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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Justify yourselves

Allonby v Accrington and Rossendale College and others [2001] IRLR 364

THE COURT of Appeal's seminal judgment in this case sends a clear message to employers of the full extent of their obligation to justify indirect discrimination.

Ms Allonby was originally employed by the College as a part-time lecturer. To cut costs, the College decided to terminate part-time lecturers' contracts and then re-engage them as sub-contractors through an agency, ELS. This meant that Ms Allonby and her colleagues lost a series of benefits, such as sick pay, career structure and the right to join the Teachers' Superannuation Scheme because she was treated as self-employed.

She claimed that her dismissal was indirectly discriminatory because the condition for remaining in employment with the College was that lecturers had to be full-time and disadvantaged a significantly greater proportion of women than men, a higher proportion of part-timers than full-timers being women. She also claimed that she was discriminated against as a contract worker, and that her pay and exclusion from the Superannuation Scheme breached the equal access requirements of the Pensions Act and her right to equal pay .

Ms Allonby is backed by NATFHE. She lost her case at the Employment Tribunal and the Employment Appeal Tribunal. There had been indirect discrimination, but it was justified and therefore not unlawful, the Employment Tribunal had held. 38% of men, but only 21% of women could comply with the condition and therefore have access to the higher pay and benefits.

The College's argument that any discrimination in the dismissal was justified because it needed to save money and impose firmer budgetary control was sufficient. The Tribunal accepted these grounds relatively uncritically and effectively found that it was no more than a coincidence that the means chosen disadvantaged significantly more women than men. The Employment Appeal Tribunal was not prepared to interfere with this conclusion.

The Court of Appeal emphasised the well-known "Bilka-Kaufhaus"test for objective justification: "the means chosen must (1) correspond to a real need on the part of the undertaking; (2) be appropriate with a view to achieving the objective; and (3) be necessary to that end". Crucially, the Court of Appeal said that there had to be a "critical evaluation" of the College's reasons for dismissal and then a balancing exercise between the needs of the employer and the disadvantage to Ms Allonby. The Tribunal had not met these criteria, and the case would therefore have to be re-considered.

On the equal pay and pensions issues, the Court of Appeal had to decide whether or not Ms Allonby, whose contract was with ELS, could compare her rights with those of a named male comparator employed direct by the College, or indeed whether she needed a comparator at all for the pensions claim. Here, the Court referred questions to the European Court of Justice. But in doing so, there is a clear suggestion that it does not matter that the College and ELS are not under common control.

Ms Allonby's case is a long way from over – some bits of it are on their way back to the Tribunal, while others are on the way to Luxembourg. But the Court of Appeal's judgment is a significant re-statement of the law, which will benefit many who suffer pay and indirect discrimination.

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Nursing a right to a fair hearing

Tehrani v UKCC for Nursing, Midwifery and Health Visiting [2001] IRLR 208

WITH THE coming into force of the Human Rights Act, there has been much speculation about the impact of Article 6 of the European Convention on Human Rights – the right to a fair trial – on internal and professional disciplinary proceedings. In Tehrani v UKCC, the Scottish Court of Session finds that disciplinary proceedings before the UKCC's Professional Conduct Committee (PCC) are covered by Article 6, although a right of appeal to a court means that not every stage of the disciplinary procedure has to satisfy all the consequent requirements of an impartial tribunal.

Ms Tehrani was a qualified nurse. The PCC decided that disciplinary proceedings should be started against her. Those proceedings could lead to her being removed from the register of nurses entitled to practice. She brought a challenge under Article 6, claiming that she was entitled to a hearing before an impartial tribunal.

Article 6 applies where there is a "determination of an individual's civil rights and obligations". The European Court of Human Rights has not always been consistent in its reasoning in deciding whether or not there is a determination of those rights in disciplinary proceedings. By and large, it has been easier to engage Article 6 in professional disciplinary proceedings than in internal disciplinary procedures.

