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More relations arrive

Race Relations (Amendment) Act 2000

WE'VE HAD the Employment Relations Act 1999, and now the Race Relations (Amendment) Act 2000 has been passed by parliament and is planned to come into force in April 2001.

For the first time, the Race Relations Act 1976 will be extended to cover the activities of bodies and public authorities such as tax inspection, law enforcement and customs and excise. It has been a gaping hole in the existing legislation that has exempted some public authorities from liability for racially discriminatory acts in the exercise of their public duties. The Stephen Lawrence inquiry helped highlight the urgent need for legislative reform in this area.

There will also be a general duty placed on a wide range of public authorities to work towards the elimination of unlawful discrimination and to promote equality of opportunity and good relations between people of different racial groups. Some authorities will also have specific duties imposed on them which are not yet finalised and will be contained in a future statutory instrument. A consultation exercise is being undertaken on both the specific duties to be created and whether to extend the range of public bodies to be covered by the general duty. One crucial issue will be the extent to which private sector companies delivering a public sector service with state funding should be subject to the same high standards as public authorities themselves. There is a risk that the creation of two-tier standards will be a boon to private contractors and speed the process of privatisation and outsourcing.

The Act continues the trend in recent legislation to impose duties specifically on public authorities. The Human Rights Act introduced a duty on public authorities to act in a way which is compatible with the European Convention on Human Rights while the rest of us have to rely on courts and tribunals interpreting existing law to comply with the Convention where that is possible. It means the difference between creating a new legal right – a legal obligation owed by the public authority towards others, and a general shift of emphasis while applying existing law. In Northern Ireland too a duty on public authorities to promote equality of opportunity is contained in the legislation which will be looked at more closely in a future issue.

The Race Relations (Amendment) Act 2000 also contains some employment specific provisions which go some way to plugging other gaps. Many public and government appointments are expressly outside the scope of the Race Relations Act by Section 76. This will be amended when the Race Relations (Amendment) Act 2000 comes into force. Discrimination in relation to an appointment to an office or post will cover the terms of the appointment, access to opportunities for promotion, transfer or training or any other benefits, facilities, or services once appointed, and the termination of the appointment or subjecting the person to any other detriment.

The Race Relations (Amendment) Act 2000 does not go as far as many would have hoped, but it is at least an improvement on the current flawed legislation and for that, is to be welcomed.

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Motoring to employment rights

Motorola v Davidson and Melville Craig Group Ltd EAT, 18 May 2000 (46/00)

THIS CASE provides a useful guide on considering employee status, and in particular the interpretation of the 'control' test.

Davidson, was employed as a temporary employee under a contract for services with an employment agency, MCG Ltd to work at Motorola's plant. He was dismissed following a disciplinary hearing. He decided to bring an unfair dismissal claim against Motorola.

Under the Employment Rights Act, an employee is defined as someone who works under a contract of service or a contract of apprenticeship. The current approach taken by the courts is for them to consider a number of factors before reaching a conclusion on the employees status.

The Tribunal decided at a preliminary hearing that Davidson was an employee of Motorola, and could pursue an unfair dismissal claim. Motorola appealed, and argued that the only issue was whether they exercised sufficient control over Davidson to give rise to an employer-employee relationship.

The EAT said there were a number of factors which indicated that Motorola had effective control over Davidson, such as he used their tools, wore their uniform, booked holidays and had to raise any grievances through Motorola. In fact, Motorola suspended Davidson, and went on to terminate their relationship.

Motorola argued that the key issue was whether they had legal power to control Davidson. The EAT stated that under the terms of Davidson's contract he was obliged to attend work at Motorola's request. Although, MCG Ltd had similar or greater powers of control over Davidson, this did not mean Motorola did not have sufficient control over Davidson to satisfy the 'control' test. Davidson was an employee of Motorola and they would be liable if he had been unfairly dismissed.

Ask not what the union can do for you...

English v Unison, IDS Brief 668, Rhyl County Court

UNIONS HAVE finite resources with which to advance the collective interests of their members and pursue the union's objects. No union can represent every single member in every case against an employer. There cannot be an absolute obligation to represent in all cases nor an absolute entitlement to representation.

Increasingly members are bringing cases against unions complaining about decisions not to represent them. Sometimes the claimants allege discrimination. Sometimes they allege breach of contract by reference to the rules. There have even been challenges to the very principle of a union's discretion not to provide representation in cases where there is a less than fifty per cent chance of success.

Union rule books tend to be phrased in a way which reflects the discretionary nature of representation. Many unions will not generally provide representation where the issue concerned arose before the person became a member.

