Published by Thompsons Solicitors

CONTENTS

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 57 April 2001

Phone a friend?

John Lewis plc v Coyne [2001] IRLR 139 EAT

THE RECENT flurry of judicial activity on the scope of an Employment Tribunal's power to interfere with management decisions that are "within a band of reasonable responses" emphasises the difficulties for employees in unfair dismissal cases. But this heartening case illustrates the scope of protection from unfair dismissal in so-called misconduct cases.

John Lewis' disciplinary code was clear – dishonesty was considered as serious misconduct which normally led to dismissal. Employees were forbidden to use company telephones to make personal calls. If this regulation was breached and if the circumstances justified it, this could lead to dismissal.

Mrs. Coyne job-shared at John Lewis with Mrs. McMorrow. They often spoke on the telephone during the week to discuss work and they would have a chat as well. Mrs Coyne also used the office phone to ring her husband on a mobile, after she had had a miscarriage and was upset. She also used to ring a letting agency about difficulties with a house she was renting out.

Mrs. Coyne was aware of the rules regarding personal calls, but not that this could be considered as dishonesty.

In June 1998, the departmental manager told the general manager that he believed she was making personal calls. He did not mention she had been suffering from personal problems. Following a printout of calls from her phone to Mrs. McMorrow, the letting agency and her own mobile phone, the employers found that she had made 2.3 calls per week over a one year period lasting on average seven minutes each and costing 34p each. The majority of calls were to Mrs McMorrow.

She was suspended, disciplinary proceedings followed and she admitted making some personal calls but denied that all calls were personal. She offered to pay for the calls, but the general manager had already made his decision and she was summarily dismissed.

At the Employment Tribunal, her dismissal was held to be unfair – the employer should have investigated properly and not automatically dismissed Mrs Coyne. The employers appealed saying, as she had admitted making personal calls without permission, and not offered to pay for them until she was found out, her conduct was dishonest and there was no need for a warning or investigation.

The EAT held that using an employer's telephone for personal calls is not necessarily dishonest. They could not accept that Mrs Coyne's admitted conduct of making some personal calls and not offering to pay for them was, on any objective view, dishonest. There are two parts to dishonesty. Firstly, deciding whether according to the ordinary standards of reasonable and honest people what was done was dishonest and secondly, whether the individual realised what they were doing was, by those standards, dishonest.

In this case, it was not necessarily obvious that using the employers' telephone for personal calls was "dishonest", it depended on the circumstances and the employers had failed to investigate the question of her dishonesty. Furthermore, the disciplinary code did not indicate that dismissal was an inevitable consequence. The EAT found that the employers' procedures were not fair.

THOMPSONS SOLICITORS

THOMPSONS' EMPLOYMENT RIGHTS UNIT

Thompsons has the largest nationwide team of lawyers specialising purely in employment law work for trade unions. The team covers the full range of employment law, with lawyers who focus on key specialist areas.

Thompsons' Employment Rights Unit (ERU) has expanded significantly over the last few years, during which there has been a dramatic increase in the range and volume of employment work and an increased demand for specialist expertise in the field. A new management structure takes effect from 1 May 2001 to enhance further the ERU's service to trade unions and ensure the continuation of consistently high standards across the whole range of the ERU's work. Heads have now been appointed for the Regions and Specialist Functions within the ERU

Head of Employment Rights Unit	Stephen Cavalier

FUNCTIONAL HEADS

Collective and Institutional	Richard Arthur
Equality	Nicola Dandridge
Pensions	Ivan Walker

REGIONAL HEADS

London and South East	Victoria Phillips
Midlands	Susan Harris
North East and Yorkshire	Stefan Cross
Northern Ireland	John O'Neill
North West	Kate Ross
Scotland	David Stevenson
South West and Wales	Gavin Roberts

Each Region and Function has a dedicated team of lawyers and staff. Existing contact arrangements with unions will continue as before. Work will continue on delivering further significant improvements in procedures and information technology in order to enhance the overall quality of the service delivered.

Councillors curbed

Moores v Bude Stratton Town Council [2000] IRLR 676 EAT

IN MR MOORES' case against his council employer, the whole question of the extent to which a council is liable for the actions of individual councillors in an employment context is examined.

This case concerns a council worker's claim for constructive dismissal. Mr Moore resigned after he was subjected to verbal abuse and accusations of dishonesty by one of the councillors, in front of other council workers. The Tribunal held that the individual councillor did not have either actual or ostensible authority to bind the council as employer.

Mr Moore appealed claiming that the individual councillor's conduct amounted to a breach of the implied contractual term of trust and confidence, for which, the council as employer was vicariously liable.