The Court of Session found that Article 6 applied because the decision of the PCC could lead to Ms Tehrani finding it difficult to get another job as a nurse and her earnings would be affected. This meant that she was entitled to a fair trial, and that included a hearing before an impartial tribunal.

However, under the UKCC's procedures, if Ms Tehrani lost her case before the PCC, she could appeal to the court. The court would satisfy the requirements of an impartial tribunal and this meant that it did not matter that the hearing in front of the PCC did not comply with Article 6.

The Court of Session gave some helpful guidelines as to why, in isolation, the PCC may not be an impartial tribunal. Most importantly, the same people could sit on both the Preliminary Proceedings Committee, which would decide if proceedings should be started, and the PCC which would then determine those proceedings. Also, the UKCC was the body which brought disciplinary proceedings, as well as being the body which set the guidelines used to measure whether proceedings should be started. It was not enough that the prosecution was brought by a solicitor, that detailed rules of procedure applied or that detailed reasons had to be given for any decision.

Key issues remain. Is Article 6 engaged in internal disciplinary proceedings? If so, is the right to claim unfair dismissal at an Employment Tribunal, and the re-birth of the range of reasonable responses test in misconduct cases, sufficient to correct Article 6 defects at earlier stages in a disciplinary procedure? We are not at all convinced that it is.

The right to claim unfair dismissal as it stands is not a right to a re-hearing. Instead, the Employment Tribunal will review the employer's standard of investigation and decision making process. In addition, the successful applicant in an unfair dismissal claim is unlikely to be awarded re-engagement or reinstatement. It may well be that a Tribunal does not have sufficient influence on proceedings to ensure compliance with Article 6. Watch this space!

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They've got the power

International Power Plc v. Healy and Others, formerly National Power v Feldon and Others and National Grid Company Plc v Mayes and Others [2001] IRLR 394

IN THIS case the Lords ruled that National Grid and International Power were permitted to use the surplus in the industry wide Electricity Supply Pension Scheme (ESPS) to augment benefits and provide enhanced early retirement and deferred pensions on redundancy.

The rules of the ESPS provided that no payment could be made to the employers out of the assets of the scheme. Faced with actuarial surpluses in the ESPS, the electricity companies made arrangements to reduce the amounts they paid to the scheme, by treating certain accrued liabilities to the fund as discharged. It was not a "pensions holiday" but paid to meet actual debts payable to the fund incurred to finance extra benefits for certain individuals who had been made redundant. The question for the Courts was whether the scheme rules permitted this, given that there was no explicit power to do so.

The employees and pension fund members objected to this use of the pension fund surplus. The Pensions Ombudsman upheld their complaint and found that the employer's duty of good faith had been broken when a substantial part of the surplus was applied in the employer's own interests. He also found that the contribution rules in the scheme created a debt on the employer and release of this debt was tantamount to the employer making a payment to itself and any amendment "making any of the moneys of the scheme payable to any of the Employers" was prohibited by the rules.

A High Court judge concluded that the arrangements were valid and that the implied duty of good faith did not prevent an employer from acting in its own interests. The Court of Appeal reversed this decision, finding that the rule preventing a surplus being paid to the employers did not empower the employer to discharge his debt to the fund. But they found that the scheme rules could be changed to allow a discharge of the debt from the surplus.

The employers appealed to the House of Lords, after making the necessary amendments to the scheme. The primary question was whether the power to make arrangements to deal with surplus included the discharge of employer's accrued debts and whether this amounted to a payment to the employers out of the scheme. It was concluded that preventing employers from accessing assets by way of discharging debts was not the same as paying assets from the scheme. It was held that using a surplus to fund redundancy contributions amounted to reducing a debt rather than making a payment. Importantly, this rejects the contrary view in **British Coal Corporation v British Coal Staff Superannuation Scheme Trustees Limited**. Once this issue was decided, it was clear that the employers had power to do what they had done.