It is all the more surprising in this context that a County Court judge found that a union had a contractual duty to provide representation, subject to certain qualifications.

The union's rule book gave rise to no such right. However, the judge

focussed on a phrase in a guide sent to members along with the rule book which said "if management want to have any meetings or interviews with you about the disciplinary action it is your right to have a Unison representative with you, so make sure you do".

Not surprisingly the union argued that this should be given its obvious meaning. The worker had a right to insist his employer allowed his union representative to attend. It did not mean that the worker had a right as against the union to insist that the representative attended.

Amazingly, the judge decided that although the guide as a whole was not capable of being contractually binding, this part of the guide was and the phrase should be interpreted as giving the member a contractual right to be represented by the union. The judge did say that this was not absolute, but that the member had a right to representation unless in all the circumstances it would be unreasonable. The case was then settled so the judge never went on to decide whether the refusal to represent because the case had no merit was reasonable in the circumstances.

This is only a County Court decision. It is not binding. Nonetheless it is a timely reminder of the need to emphasise the discretionary nature of legal and other representation for union members. This is particularly important with the extension of statutory rights, for example the right to be accompanied at a discipline or grievance hearing. This gives a union member the right to insist the employer allows the union representative to attend, but not the right to insist that the union provides a representative.

Compromising positions

Sutherland v Network Appliance Ltd (IDS Brief 668)

THE USE by employers of settlement agreements to terminate employment continues to provide a steady trickle of case law. In this case, Sutherland had signed a letter setting out payments to be made to him on termination and stating "These sums are in full and final settlement of any claims you may have against the Company arising out of your employment or its termination".

He signed the letter signifying his agreement to the terms. He later lodged an IT1 claiming unfair dismissal, sex discrimination, damages for breach of contract, unlawful deduction from pay and payments of sums due.

The preliminary issue for the Employment Tribunal was whether the letter prevented Sutherland from bringing some or all of his claims against his former employer. An agreement purporting to exclude or limit the operation of any provision of the Employment Rights Act or to preclude a person from bringing any proceedings under the Act in the Employment Tribunal is void unless it complies with section 203. Strict requirements must be complied with under section 203 and there was no dispute that the letter Sutherland had signed did not comply with section 203.

The claims based on breaches by the employer under employment legislation – such as unfair dismissal, unlawful deduction of wages and discrimination were not affected by Sutherland signing an agreement "in full and final settlement of any claims" and a Tribunal could hear these, but how did that affect Sutherland's breach of contract claim?

The Employment Appeal Tribunal took a restricted view of Section 203 – "The Court picks up the agreement after the statutory scissors of section 203 have cut out the parts to which effect is not to be given and enforces the remnant. To oblige the scissors to dismantle the whole agreement would be to do more than the Act stipulates".

The agreement therefore prevented Mr Sutherland from pursuing his claims for breach of contract but was void as far as his statutory claims were concerned.

Trade unions cross the first CAC hurdles

THE DOOM merchants who predicted that the re-vamped Central Arbitration Committee would collapse under the flood of cases have been proved wrong. Six months has now passed since the trade union recognition provisions in the Employment Relations Act 1999 came into force. By the end of December just 33 cases for recognition had been lodged with the CAC for bargaining units ranging from tens to thousands of workers. The TUC and most unions report that many employers are agreeing to voluntary recognition under threat of use of the legislative provisions – hence the low number of formal applications. And many of the cases lodged with the CAC have resulted in semi-voluntary agreements before the statutory procedure has been completed.

In this article we look at some of the cases the CAC has dealt with so far and the main issues to emerge. If it is the fear of CAC proceedings that is bringing employers to the bargaining table, how the statutory procedure is working in practice is crucial to the formation of voluntary agreements as well as the statutory process itself.

There are essentially five steps in the statutory procedure once an application has been lodged. The first is the acceptance stage – when the CAC applies the admissibility and validity tests. If the union passes the first stage, the CAC will go on to look at the bargaining unit if the parties cannot agree it between themselves. The cases so far have mainly concerned these two stages – by mid December there had been just one case on whether a secret ballot should be held where the union had more than half of the bargaining unit in membership. The CAC has not yet had to use its powers during a ballot or adjudicate on the method of collective bargaining to be used.

Acceptance

To accept an application, the CAC must apply some initial tests. Three of these have featured heavily in the cases so far – whether the union has members consisting of at least 10% of the proposed bargaining unit; whether a majority of workers in the proposed bargaining unit would be likely to favour recognition of the union for collective bargaining; and whether there is an existing, voluntary, recognition agreement with another union or even the one making the application.