The EAT, in a majority decision, held that individual councillors are under a duty not to engage in conduct likely to undermine the trust and confidence required in contracts of employment. Furthermore, by subjecting Mr Moore to verbal abuse and accusations of dishonesty while he was doing his job on council premises could amount to a breach of the duty of trust and confidence. Such action could therefore justify Mr Moore resigning and claiming constructive dismissal.

In allowing the appeal, the EAT remitted the case back to a new Employment Tribunal to determine whether Mr Moore was constructively dismissed as a result of the conduct of an individual councillor for whom the council as a whole was vicariously liable.

This case is especially significant for local government workers. In particular, councils should be aware that they have a responsibility to ensure that individual councillors do not impede a workers ability to do their job properly.

Teaching a lesson in natural justice

McNally v Secretary of State for Education (Court of Appeal Unreported Case No: C/2000/2817).

THE RIGHT to a fair disciplinary hearing may not be guaranteed by the Human Rights Act but employers must act consistently with the ACAS Code and obey the rules of natural justice. The latter point was confirmed by the Court of Appeal in a case where Thompsons acted for Mr McNally in his case against the Secretary of State for Education. The decision in this case is particularly significant for workers subject to a statutory disciplinary procedure including teachers, firefighters and health service professionals.

Tony McNally is a schoolteacher. A parent alleged that he had touched a pupil inappropriately and he was suspended by the school governors. The council, Bury, decided to hold an enquiry which recommended disciplinary action against Mr McNally. The enquiry report was presented to the school governors as they have the legal responsibility to decide disciplinary measures against teaching staff. A sub committee was convened and a hearing held. The council's case was presented by their solicitor and Mr McNally was represented by his NASUWT official. After the final submissions were made the governors excluded everyone from the room and considered the evidence in private and made a decision. They concluded that no misconduct had taken place and that the teacher should return to work.

The council appealed to the Secretary of State for Education against the decision claiming that the Council's chief education officer (CEO) should not have been excluded from the meeting at any stage. The statutory entitlement to be present during all proceedings of a school's governing body when they were considering whether to terminate a teacher's employment included that part of the proceedings when the governors retired to consider the evidence and make their decision.

The Secretary of State agreed that the governors had acted in breach of the statutory disciplinary procedures by excluding the CEO and ordered them to convene a new disciplinary hearing.

The NASUWT backed their member and took judicial review proceedings against the Secretary of State which eventually went to the Court of Appeal.

The Court of Appeal stated that even though under the Education Reform Act 1988 the CEO was entitled to attend a meeting in certain circumstances natural justice may make it inappropriate for the CEO or the head teacher to remain.

Where a relatively formal procedure is established to consider serious allegations it is incompatible with the principles of natural justice for a local government official, who the employee may reasonably regard as a member of the prosecuting team, to be with the disciplinary panel when its members withdraw to discuss among themselves whether the misconduct alleged has been proved.

This decision makes clear that a separation must be maintained between the disciplinary officer and the panel that assesses evidence and decides whether an allegation has been proved. It may not be appropriate for any representative of the employer who has been involved in investigating the allegations or presenting the case to the disciplinary body to be present throughout.

The Court of Appeal stated that this applies even where a particular officer of the employers has a legal right to attend meetings of a disciplinary panel.

It is only when the disciplinary body has made its decision, including where an employee has admitted misconduct, that the officer can attend to give advice on the options open to the disciplinary panel in that situation.

We're only making plans

RMT v London Underground Limited (Court of Appeal, 16 February 2001)

Westminster City Council v UNISON (Court of Appeal, 21 March 2001)

THE LAW requires unions to give seven days' notice to employers both before balloting for industrial action and again before taking action following a successful ballot. The requirements are set out in sections 226A and 234A respectively of the Trade Union and Labour Relations (Consolidation) Act 1992.

The law was amended by the Labour government in the Employment Relations Act 1999. The courts had interpreted the legislation introduced by the Tories as requiring unions to give employers the name of each individual member who would be balloted and who would be called upon to take action. This followed the decision of the Court of Appeal in **Blackpool and Fylde College v NATFHE** [1994] ICR 648 (CA).

The amendment made by the Labour government was intended to remove this onerous requirement which many felt infringed the civil liberties of individual union members.

The new requirement in the amended legislation is for the notice to contain "such information in the union's possession as would enable the employer to make plans and bring information to the attention of those of his employees who it is reasonable for the union to believe… will be entitled to vote in the ballot". The legislation goes on to say that "if the union possesses information as to the number, category or workplace of the employees concerned, a notice must contain that information (at least)" but that "if a notice does not name any employees, that fact shall not be a ground for holding that it does not comply" with the legislation.