The House of Lords did not rule on whether a surplus in a pension scheme will generally belong to an employer or to the beneficiaries. Until this issue is decided, what constitutes a legitimate use of a surplus will depend on individual schemes' rules and the way in which the courts interpret them. This case revolved around the relevance and interpretation of certain clauses in the scheme rules, and it is notable that these clauses are not typical of more modern sets of pension scheme rules. Nevertheless, it indicates how the Courts may regard the application of pension scheme surpluses. It seems that they will favour a flexible commercial view of how surplus can be applied.

Calculating rights

Check out the new DTI website that calculates maternity rights on screen including entitlement to Statutory maternity Pay, eligibility for additional maternity leave and maternity leave dates.
It also calculates national minimum wage entitlements and is planned to extend to other employment rights.
It's more user friendly than the acronym it stands for would suggest: Tailored Interactive Guidance on Employment Right

Visit www.tiger.gov.uk

What am I like?

Secretary of State for Defence v MacDonald [2001] IRLR 431

THE STRUGGLE for equality for gay men and lesbian women in employment must continue. The Scottish Court of Session (equivalent to the English Court of Appeal) has overturned the earlier decision that discrimination on grounds of sexual orientation falls within the definition of sex discrimination under the Sex Discrimination Act 1975 (SDA).

Ministry of Defence v MacDonald arose as a result of the compulsory resignation from the air force of Mr Macdonald prior to the removal of the ban on gays in the military. By contrast with those who had previously challenged the ban, MacDonald proceeded by way of a challenge under the SDA. Although there was authority to the effect that the SDA did not prohibit discrimination on grounds of sexual orientation, these cases had been before the Human Rights Act 1998 (HRA).

The Scottish Employment Appeal Tribunal allowed Macdonald's appeal on the (mistaken) basis that the European Convention on Human Rights treated sexual orientation as 'sex' with the effect that the word 'sex' in the SDA was ambiguous and, accordingly, could be construed so as to give effect to the UK's Treaty obligations to protect the applicant from discrimination on grounds of sexual orientation.

The Ministry of Defence appealed against EAT's decision. By this time the HRA was in force which meant the Court was bound to read and give effect to primary legislation, such as the SDA, in a way which is compatible with the Convention rights (s3). Further, as a public authority, the Court was bound not to act in a way which was incompatible with a Convention right (s6). Their Lordships accepted that such discrimination contravened the European Convention on Human Rights. But the Court was unanimous in the view that 'sex' for the purposes of the SDA referred only to the 'male sex and the female sex, and the simple categorisation of people as men or women', rather than to 'gender or sexual orientation'.

Having defined the meaning of sex, the task was to establish whether there has been less favourable treatment on grounds of sex. That requires a comparison of the cases of people of different sex where 'the relevant circumstances in the one case are the same, or not materially different in the other' (section 5(3) SDA). The Ministry of Defence had argued that the appropriate female comparator in this case was a lesbian woman who would have been subject to the same treatment as MacDonald himself. Macdonald argued that the appropriate comparison was with a heterosexual woman – so a man wanting or having a male partner should be compared with a woman wanting or having a male partner.

'... the Court was unanimous in the view that 'sex', for the purposes of the SDA, referred only to the 'male sex and the female sex, and the simple categorisation of people as men or women', rather than to 'gender or sexual orientation'.

If the "relevant circumstances" were wanting or having a male partner, less favourable treatment and unlawful sex discrimination was made out on the facts. But if the relevant circumstances were wanting or having a same sex partner, ther was no less favourable treatment on grounds of sex.

The Court of Sessions was divided, with a majority (two

Judges) taking the latter view and preferring to read the applicant's sexual 'orientation' (i.e., his homosexuality, as distinct from the bare fact of his attraction to men) into the circumstances 'relevant' for the purposes of s5(3). They were not satisfied that s3 of the HRA required that the SDA be interpreted to extend to the prohibition of discrimination on grounds of sexual orientation as well as gender.

'...it can be argued that the court is obliged to interpret the SDA itself 'so far as it is possible to do so' to prohibit sexuality discrimination.'