By the end of December 2000 only, two cases failed to be accepted by the CAC (although a number of cases that looked likely to fail were withdrawn first). In both cases it was because of a pre-existing agreement with another union. The CAC will not get involved in inter-union disputes which are for the TUC to resolve. The CAC has no power to accept an application where another union is recognised, even if it is a non-independent union or a union with no, or minimal membership or support at the workplace. (There is one limited exception to this where a non-independent union has been de-recognised and re-recognised within three years). Where the agreement is with a sweetheart union one or more workers must apply under part 6 of the procedure in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, for the sweetheart union to be de-recognised and then the independent union can start the recognition process.

In **Prison Officers Association v Securicor** the POA's application was not accepted because of an existing agreement with the Securicor Custodial Services Staff Association. The CAC panel held that the agreement with the non-independent staff association was in force and covered pay, hours and holiday. In this case the agreement with the staff association was in writing and the evidence was that it had operated continuously for some time. The staff association was listed with the Certification Officer as a non-independent trade union.

In **ISTC v Award PLC**, the application failed because the company had signed a recognition deal with the AEEU literally days

before the ISTC lodged their application to the CAC.

It was feared by some that big disputes would arise over a union's assertion that ten per cent of the proposed bargaining unit was in membership and whether a majority favoured recognition. So far this has not happened. Unions have been relying on anonymised membership records information to show their levels of membership, and in some cases the CAC have conducted their own membership check. This has been done by comparing the list of names of union members given by the union in confidence to the CAC against the list of workers in the bargaining unit given in confidence by the employer. But in the cases so far the employers have not seriously challenged the authenticity of the union's membership figures.

Showing majority support for recognition has been achieved mainly by petitions in the workforce, signed statements of support and membership figures (where half or more of the proposed bargaining unit are members of the union seeking recognition). In one case, **TGWU v Stadium Electrical Components Ltd** , the employer sought to challenge the union's petition as they thought workers had signed it only after the union had misrepresented the company's position in their leaflets. The CAC panel rejected this argument and found that the union's newsletter did not detract from the significance of the petition which showed majority support for recognition. In **Equity v New Millennium Experience Company** the union relied on a straw poll of workers in the bargaining unit and the evidence of the union official who conducted the poll.

In **ISTC v Fullarton Computer Industries Ltd** the company argued that the union's membership had been temporarily inflated due to an aggressive recruitment campaign and a recent redundancy announcement. The CAC decided that the company's evidence did not detract from the clear statistical evidence of union support verified by the case manager.

Bargaining unit

If the union gets through the acceptance stage and if the parties are unable to agree, the CAC will determine the bargaining unit. There have been three contested hearings on the bargaining unit. In **ISTC v Benteler Automotive Ltd** it was decided in the union's favour – in other words the CAC supported the union view that the bargaining unit proposed by them was compatible with effective management and the union could proceed to the next stage. In the ISTC case, the union saw the bargaining unit as production operatives and material handlers. The company is a car parts manufacturer. Management were arguing for a wider bargaining unit than the union – to include the whole company excluding only nine managers, or, as an alternative, all hourly paid workers which would include supervisory, control and administrative staff. The CAC panel supported the union's unit because it fitted with the reality of the existing management organisation and practice and current terms and conditions.

In **GPMU v Red Letter Bradford Ltd** the union argued for a bargaining unit of shopfloor members excluding managers and agency workers. The company wanted the entire workforce. The CAC panel accepted the union's proposed bargaining unit – it was clearly identifiable and operated elsewhere within the company and the industry generally.

In the other cases that have reached the bargaining unit stage there has been agreement – in **MSF v Saudi Arabian Airlines** the employer did not disagree with the union's proposed bargaining unit of the entire workforce excluding senior management. In **Equity v NMEC** the employer agreed the proposal for all costume character hosts. In **UNIFI v Union Bank of Nigeria** at the hearing the union agreed to the exclusion of senior management from the bargaining unit.

Declaration of Recognition

The CAC has made a declaration of recognition in three cases – **UNIFI v Union Bank of Nigeria** and **ISTC v Benteler Automotive Ltd**, and **GPMU v Statex Press (Northern) Ltd** leaving only the method of collective bargaining to be resolved in those cases.

In **MSF v Saudi Arabian Airlines** a postal ballot is currently underway as the union did not have membership density of 50% plus in the bargaining unit decided. The outcome of the ballot will determine whether the union is recognised or not.

So although its early days for the CAC's recognition procedures, the cases are progressing fairly smoothly, largely within the timeframe laid out in the legislation with unions having a considerable degree of success. Time will tell whether the cumbersome procedures can withstand more sustained and aggressive resistance from recalcitrant employers, or if the pattern set by the early cases will remain the norm.