The amendment came into force on 18 September 2000. Only a few months later its interpretation is already a matter of controversy in industrial disputes and in the Court of Appeal.

The first case in which the Appeal Court considered the issue was **London Underground v RMT.** A High Court judge had granted London Underground an injunction to prevent RMT members participating in a series of one day strikes.

RMT had given notice that the ballot would be of "all RMT members employed by [London Underground Limited] in all categories at all workplaces" and gone on to state that according to the union's records "there are approximately 4,938 members". A similarly-worded notice was given following the successful ballot and similar notices were given in respect of each of the subsidiary companies involved in the dispute. RMT did not have check-off arrangements with LUL for deduction of union subscriptions from pay.

LUL wrote to RMT on the day of the ballot result to take issue with the adequacy of the information given. This was disputed in correspondence and the company then applied for an injunction. In granting the injunction, the judge said that it was legitimate for the employers to require the information to "prepare for a shut-down of services so that trains and other equipment are in the right place so as to ensure that services can be resumed with the minimum of disruption. If equipment needs to be moved or other steps need to be taken, employers need to know who remains available, where and in which category, so that those still at work can be deployed to do the necessary work" and "to see whether some services can be run or, if not, then to liaise to see whether alternative arrangements can be made for the public". The judge described these as "legitimate objectives four-square within the meaning and intent of the statutory provisions". He said that the information supplied in the notices was "effectively of no use (or almost no use)" for those purposes.

The judge also said that in assessing whether the union held information, one should look not just to the union nationally, but to

branches and branch officials.

The Court of Appeal upheld the grant of an injunction. It said that the Labour amendment did not make "any significant change in the legislative policy or the purpose for which information was to be given to the employer". The legislative purpose was "to enable an employer to know which part or parts of its workforce were being invited to take industrial action". The amendment was "a change of means, not of objective" – which may come as some surprise to some of those in government who engineered the change.

The Court suggested that information should be supplied, perhaps in the form of a grid or spreadsheet, listing categories and workplaces, with numbers for each. The Court of Appeal also held that information was in the union's possession if it was held by the national office or branch secretaries, that is "any official of [the union] who, in accordance with [the union's] rules and normal operating procedures, was concerned with maintaining records for [the union's] purposes".

This decision caused widespread concern amongst unions. It seemed to undermine the purpose and intention of the amendment. There was no longer a specific requirement to supply a list of names, but in many ways the new requirement as interpreted by the Court was both more onerous and less clear: unions would be required to provide more information, but could still not be sure whether they had complied. Indeed, providing a list of names of members to be balloted which would have complied with the old law, may no longer be enough.

To an extent, these concerns remain. However, some perspective has at least been brought to the situation by a further Court of Appeal decision in **Westminster City Council v UNISON**. Here, UNISON successfully overturned an injunction granted in an unusually trenchant judgment by a deputy High Court judge.

The notice given by the union had identified those to be balloted as "all those staff who pay their subscriptions via [check-off]. They work in the Advice and Assessment Office at Harrow Road and they can be described as A&A workers. I believe there are 45 in total".

the notification requirements are "to enable an employer to know which part or parts of its workforce were being invited to take industrial action"

The Court of Appeal highlighted the differences from the RMT case. The Court thought that the information was sufficient. There were only 45 staff. There job title and place of work were identified and information as to their individual identities could be ascertained by the employer through the reference to check-off. The Court rejected the employer's argument that a distinction should have been drawn between managers and other staff and between different sub-units of the department. One of the judges pointed out that the employer is likely to have far more accurate information as to workplaces, categories etc than the union.

This judgment is a welcome application of common sense, but the interpretation of this provision is still a cause for concern and a matter which the government may wish to address by clarifying the legislation.

Trade Dispute

There is one further important aspect of the UNISON decision. The dispute concerned a proposed transfer to a private sector employer. The transfer was to be covered by TUPE. The judge decided that the dispute was political and not a trade dispute.

This was rejected by the Court of Appeal, who were critical of the judge's approach to the evidence.

Of wider interest was the fact that in reaching the conclusion that there was a trade dispute, the Court of Appeal effectively accepted that the trade dispute concerned the identity of the employer, as well as the implications of that change for pensions and other matters connected with the change.

