Published by Thompsons Solicitors

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ISSUE 51 October 2000

Consultation rights prove their virility

GMB v Man Truck and Bus UK Ltd [2000] IRLR 636
Scotch Premier Meat Ltd v Burns and ors [2000] IRLR 639

IN A triumph of common sense and logic, the Employment Appeal Tribunal have upheld the rights of workers representatives to be consulted when terms and conditions of employment are changed by mass termination and the introduction of new contracts.

Most trade unionists will be familiar with an employer who wants to change terms and conditions of employment. If the workforce refuses to agree, it is not lawful for the employer to just impose the new terms. It is a common strategy for management to give notice of termination of current terms together with an offer of new employment on revised terms. Faced with what appears to be a choice between no job and a job on reduced terms, without strong trade union organisation, it is often the industrial reality that management succeed in imposing the new terms on the workforce. Whilst it is possible for each individual to claim unfair dismissal and seek reinstatement on their old terms of employment, the success rate of these cases in the Tribunals has been patchy.

But in GMB v Man Truck and Bus UK another legal weapon to protect the reduction of terms and conditions of employment has been firmly established. The EAT have held that the right to trade union consultation in collective redundancies applies wherever an employer is proposing to impose measures on a group of the workforce, on a group rather than individual basis, involving termination of their existing contracts. For consultation rights to apply, it is not necessary for there to be lost jobs or workers since the European definition of redundancy applies: "dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related". This is a different definition to the one used in the Employment Rights Act to determine both an entitlement to a redundancy payment and the reason for redundancy.

The EAT have referred the case back to the Tribunal for an assessment of whether the employer had failed to comply with the consultation obligations. If so, the GMB members will receive a protective award.

The case of Scotch Premier Meat Ltd v Burns also considered workers' consultation rights. The duty is triggered when an employer is proposing to make 20 or more employees redundant. In this case, the company had not reached a final decision about dismissal: it had two possible plans – to close the factory or sell it as a going concern. Only one plan would involve mass redundancies. The EAT upheld the Tribunal's view that once the company had determined on a plan of action which had two alternative scenarios one of which involved collective redundancies, they had a "proposal" which triggered the duty to consult the workforce. But in an aside, the EAT said that the word "propose" has a narrower meaning than the term "contemplate" which is when the duty arises in European law.

Where the buck stops

HM Prison Service & Ors v Davis (EAT 29.3.00 case No. 1294/98)
Bennett v Essex County Council & Ors (EAT 2.11.99)

TWO RECENT cases highlight the difficulties tribunals have when deciding on an employer's vicarious liability for acts of sexual and racial harassment.

In HM Prison Service & Ors v Davis EAT the point at issue was whether the employers were liable when an employee visited another work colleague at her home when they were off duty and made wholly unwanted sexual advances towards her. Essentially, the tribunal had to consider whether his actions were within "the course of employment." Although the tribunal thought they were and held that the employer was vicariously liable, the EAT have overturned the decision. The EAT considered that the reasons given by the tribunal to reach their conclusion were unconvincing. The reasons relied on were that:

1 The Applicant had recently moved and as she had only given her address to her employer, the Respondent must have obtained it through work.

2 The disciplinary code applied to conduct "on and off duty" and provided for action to be taken when a criminal offence had been committed away from the workplace (the Applicant had reported the matter to the police).

3 Even though the harassment was off duty, it had impacted on the workplace since the employer organised the shifts so that both employees did not come into contact with each other.

4 The employer's reaction to the complaint suggested that they accepted responsibility for it.

In considering these reasons the EAT found that:

- There was no direct evidence that the individual had got her address from the employer. Even if there had been the EAT found it difficult to see how his behaviour was in the course of employment.
- The fact that an employer can legitimately complain about an employee's activities outside of employment does not make that activity within the course of employment.
- The fact that the employer reorganised the shifts was irrelevant all that it showed was that the employer's behaved responsibly.
- The concern shown by the employer did not necessarily indicate that the incident was bound up with the duties of employment.

In the EAT's view the harassment had only the most slender connections with work and the employer was not vicariously liable. This is a worrying development since on the facts it is hard to see that the harassment, did not fall within the ordinary meaning of "in the course of employment". However, the EAT held that the employer was guilty of sexual discrimination because by delaying the investigation into the incident they had subjected the Applicant to other detriment.

In Bennett v Essex County Council & Ors the question was whether the school had taken all reasonable steps to prevent racial harassment by pupils against a teacher even though a school was not vicariously liable for the acts of pupils. The teacher had been subjected to two periods of racial harassment. One between January to April 1995 and another in April 1996.

