid maternity leave for working mothers, as well as for adoptive parents. It would also introduce two weeks paid paternity leave for working fathers.

The lower rate of statutory maternity pay will increase in 2003 to £100 from its current £62 with reimbursement provisions for employers.

Union learning representatives

Union Learning Representatives will be established with rights to paid time off and the same rights and protections as trade union and health and safety representatives.

Tribunal procedures

The Bill introduces questionnaires in equal pay cases, in line with existing procedures under other anti discrimination legislation. Fixed periods of conciliation in Tribunal cases are likely to be introduced, and a fast track procedure for hearing cases.

Holiday! It would be so nice

Working Time (Amendment) Regulations 2001 SI 2001/3256
Campbell and Smith v Greenwood [2001] IRLR 588
Whitley & District Men's Club v Mackay [2001] IRLR 595

IN KEEPING with tradition, the New Year seems the appropriate time to consider holidays. This month we analyse the annual leave and working time cases on holiday entitlement.

We reported on the landmark victory of the Broadcasting Entertainment Cinematograph and Theatre Union in the European Court of Justice in June last year (Issue 59 LELR). BECTU successfully challenged the 13 week qualifying period for the right to paid annual leave.

On 25 October 2001 the government, somewhat sluggishly, implemented the Working Time (Amendment) Regulations to give effect to the BECTU ruling.

With effect from 25 October 2001, all workers from their first date of employment are entitled to four weeks paid holiday every year. Regulation 15A has been added to the Working Time Regulations which provides an accrual system that will apply during the first year of employment and workers only have the right to take as much leave as has accrued at the time they take their holiday – unless of course their employer agrees to be more flexible.

The amount of leave that can be taken in the first year builds up monthly in advance at the rate of one-twelfth of the actual entitlement each month. Where this calculation does not result in an exact number of days' leave, the amount is rounded up to the next half day. So there is still an area of vulnerability in the first month of employment.

The DTI guidance has also been amended to give examples of how Regulation 15A works in practice.

Whitley and District Men's Club v McKay [2001] IRLR 595 considered the extent of the right to accrued and untaken leave on termination of employment.

Regulation 14 of the Working Time Regulations provides that, where a worker's employment is terminated during the course of the leave year, she or he is entitled to payment in respect of accrued, but untaken, holiday. Regulation 13 (3) provides that the payment shall be "such sum as may be provided for the purposes of the Regulation in a relevant agreement…". A relevant agreement can include a collective agreement or an individual contract.

"…all workers from their first date of employment are entitled to four weeks paid holiday every year"

What happens if the "relevant agreement" provides for no payment at all?

Mr McKay's contract of employment incorporated the terms of a collective agreement which included the term "no worker shall be entitled to accrued holiday pay if [he] is dismissed for dishonesty… and [he] is so informed by [his] employer at the time of dismissal".

Before the implementation of the Working Time Regulations this was a fairly standard and perfectly lawful clause in a contract.

Mr McKay was summarily dismissed for dishonesty. On the date of his dismissal he had twenty-six days' outstanding holiday entitlement. The club refused to pay him any sum in respect of accrued holiday pay, relying on the clause in the contract and the Employment Tribunal found that

the employer had failed to make a payment in lieu of leave as required by Regulation 14. The employer appealed.

The Employment Appeal Tribunal said that the words "such sum" in Regulation 14 (3) (a) did not include "no sum". The employer had to make some payment in respect of leave entitlement outstanding on termination. This also meant that the provisions of the collective agreement were void because they would have had the effect of ousting the protection of the Working Time Regulations.

In this case the amount of money owed was £1,164.80. A reminder that the amounts involved can be significant.

What the case does not address is the position where a relevant agreement provides for only a nominal sum rather than full pay for the period of leave entitlement. Another interesting feature is that Mr Mackay was compensated for 26 days which would appear to be more than the four week annual leave provided for by the Working Time Regulations 1998.

WHO IS "THE PUBLIC"?