The decision in MacDonald may be criticised because of the approach taken by the Court to its interpretation both of the Human Rights Act and the Sex Discrimination Act. In another HRA case (**R v A**) the House of Lords took a very robust approach to the application of s3, utilising it to subvert the intention of the legislature where the legislation at issue was itself seen to interfere with individual rights.

In **McDonald**, the SDA merely failed to provide a remedy against interference whether by a public or private employer. The decision, should it stand, illustrates the operation of entrenched rights as constraining, rather than requiring, state action. Such rights operate against action taken by the State to ameliorate disadvantage – in **R v A**, the House of Lords undermined legislation directed specifically towards eradicating the impact of sexist assumptions on rape trials. But they are less effective in requiring a positive response to action taken by others.

It is arguable that the Court of Sessions misapplied the specific model of entrenchment embraced by the HRA, coupled with the imposition by the European Convention organs of some degree of positive obligation on the state to protect Convention rights from interference by non-state actors. Confronted with a case brought under the SDA, it can be argued that the court is obliged to interpret the SDA itself 'so far as it is possible to do so' to prohibit such discrimination.

'The question whether a woman and her comparator are in the same 'relevant circumstances' is at the very heart of the problem of equality.'

The second point raised concerns s5(3) SDA. Here the majority decision is the latest in a line of cases in which that provision (and its Race Relations Act equivalent) has been used to as to undermine the ability of the SDA (and the RRA) to prohibit direct discrimination. The question whether a woman and her comparator are in the same 'relevant circumstances' is at the very heart of the problem of equality. Unless it is taken that the circumstances 'relevant' to the comparison do not themselves differentiate directly between men and women, any less favourable treatment which could be rationalised by reference to any difference between the man and the woman compared would be defined as 'not discrimination'

S5(3) has given rise to difficulties in relation to sex-specific clothing and appearance rules, (such as mandatory silly hats for female nurses and pony tail bans for men) as well as in sexual orientation cases. The courts generally accept that a 'sex appropriate dress code' can be a 'relevant circumstance' within s5(3), and find discrimination only if the terms of the code, as they apply to one sex, are significantly less favourable than those which apply to the other (**Schmidt v Austicks Bookshops** [1978] ICR 85). 'Less favourable treatment' has, on occasion, been found by tribunals in the dress-code context but such decisions are rare. It is to be regretted that the Court of Sessions did not seize the opportunity afforded it in MacDonald to give effect to the purpose of the SDA – the eradication of sex discrimination – by refusing to accept as relevant for the purposes of s5(3) a circumstance itself tainted by sex. Had it done so, the logic of the decision would have reached beyond the issue of sexual orientation discrimination and beyond.

This month's guest author is Aileen McColgan, Reader in Law at King's College London and at Matrix Chambers. She is author of *Discrimination Law: text, cases and materials*, published by Hart Publishing, 2001.

What's the alternative?

IF THE Holy Grail in unfair dismissal cases is a quick, cheap, informal and fair hearing where lawyers are unnecessary, then the search may be set to continue.

The talk of a different system to the employment tribunal route for unfair dismissal cases has spanned two decades and draft legislation has been in existence for five years. It has now resulted in the ACAS arbitration scheme which is an alternative to a tribunal hearing.

Introduced with minimum fanfare and apparently little enthusiasm on 21 May 2001 the acid test will be whether the scheme delivers what it aims. The aims are, after all, broadly the same as currently apply in tribunals. Employment Tribunals themselves were created as an alternative to the Civil Courts with similar aims to that of the arbitration scheme.

Key features of the ACAS scheme

Instead of a panel of three (a lawyer, an employee representative and an employer representative) there is a single arbitrator appointed to the case under the ACAS scheme with experience in employment relations. It is not therefore an industrial jury that decides the case.

Another difference is that the hearing is held in private, unlike a tribunal hearing. The result of the arbitration as well as the hearing will be confidential to the parties.