This is of wider assistance in disputes involving contracting out and issues such as the Private Finance Initiative, which had seemed seriously curtailed by the judgment of the Court of Appeal in **University College of London Hospital v UNISON** [1999] IRLR 31 where the Court had upheld the grant of an injunction against the union on the basis that the dispute was effectively about terms and conditions after the transfer with a new employer and therefore was not therefore a dispute with their current employer. The Westminster case suggests disputes over the identity of the employer and effect of a change of identity through a TUPE transfer can attract the protection of the legislation.

Trade union rights are human rights

BECTU v Secretary of State for Trade and Industry, (ECJ Case C-173/99 of 8 February 2001).

The EU Charter

TRADE UNION rights may not figure on the UK political agenda, but they are definitely on the constitutional agenda of the European Union. In June 1999, a working group entitled the "Convention", comprising 15 representatives of the EU Member State Governments, 15 from the European Parliament, 30 from national parliaments and one from the Commission was appointed by the Member States meeting as the European Council in Cologne. The task of this "Convention" was to formulate an EU Charter of Fundamental Rights and Freedoms, to be presented to the European Council meeting in Nice in December 2000.

There were fierce debates among members of the Convention. Some wanted the EU Charter to include only the traditional liberal civil and political rights (rights to life, liberty, property, conscience, religion, expression, etc.), excluding social rights (working conditions, social security, health, environment, etc.) altogether. Among those advocating the inclusion of social rights, some wanted them confined to a separate section of the EU Charter as mere "programmatic objectives" of government, while others wanted them given equal status to other "justiciable" human rights, enforceable by the courts. As to the legal status of the rights in the EU Charter, some wished to incorporate it into the EC Treaty, so it could be directly enforced in national courts, while others wanted it to be purely declaratory, with no legal effects whatsoever.

In December 2000, the European Council of EU Member States at Nice adopted a compromise. On the one hand, the EU Charter of Fundamental Rights did include fundamental social rights having equal status to traditional civil and political human rights. Among these are at least three fundamental trade union rights: Article 12: Freedom of assembly and of association, Article 27: Workers' right to information and consultation within the undertaking, and Article 28: Right to collective bargaining and action. On the other hand, the Charter was approved as merely a political declaration. A decision on its final legal status was deferred to the next Intergovernmental Conference, scheduled for 2004.

However minimal its content by European standards, the trade union rights in the EU Charter go beyond anything available in British legislation, which Tony Blair has proclaimed as the most restrictive in Europe. In this connection, there were some who argued that even a purely declaratory Charter could be taken up by the European Court of Justice keen to prove its credentials in protecting fundamental human rights. In this way, the EU Charter might offer possibilities to British trade unionists.

BECTU

An early and encouraging indication arrived after barely eight weeks in a case in which Thompsons was acting on behalf of the broadcasting union, BECTU, to challenge the UK government's implementation of the Working Time Directive (**BECTU v Secretary of State for Trade and Industry**). The UK government made entitlement to paid annual leave subject to a qualification period of 13 weeks' employment. There is no such qualification in the Directive and, as EC law has supremacy over national law, the UK, as a Member State, is obliged to respect the rights guaranteed by EC law. BECTU complained because many of their members on short-term contracts were being deprived of their right to paid annual leave under EC law by the

This month's guest author is Professor Brian Bercusson, Professor of Law at King's College London and Director of the European Law Unit at Thompsons Solicitors

UK government's legislation.

On 8 February 2001 Advocate General Tizzano delivered his advisory Opinion upholding BECTU's complaint. The European Court still has to deliver its judgment, and the Opinion of Advocate General Tizzano is not binding on the Court. Nonetheless, the Opinion is a persuasive precedent with which the Court tends to agree in about 85% of cases.

"However minimal its content by European standards, the trade union rights in the EU Charter go beyond anything available in British legislation, which Tony Blair has proclaimed as the most restrictive in Europe"

What is particularly important about the Advocate General's Opinion is that he looks at the right to paid annual leave "in the wider context of fundamental social rights" (paragraph 22). A worker's right to a period of paid annual leave is to be given the same fundamental status as other human rights and guaranteed absolute protection.

Tizzano then pointed out that "Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the Commission after approval by the Heads of State and Government of the Member States" (paragraph 26). He freely admits that "formally, [the EU Charter] is not in itself binding"(paragraph 27). However, he states unequivocally: (paragraph 28)

"I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right".

This is the worst nightmare of those who fought against the inclusion of fundamental social rights, including trade union rights, in the EU Charter. The trade union rights in the EU Charter are "a substantive point of reference", and not only for the Community institutions, but also for Member States (for example, as in BECTU, where a Member State is responsible for transposing an EC directive including the fundamental social right to paid annual leave), and even for private persons, human and corporate.