In **Campbell & Smith Construction Group Ltd v Greenwood** the Employment Appeal Tribunal probed contractual rights in holiday entitlement. The issue was the extra public bank holiday granted for the millennium. Mr Greenwood and his colleagues were entitled under their contracts of employment to winter holidays of seven working days plus Christmas Day, Boxing Day and New Year's Day. Was 31 December 1999, which was declared as a public holiday, to be added to the other bank holidays or be treated as a working day? Was Mr Greenwood entitled to a total of ten or eleven days as his winter holiday?

The Employment Tribunal held that as 31 December was a public holiday it ceased to be a working day and the employer had made an unlawful deduction from wages by failing to give Mr Greenwood and his colleagues an extra day's paid holiday. The Employment Appeal Tribunal overturned the decision. They analysed the Tribunal's decision as effectively stating that the employees were entitled to an additional day's paid holiday because of the Government declaration. Unless there was a contractual provision to that effect, the Government declaration did no such thing. Only if the employers had agreed to amend the contract would a right arise. The case begs the question of who "the public" is when a public holiday is declared if the announcement has no legal effect.

The case is particularly topical because of the forthcoming "Golden Jubilee Bank Holiday" on 3 June declared by the Government. It seems that Mr Greenwood and his colleagues maybe unable to show their loyalty and excitement as the Queen's subjects in celebration of her reign. But whether other workers throughout the country will be able to down tools for the street parties will depend on what their contracts of employment say. It is worth checking the detail of contracts of employment and collective agreements to see. For example, a contract which entitles a worker to, for example, 15 days annual leave in addition to all statutory, bank and public holidays, would give the worker an extra day's paid holiday on 3 June. But if public holidays are not given as paid holiday or if each holiday is listed by name, as in Mr Greenwood's contract, it could be more tricky. A fairly common contractual clause is to provide 20 or 25 days holiday inclusive of statutory and public holidays. It is doubtful whether this type of wording would be interpreted as giving rise to an additional days holiday because of the Golden Jubilee and employer's agreement should perhaps be sought.

Overtime rates and anti-social hours payments could also be affected depending on the precise wording of the contract.

Neither will the interplay between contractual and Working Time Regulation statutory rights help Mr Greenwood – the right to 20 days annual leave is inclusive of public holidays unless the contract stipulates otherwise.

ASK FIRST

A number of unreported Employment Tribunal cases have highlighted the need to comply with the detail of the technicalities in asserting holiday rights under the Working Time Regulations 1998. Regulation 30 sets out that a worker may bring a claim to a Tribunal if their request for annual leave is refused. A worker – either directly or through his or her trade union – must therefore request annual leave in accordance with the regulations and have that request refused before bringing a case in the Employment Tribunal. The refusal of leave is the trigger for the claim, rather than spotting the defect in the contract. Unfortunately it means that if an employer is unwilling to negotiate, individual requests and

claims are necessary.

Breaching trust and confidence: latest cases

Morrow v Safeway Stores plc
[2002] IRLR 9
Hilton v Shiner Builders Merchants [2001] IRLR 727
BG plc v O'Brien [2001] IRLR 496
Johnstone v W Wilson and Sons IRLB 667
Quinn v Weir Systems Ltd IRLB 673

CONSTRUCTIVE DISMISSAL cases are often seen as the last refuge of the desperate and the first refuge of the bar room lawyer. There has been a recent flurry of cases considered by the Employment Appeal Tribunal which look at breaches of contract and in particular the duty of trust and confidence. This feature summarises the cases and gives guidance for advisors.

The test for whether or not constructive dismissal can be shown is set out in the box. For an employee to get a claim off the ground she first has to identify a breach of contract, the classic contractual test is set out in **Western Excavating (ECC) Ltd v Sharp** {1978} IRLR 27. The employee has to show that the employer is guilty of conduct going to the root of the contract of employment. It has long been clear that the breach can be an actual breach of contract or a breach of the implied term of trust and confidence or fair dealing.

In **Morrow**, the applicant was employed in the supermarket as a bakery production controller. She had had a bad working relationship with the store manager who she felt unreasonably harassed her. The store had a special promotion of bloomer loaves and when the store manager found the loaves were not on the shelves he gave her a strong ticking off in front of staff and a customer, saying "If you cannot do the job I pay you to do, then I will get someone who can". Two hours later he gave her another telling off. She was extremely distressed at the way she had been spoken to and resigned claiming constructive and unfair dismissal.