But what does it all mean?

Gard & Co v Symonds IRLB 647
T & K Home Improvements Limited v Skilton [2000] IRLR 595
Clark v Nomura International Plc October 2000 IRLB 651

THREE RECENTLY reported cases may offer some useful guidance in relation to interpretation of contracts in disputes arising on dismissal. Each of the three have completely different facts and circumstances but show a consistency of approach in the Tribunal or Courts' interpretation of the relevant sections of the contract.

In the case of **Gard & Co v Symonds**, the Applicant was a solicitor employed by his firm to set up and run a Family Law and Litigation Department. After five years of failing to achieve the targets set for annual fee income, Mr Gard was advised by the Partners of his firm that his continued employment was dependent upon him meeting fee targets. Shortly afterwards, he became sick and, in his absence, it was discovered that, while his files had been well-maintained, some were missing. A deadline was set for Mr Gard to produce these files and was told that if he failed to produce them, his contract would be terminated. The files were not produced in time and he was summarily dismissed. Mr Gard complained to the Employment Tribunal that his dismissal was both wrongful and unfair. Summary dismissal was provided for in his contract for reasons of "serious misconduct" or any "material breach" of its terms. The Tribunal found that his failure to produce the missing files, for which he was responsible, but in respect of which he was not guilty of any misconduct, was wrongful. They found that "material" in the contract should be looked at in the context of other serious breaches in the contract. The EAT agreed

The Employment Tribunal took a similar approach in its attempts to interpret Mr Skilton's contract when he was dismissed by his employers.

T & K Home Improvements Limited v Skilton was eventually decided by the Court of Appeal in April this year. Mr Skilton's contract had clauses for dismissal without prior notice or pay in lieu for, inter alia, "gross misconduct, gross incompetence or other repudiatory breach of contract". Significantly, however, there was a later Addendum to the contract which dealt specifically with "dismissal for missing targets", which indicated that, "If over any quarter you fail to achieve your performance target… you may be dismissed with immediate effect". Mr Skilton was dismissed for failing to meet his sales targets and the employers contended that the contractual provision entitling them to dismiss him "with immediate effect" for failing to achieve his performance target excluded any liability on them to give notice of termination or to make a payment in lieu. Once again, the Tribunal, the EAT and, ultimately, the Court of Appeal gave their interpretation of the offending contract clause in its context. They read a specific meaning into the Addendum and held that "You may be dismissed with immediate effect" rather than "We can dismiss you without prior notice or payment in lieu" powerfully demonstrated that the former was intended to provide for a different and less draconian form of dismissal than the usual summary dismissal process. In the specific circumstances of that case, it was held that, as Mr Skilton was not entitled to work out his period of notice as a result of his dismissal "with immediate effect", he was entitled contractually to be paid in lieu of notice.

In the last of these three cases, **Clark v Nomura International Plc,** the Claimant, Mr Clark, sought to have separate and additional oral agreements accepted in evidence which he argued supplemented the written contract. In the event, that evidence was not accepted and, once again, consideration was given solely to interpretation of the written terms of

contract in their context.

The dispute arose from the non-payment of a bonus on Mr Clark's dismissal. His contract referred to the bonus as being "not guaranteed in any way, and… dependent upon individual performance and after the first 12 months of your remaining in our employment on the date of payment". When Mr Clark was dismissed, he was paid his basic salary in respect of the three month notice period provided in the contract but, although he was still in employment at the date for payment of the annual bonus and had earned substantial profits for the Company during the relevant period, he received no bonus at all in respect of the period from 1 July 1996 to 31 March 1997.

It was Mr Clark's case that, according to the terms of his letter of appointment, which formed the basis of the contract, the exercise of his employer's discretion to award a bonus was dependent upon his individual performance which, in that context, meant his profitability as a proprietary trader.

The evidence showed that there was no question over his success and profitability on that basis.

However, his employers sought to interpret "performance" in a much broader way so that it might include all aspects of his employment and his overall contribution to the success of the business. Their reasons for dismissal related to his "inappropriate dress and appearance, erratic time-keeping and attendance, lack of attendance at management meetings, involvement in perpetuating rumours about peers, and outright criticism of the Management Committee and their strategy in front of peers and subordinates". The Claimant was told following his dismissal that they had had the opportunity to consider both his financial performance and the other concerns they had in regard to his behaviour and decided that no further payment would be made under the discretionary bonus arrangement. Mr Clark had, in fact, made profits for the Company of around £6.5 million for the relevant period and was, thereby, eligible for a bonus in the sum of £1.35million. In addition, as a result of transactions carried out and managed by Mr Clark, the Company was expected to receive a profit of £16million for the whole of that year.