There will be no cross-examination of witnesses or the giving of evidence under oath. The taking of the oath, as Jeffrey Archer now knows, is the mechanism tribunals and courts use for ensuring that witnesses tell the truth. If a witness lies on oath they have to account not only to their conscience or religion, but also to the criminal law - it is a contempt of court to lie on oath and can also involve the crime of perverting the course of justice. None of this will be available in the ACAS arbitration scheme. In addition, questions cannot be put to the other side's witnesses -–cross examination – but only by the arbitrator who is independent and neutral. It is essentially an investigative procedure.

But the reality of most unfair dismissal case is that there is bad feeling on both sides and applicants are entitled to view a tribunal case as Get Your Own Back Time. They have after all lost their job, feel wronged and disempowered. As the House of Lords described in **Johnson v Unisys** *(see page 8)* the obligation of trust and confidence does not survive dismissal. It is only if there is a genuine prospect of re-instatement that both parties will feel an obligation to maintain a workable relationship which can better be preserved through a non-adversarial adjudication system.

Given that it is generally accepted that the best remedy for having been unfairly dismissed is to be given the job back, what are the chances of this happening through the ACAS scheme? On paper, the same as in a tribunal – the awards are the same, the same principles and criteria will apply. In practice there is a possibility that reinstatement will be awarded more often if delays do not build up in the arbitration scheme as they have with the Tribunal. The delay from dismissal to hearing is a factor in both whether an ex-employee wants to return and whether it is practicable for them to do so.

So in two crucial respects – privacy and exclusion of cross examination – the ACAS scheme is not designed to give an applicant their day in court and the triumphalism and confrontation that can categorise tribunal cases should be absent.

Unlike tribunals, there will be no fixed hearing centre – hearings will be held at a neutral venue – an ACAS office or hotel convenient to the parties. It will not be at the former workplace unless the employer consents. ACAS bears any cost of room hire.

The parties are expected to co-operate in agreeing a date and venue with the arbitrator to take place within two months of the case being referred to the ACAS scheme. If that does not happen, the arbitrator can set the date and venue him or herself. Until the case load builds up cases are likely to be heard quicker under the arbitration scheme than the present delays in the Tribunal system.

The scheme's aim is for the cases to last no more than half a day although it is not at all clear how this can be ensured. Lawyers are not encouraged, but

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cannot be prevented. The scheme provides that they are given no special status – as is the case with tribunals.

The scheme aims to provide finality in cases and so there is no right of appeal from the arbitrator's decision except on a point of EC law or the Human Rights Act 1998 or to the validity of the arbitration and whether the dispute was within the scope of the scheme itself. The appeal route is to the High Court or Central London County Court.

The scheme only covers unfair dismissal claims - any other type of case, unpaid wages for example, discrimination, breach of contract cannot be dealt with by the arbitrator – even if the case is a mixed claim and contains unfair dismissal and other types of claim. Also the scheme does not cover any jurisdictional issues – for example whether an individual is an employee, has sufficient service to bring a claim, or lodged their tribunal claim within the time limits.

Entry into the scheme will be via the Tribunal – an applicant will have to complete an tribunal claim form (ET1) in the normal way and if both parties agree that the case should go to arbitration under the scheme, a formal compromise agreement will have to be completed. All the requirements of a compromise agreement must be complied with – independent advice from a qualified trade union official, ACAS officer or lawyer and the tribunal claim is then dismissed on the basis that the parties have agreed with the referral to an ACAS arbitrator.

What are my chances?