The Employment Tribunal had found that although the school's response to the first incident was inadequate, it had taken action in relation to the second incident. Overall then the school had not failed in its responsibilities.

The EAT found the tribunal's conclusion irrational and illogical. In applying the rule in Burton and Rhule v De Vere Hotels Ltd EAT [1996] IRLR 596 the EAT asked itself whether the event was sufficiently under the control of the employer to the extent that he could have prevented it. Consequently, the school's failure to properly deal with the first incident of racial harassment meant that the employer had failed in its duty to take all reasonable steps to prevent the teacher from being subjected to racial harassment by the pupils.

These cases show that even where employers may not be held to be vicariously liable for the actions of a harasser, they still have a duty to protect the person being harassed. Therefore failure to properly investigate incidences of harassment even when an employer may not be vicarioulsy liable can still lead to a finding of discrimination.

Worker or drone

Perceval – Price and others v Department of Economic Development and others [2000] IRLR 380 Northern Ireland Court of Appeal

IN THIS case the Northern Ireland Court of Appeal decided that the term "worker" in the context of European Community law must be broadly and purposively interpreted. This finding allowed the applicants who were all Tribunal Chairmen to bring claims under equal pay and sex discrimination legislation.

Although few of our readers are Tribunal Chairmen who will directly benefit, the judgment is of wider use in the context of public service where many trade union members are in fact "office holders" rather than employees. The judgment may also have the effect of extending protection to workers (in the UK law sense) of other European measures – such as parental leave and pregnancy and maternity rights.

The applicants brought claims that they had been deprived of equality with men in respect of their pension rights. Their claims were opposed on the basis that they were "office holders" and that therefore an Employment Tribunal did not have jurisdiction to hear their claims.

However, both the Employment Tribunal and the Court of Appeal took a more purposive approach to the legislation. Equal pay legislation defines being "employed" as meaning "employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour".

To come within the provisions of Community law in particular Article 119 the applicants had to establish that they were "workers" who were in "employment". The European Court of Justice has declared that the word "worker" has a Community meaning in the context of Article 39 (Free movement of workers) and that the criterion for the application of Article 39 is the existence of an employment relationship, regardless of the legal nature of that relationship or purpose. In the case of Lawrie – Blum v Land Baden – Wuerttenberg[1986] ECR 2121 the ECJ said "The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration".

Applying this definition to the work of Tribunal Chairmen the Court of Appeal held that the applicants came within the terms of Article 119 and the Directives as workers in employment. The Government consultation paper on extending employment rights to workers is due out shortly. In the meantime, this case will help to extend employment to protection with a European underpin to workers as well as employees.

LELR Index

Enclosed with this month's issue is an index of cases and topics covered from our first issue to December 1999. An annual index will be produced in December for 2000, and annually from then on. If you need any back issues, please contact: Communications Department, LELR Back Issues, Thompsons Solicitors, Congress House, Great Russell Street, London WC1B 3LW

Or visit our website www.thompsons.law.co.uk which contains all back issues of LELR and an up to date subject index.

Human rights are here

THE HUMAN Rights Act 1998 is in force in England on 2 October 2000, having previously come into force in Wales, Scotland and Northern Ireland. For the first time, fundamental human rights contained in the European Convention on Human Rights are incorporated into domestic law.

The Human Rights Act is already having a major impact on all areas of law. Trade union and employment law will be no different. Through the creation of new rights against "Public Authorities" and requiring all existing laws to be interpreted consistently with the European Convention on Human Rights, the Act represents a cultural shift towards the prominence of positive individual and collective rights. These will create new bargaining and negotiating opportunities as well as legal challenges.

In two articles this month, we explore first the novel way in which Convention rights are incorporated into domestic law, and, secondly, the way in which specific Convention articles can be put to use by trade unions.

STRUCTURE OF THE HUMAN RIGHTS ACT

The Human Rights Act operates in two main ways:

(1) "The interpretative obligation": all existing laws must be interpreted so as to conform with the Convention and any relevant case law from the European Court of Human Rights, unless the law cannot be read in a way which conforms with the Convention.

(2) New rights against "Public Authorities": it is unlawful for a Public Authority to act in a way which is incompatible with a Convention right (except when prohibited from acting compatibly by primary legislation). "Public Authorities" include individual Courts and Tribunals. A new type of legal claim – "breach of a Convention Right" is created against Public Authorities, but not against a private party.