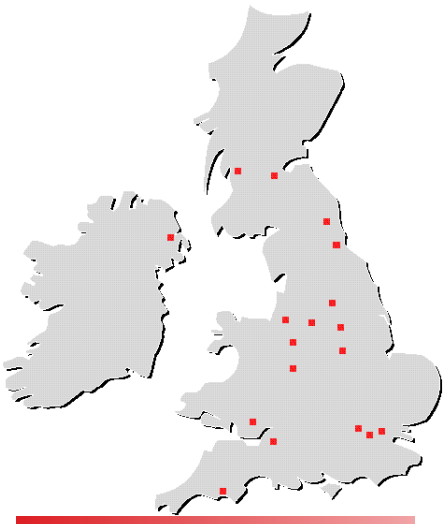
The potential for British trade unions

The potential of the trade union rights in the EU Charter will be apparent when they are compared with UK laws which restrict or inhibit the rights of workers and their representatives to information and consultation, to join trade unions and have their unions recognised for the purposes of collective bargaining, and to take strike action. What if an employer refuses to enter into collective agreements, or dismisses strikers exercising their fundamental right to take strike action, or closes down the undertaking without advance information and consultation? Will EU law become available to challenge violations of what are declared in the EU Charter to be the fundamental human rights of trade unionists?

Of course, the Opinion of the Advocate General awaits the decision of the Court of Justice. Also, crucially, the EU Charter can be used only where the issue is governed by EU law (as in BECTU, where paid annual leave was regulated by the Working Time Directive). There are EU laws on information and consultation, where the EU Charter may become very relevant, but other areas, such as strikes and collective bargaining, may not be covered by any EU law or only peripherally so. Nonetheless, as EU law continuously expands, the actions of Member States and private individuals and corporations may come to be challenged where they fail to respect what are now recognised as the fundamental human rights of workers and their representatives.

During the period up to the Intergovernmental Conference planned for 2004, when key decisions are to be made, there will be critical debates, both over the final legal status of the EU Charter and, no doubt, over possible changes to its content. Litigation such as the BECTU case will play an important role in this debate.

It's like that, (that's just the way it is)



Chief Constable of West Yorkshire v Vento (2001) IRLR 125
Stenning v Jarman and London Borough of Hackney (unreported; 17.11.2000, EAT/1288/99)

PROVING DISCRIMINATION generally requires proof of less favourable treatment of the applicant compared to someone who is of a different racial group or gender. Often it is difficult to find a person who is in the same situation as the applicant. Instead reliance is placed on a hypothetical person, asking a tribunal to imagine how the employer would have treated someone of a different race in similar circumstances to the applicant. If the Tribunal decides the treatment would have been different, the Tribunal can infer that the difference of treatment is on grounds of sex or race and amounts to unlawful discrimination.

Two recent cases suggest a better approach to how the comparison should be approached when there is no actual like-for-like comparison.

In **Chief Constable of West Yorkshire v Vento** a tribunal had inferred less favourable treatment by comparison with the treatment of other males and female police officers. They were not an exact match, but they had either been considered dishonest by their employer or reflected other similarities with the applicant's alleged position. The Employment Appeal Tribunal stated that it did not matter that the comparison was not exact – they were examples which could be used to judge how a hypothetical male would be treated. The tribunal was entitled to infer from the examples that a male probationer accused of dishonesty would not have had their probationary employment terminated, unlike the applicant.

The EAT did not say that the tribunal was compelled to use actual comparisons to construct the hypothetical, only that it was a permissible approach.

Another EAT case goes a little further. In **Stenning v Jarman and London Borough of Hackney** the Employment Tribunal found against the applicant by rejecting actual comparators put in evidence. However on appeal the EAT said that if a comparison is rejected, the Tribunal must show how the treatment and circumstances of the comparators were different and explain its decision.

These cases suggest that it is increasingly useful to produce named comparisons as examples if not evidence to a tribunal of discrimination.

On the Up

The limits on the amounts Employment Tribunals can award has increased in line with inflation. Effective from 1 February 2001 in respect of dismissals etc after that date the amounts are as follows:

Maximum compensatory award in ordinary unfair dismissal cases from £50,000 to £51,700.

Limit on the definition of "a week's pay" from £230 to £240.

Minimum basic award for trade union membership or activities dismissals and redundancies, health & safety dismissals, working time, occupational trustees and employee representatives dismissals, from £3,100 to £3,300

Limit on the amount of guarantee payment from £16.10 to £16.70.

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LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS. THIS PUBLICATION IS NOT INTENDED AS LEGAL ADVICE ON PARTICULAR CASES