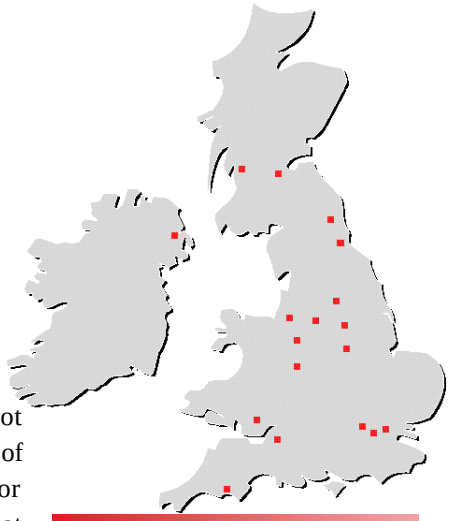
Of course, the unwritten consideration that both sides will assess before choosing the scheme is 'Am I more likely to win if the case goes to arbitration?'. The prospects of success in any case are largely determined by the yardstick by which fairness is judged. Tribunals consider the test of 'reasonableness' by reference to the Employment Rights Act 1996, the ACAS Code of Practice and case law – the range of reasonable responses and so on. Under the ACAS scheme the arbitrator must have regard to the general principles of fairness and good conduct in employment relations, including the ACAS Code. Neither the arbitrator nor the tribunal may substitute what they would have done for the actions taken by the employer.

So slightly different wording, but will the test of fairness be the same under the scheme as in the tribunal? The big question for which there is no certain answer. The lack of transparency and openness of the proceedings may mean that the precise formulation of the fairness test is never developed consistently across the panel of arbitrators or publicly articulated. The voluntary nature of the scheme however is likely to ensure that if the test of fairness departs significantly from the one adopted by the tribunals there will be one side of industry that will choose not to use the scheme and prefer to live with the existing system.

Some unions are already using the scheme and welcome its informality, finality and promise of speed. In the longer term it is hard to see how it will avoid replicating the tribunal system and its success may depend on how well it is resourced and the quality of the arbitrators.

Full copies of the scheme itself, a guidance note and introduction prepared by ACAS are available from the ACAS website – www.acas.org.uk

It's the way that you do it



Johnson v Unisys Limited [2001] IRLR 279

CAN YOU recover damages in a breach of contract claim for the manner of dismissal? This question was answered with a resounding "No" by the House of Lords in this long running case. But "maybe" in unfair dismissal claims.

Mr Johnson started working for Unisys in 1971, was made redundant in 1987, re-employed by them in 1990 and in January 1994 was dismissed for an alleged irregularity. He had spent all his working life in the computer industry. He won his case of unfair dismissal in the Employment Tribunal – the company had not given him the opportunity to defend himself nor complied with its own disciplinary procedure. He was awarded the then maximum compensation, although deducted 25% was on the basis that he had contributed to his own dismissal.

The dismissal had catastrophic effects on Mr Johnson. He suffered a mental breakdown; was depressed; attempted suicide; began to drink heavily and was an in-patient in a mental hospital. He has been unable to find new work and doubts he will ever find paid employment again. He brought a claim in the County Court in both tort and contract, the value of the claim was stated to be £400,000 for his psychiatric injuries and loss of earnings. His claim was struck out on the basis that it disclosed no cause of action at common law. He appealed all the way to the Lords who have again dismissed his claim.

Since 1909 the cases have said that where an employee is wrongfully dismissed in breach of contract from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. More recently, the courts have accepted (**Malik v BCCI** [1998] AC20), that there is an implied term in a contract of employment that the employer shall not, without reasonable and proper cause, conduct himself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence. In principle, employees can claim damages if they can bring their cases within the remit of the Malik decision. However none have so far been successful.

The House of Lords were not prepared to find in Mr Johnson's favour. They considered the statutory right not to be unfairly dismissed. The judges said that at the time of enacting the right in 1971, Parliament could have built on the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith but instead set up the new statutory right with remedies obtainable in employment tribunals. Consequently, all the matters Mr Johnson complained of were within the jurisdiction of the employment tribunal. The financial loss flowing from the dismissal may form the subject matter of a compensatory award although it is subject to the statutory cap.

In other words, although Johnson could not get damages for the manner of dismissal in a breach of contract claim, it might form part of unfair dismissal compensation. That would not help Mr Johnson, since his compensation hit the statutory limit then applicable, but with the limit now at £50,000 could be helpful in other cases.

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