The Interpretative obligation

The interpretative obligation of courts and tribunals has three elements:

- Courts and Tribunals must read primary and subordinate legislation and give effect to it in a way which is compatible with Convention rights "so far as it is possible to do so" (S.3 HRA).
- in deciding a question which has arisen in connection with a Convention right, Courts and Tribunals must take into account:
  - any judgment, decision, declaratory or advisory opinion of the European Court of Human Rights; and
  - any opinion or decision of the Commission or decision of the Committee of Ministers

wherever made, and so far as the Court or Tribunal considers it relevant (S.2 HRA).
- It is unlawful for a Public Authority – which includes courts and tribunals – to act in a way which is incompatible with a Convention right. But note that the duty is limited to the extent that the Public Authority could not have acted differently because of primary legislation which cannot be read or given effect to in a manner consistent with the Convention right. (S.6 HRA).

Courts and Tribunals must also

adopt the Strasbourg method of judicial reasoning, which involves an explicit balance of the rights of individuals against the rights and freedoms of others and the general public interest. If possible, Courts and Tribunals must find a statutory or other legal interpretation which is consistent with Convention rights. If that is not possible, a court (but not a tribunal) may make a "declaration of incompatibility", but it does not affect the validity of the statutory provisions.

Public Authorities

Section 6 (3) of the Human Rights Act envisages three types of Public Authorities:

- "outright" Public Authorities. These are Authorities which exercise statutory or prerogative powers, such as Local Authorities, the Police, Immigration Officers and Prisons;
- "functional" Public Authorities: certain of whose functions are of a public nature; and
- Courts and Tribunals.

"Outright Public Authorities" (and Courts and Tribunals) must act in accordance with Convention rights in relation to all their activities. "Functional" Public Authorities are not acting unlawfully where the particular act under challenge is of a "private nature".

Who can bring proceedings against a Public Authority under the Act? – The need for a "victim"

Only a person who is or would be a "victim" can bring proceedings or rely on a Convention right directly against a Public Authority. It is not necessary that the Applicant has actually suffered the consequences of the alleged breach provided that there is a risk of their being directly affected.

Courts, Tribunals, Time Limits and Remedies

Applicants relying indirectly on Convention rights through the interpretative obligation, will be able to bring proceedings in the same Court or Tribunal as before. They will make the same type of claim as previously, but the law will have to be interpreted consistently with the relevant Convention right, so far as is possible.

"Victims" bringing proceedings directly against a Public Authority will have to do so in the "appropriate Court or Tribunal". The appropriate Court or Tribunal will be determined by rules yet to be made. It is possible that difficult legal questions will arise as to where proceedings are to be brought directly against a Public Authority. Most proceedings will probably be brought against Public Authorities by way of judicial review and an Applicant in judicial review proceedings can claim damages as part of her application.

Claims brought directly against Public Authorities must be brought within one year of the act complained, with extensions on the grounds of justice and equity. There are circumstances in which the one year time limit may even be reduced and, we suggest that advice is sought at an early stage.

Actions relying on the interpretative obligation will be subject to the time limit applicable to the main cause of action – eg. unfair dismissal or sex discrimination or breach of contract.

ANYALYSING CONVENTION RIGHTS

Taking account of existing human rights law in interpreting UK law requires an understanding of how Convention rights operate. Convention rights are said to be either unqualified rights or qualified rights. Unqualified rights, such as the right to a fair trial (Article 6) are absolute and there are derogations or justifications permitted.

Qualified rights, include the right to respect for private and family life (Article 8), the right to freedom of thought, conscience and religion (Article 9), the right of freedom of assembly (Article 11) and the right of protection of property (Article 1 of the First Protocol). The correct approach is to consider, first, whether there is a potential violation of the basic right; and then to consider whether the violation is within the permitted qualification.

The precise wording of qualified rights differs from article to article in the Convention. However, common themes emerge and, in order to show that it is entitled to restrict the operation of a right, the alleged violator has to prove that interference was in accordance with the law or prescribed by law; the aim of the restriction in question is legitimate according to the wording in the particular Convention right; and the restriction in the Convention right is necessary in a democratic society - in other words proportional.

Next we examine what this could mean in the field of trade union and employment law.

In this month's second article on human rights, we look at the ways in which various Convention Articles may be used under the Human Rights Act in trade union and employment law.

Article 6:
The right to a fair trial

The right to a fair trial in Article 6 of the ECHR is an unqualified right. The components of a fair trial will include: real and effective access to a Court or other independent tribunal, notice of the time and place of the proceedings, a real opportunity to present the case made, the opportunity to cross-examine the other side's witnesses, a reasoned decision, a right to be represented and a right to represent oneself.