The Employment Tribunal said it thought that the public criticism by the store manager was a breach of the implied term of trust and confidence, but that not every breach was a repudiatory breach and what had happened was not serious enough as to entitle her to resign and claim constructive dismissal. The EAT said this was wrong and that "In general terms, a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract". They stressed that the decision as to whether there was any such conduct was for the Tribunal to decide after hearing all the evidence.

In **Hilton**, the applicant worked at a builders yard for twenty years, serving customers and dealing with cash transactions. He had no written job description. The employers were concerned that customers had left the yard without a sales invoice. Mr Hilton explained this by saying he was striking a balance between building materials bought by the yard and the value of the purchases made. The employers were not satisfied, thought he had acted dishonestly and decided to transfer him to other work not involving cash. He was told he was "not suitable to be employed in a position of trust". There was no disciplinary procedure followed. When Mr

Hilton was sent a letter setting out his new role he resigned and claimed unfair dismissal.

The Tribunal thought there had been no repudiatory breach of contract and dismissed his complaint. They thought the offer made to him of a new role was a generous one. The EAT disagreed and said that "Requiring an employee to cease doing what had been his principal job, and to require him to take up a new role, in circumstance in which there had been no allegations of dishonesty, would in our view amount to a variation of the employee's contract". Further they did not think such a variation could be imposed without consent "To attempt to do so would, we think, almost always be capable of being a repudiatory breach".

BG Plc v O'Brien (LELR 64) also considered the implied duty of trust and confidence. In this case Mr O'Brien had not been offered enhanced terms for redundancy whereas all his colleagues had. The EAT again said this was a breach of mutual trust and confidence or their obligation of fair dealing. The EAT stressed that when a Tribunal has to determine whether or not an employer is in breach of the implied contractual duty of trust and confidence, the question is whether, looked at objectively, the employer has acted in a manner likely to destroy trust and confidence.

Quinn is an example of a case where no breach of contract was found. Mr Quinn was a long standing employee. The company he worked for was in financial difficulties and redundancies were anticipated. Mr Quinn heard a rumour via various secretaries in his firm that the director had said he "was next for the chop". He was upset and resigned. The Tribunal thought that it could not be reasonably said that Mr Quinn was in an intolerable position and dismissed his case. The EAT did not disturb the finding.

In **Johnstone** a head dairyman on a farm was demoted for poor timekeeping and offered a job of second dairyman on the same rate of pay. However he was also required to move to a smaller house. He told his employer he was not prepared to work under the new head and was told " You may as well go then". An employment tribunal was satisfied he had resigned but that he was not constructively dismissed because his demotion was entirely reasonable. The tribunal got into a muddle about what test it was applying and failed to identify whether there was a breach of contract, instead considering the band of reasonable responses (the test to be applied in unfair dismissal conduct cases).

The EAT found that the decision was flawed but went on to decide on the facts of the case that it was not possible to show a material or fundamental breach of contract where the reasons for the changes were related to poor conduct.

It is encouraging that the EAT has been prepared to take such robust views on what amounts to fundamental breaches of trust and confidence. However all this review considers is the first stage in proving a constructive dismissal case: whether or not a breach of contract can be proved. There are three other hurdles to leap before an employee can show she has been constructively dismissed, and then a Tribunal must also look at whether there is a potentially fair reason for dismissal and issues of fairness under section 98(4) ERA 1996.

In the current climate when so many employers are seeking ways of not terminating employment to avoid their redundancy and unfair dismissal liability it would be tempting to start relying on enforced changes of contract to justify resignation. Advisors must continue to exercise great caution before suggesting resignation and the uncertainty of litigation as against the certainty of a monthly pay packet.

However, where a situation is intolerable, these cases give some comfort.

In order for the employee to be able to claim constructive dismissal, four conditions must be met:

1 There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

2 That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

3 He must leave in response to the breach and not for some other, unconnected reason.

4 He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract or accept the repudiatory behaviour.