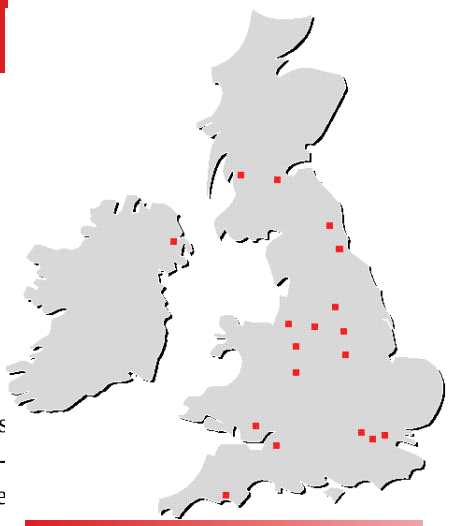
Significantly, the High Court established a 'perversity test'. The Court held that, where an employer is exercising discretion which, on the face of the contract of employment, is unfettered or absolute, there will be a breach of contract if no reasonable employer would have exercised the discretion in that way.

They stated that, in this situation, the employer's decision to award a nil bonus to an employee who had earned profits for the Company of over £6million in nine months and was responsible for a transaction that would probably bring to the Company a further £16million in the near future, and against whom any allegations that were made had not been treated previously as sufficient to require even advice or warning, and certainly not sufficient to justify summary dismissal, was plainly perverse and irrational and did not comply with the terms of the employer's discretion.

The Court distinguished this test from the test of 'capriciousness' which can be harder to establish, but stated that they felt the test was greater than a mere 'reasonableness test' The Court stated that, in applying a test of perversity or irrationality, the Court does not substitute its own view but asks the question whether any reasonable employer could properly have come to the same conclusion.

While the three cases referred to here are quite different in fact and, possibly, significance, it is noteworthy that they have maintained a general view that, in situations where there is dispute over interpretation of a contract, the Tribunal and Courts will interpret the contract strictly against the employer in cases where there may be arguments as to the true meaning of the contract.

Sauce for the goose not the gander



Clark v Fahrenheit 451 Communications Ltd EAT

IN THE case of Clark the Tribunal had to decide what was reasonable notice where the contract of a director was silent on it's length. Section 86 of the Employment Rights Act 1996 stipulates minimum notice periods depending on length of service. But these are only a minimum and if a contract is silent then case law has established that notice must be reasonable and that can be longer than the statutory minimum. If a contract contains a notice clause that is shorter than the statutory minimum, then the statutory minimum applies regardless of what is written in the contract. Also, parties are free to negotiate longer notice periods than the statutory minimum and include them in the written contract or statement of terms.

For Clark the statutory minimum would be one week's notice. Ironically, although her own contract was silent, Clark was herself responsible for drafting contracts of employment for staff which contained a one month notice clause. Directors were entitled to paid notice but no notice period was specified. Still more irony: when the question of dismissal arose for colleagues, Clark, suggested one month's notice was appropriate but when she was dismissed she told the Tribunal that six month's notice was appropriate for her.

The Tribunal had to interpret the implied term that notice would be of a reasonable length. They settled on one month in view of Clark's considerable business experience and her previous suggestion of one month for others. They construed the contract's silence on a different notice period for directors to mean that the parties intended the one month period referred to elsewhere. Clark's case for six months notice was unreasonable as it was twice as long as her period of employment and given the company's financial difficulties.

Clark appealed. The EAT disagreed with both Clark and the Employment Tribunal. The Employment Tribunal had erred in finding one month's notice reasonable because this was the period Clark had included in the express terms of other contracts although the Tribunal was entitled to see Clark's suggestion to dismiss colleagues on one month's notice as evidence of this. Clark's short period of employment was a reasonable factor to consider but the Tribunal had not struck the right balance between all the factors in this case. The Tribunal had erred in law by not considering Clark's status and seniority and putting too much emphasis on the company's financial difficulties which did not remove its obligations to employees. The EAT therefore decided that three months notice was reasonable in this case.

As with other cases where courts have upheld the contractual claims of senior, highly paid employees and company directors, the trick will be to establish that the same principles apply throughout the pecking order. The law of unfair dismissal was introduced to ameliorate the harshest aspect of contract law as it applies in the employment field. Now company directors are rushing to the courts to ensure their own contracts of employment are enforced to the letter for their own benefit, even where the same directors have been involved in driving down the terms and conditions of their own workforce. Welcome to the New Year!

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