In order to trigger Article 6, there must be a dispute concerning the Applicant's "civil rights and obligations". This means that there must be a genuine and serious dispute about a right and the result of the particular proceedings must be directly decisive of the right in question.

Private sector employment is plainly covered by Article 6. Public sector employment will be covered except where the duties of the job "typify the specific activities of the public service insofar as the latter is acting as a depository of the Public Authority responsible for protecting the general interests of the State or other Public Authorities".

The areas of employment and trade union law where Article 6 is likely to be important are:

- disciplinary procedures;
- professional disciplinary proceedings by self-regulatory organisations, such as the UKCC and financial institutions;
- administrative pension procedures, such as ill health retirement and appeals and proceedings before the Pensions Ombudsman.

Article 8:
The right to respect for private and family life

The right to respect for private and family life is qualified. The circumstances in which the right may be interfered with are the interests of national security, public safety, the economic well being of the country, the prevention of disorder or crime, or the protection of health or morals, or the protection of the rights and freedom of others.

"Privacy" includes sexual activities and sexuality. This means that discrimination on grounds of sexuality will be covered by the Human Rights Act, unless the qualification applies.

The right to respect for "family life" will be used to strengthen the enforcement of family friendly policies in the Employment Relations Act 1999 and existing discrimination laws. Article 8 is likely to be argued to defeat mobility clauses in contracts of employment and to establish part-time working rights.

The right to respect for correspondence as an element of privacy will be important and the issue of workplace surveillance will come under close scrutiny through Article 8.

The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, will cover all business-related telecommunications systems, including telephones, faxes and e-mail (both internal and external). Although the Regulations will make it unlawful to intercept "business communications" the exceptions to this general rule are extremely wide. If the individual knows of the likelihood of interception and the interception is for any of four purposes including to provide evidence so as to "establish the existence of facts" or "ascertain compliance with practices or procedures relevant to the business", the surveillance can take place. It is doubtful whether the Regulations comply with Article 10 and there may well be a Human Rights Act challenge.

Relevant principles governing workplace surveillance under the Human Rights Act are likely to include the worker's knowledge and consent to the surveillance and consultation.

The areas of employment and trade union law where Article 8 is likely to be important are:

- discrimination in connection with sexual orientation;
- dress codes (aspects of private life);
- telephone, electronic, close circuit television surveillance;
- electronic monitoring of workers' use of key boards;
- enforceable new rights to privacy for employees against Public Authorities;
- the scope of the contractual duty of trust and confidence,
- confidentiality and interpretation of the Data Protection Act 1998 and access to medical records;

- Unfair Dismissal (and race/sex/disability discrimination cases) must take account of privacy rights and may include disproportionate interference with privacy; and
- possibly restricting evidence admissible against an Applicant in Tribunal proceedings such as previous sexual conduct in a sexual harassment complaint.

Article 9:
The Right to Freedom of Thought, Conscience and Religion

The right to freedom of thought, conscience and religion is a qualified right. The main issue is likely to be whether Article 9 prohibits discrimination against religious employees on the grounds of their religious observances by, for example, refusing to give time off. It will be interesting to see how UK courts view the status of contractual obligations compared with competing Article 9 rights.

Article 9 is likely to be used to seek an extension of the scope of the Race Relations Act to cover religious groups.

Article 10:
Freedom of Expression

Article 10 is a qualified right and is also often complicated by the existence of a competing right, such as a right to privacy. Permitted interferences with the right include the protection of health and morals and the reputation or rights of others and for preventing the disclosure of information received in confidence. The European Court of Human Rights has tended to require strong justification for the abrogation of the right and this will be of particular benefit to journalists.

Political restrictions are permitted by article 10, provided that the restrictions imposed are proportionate.

The areas of employment and trade union law where Article 10 is likely to be important are:

- for journalists and in libel cases;
- interpretation of the Public Interest Disclosure Act 1998;
- dismissal or discrimination based on dress codes (see also the right to respect for private life); and
- freedom of expression within trade unions.

Article 11:
The Right to Freedom of Assembly and Association

The right to freedom of assembly and association includes the right to form and join trade unions for the protection of an interest. The Convention right is qualified, but the qualifications are restrictive, and must be prescribed by law and necessary in a democratic society, for the interests of national security and public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others.

The areas of employment and trade union law where Article 11 is likely to be important are

- dismissal of an employee for participating in a strike (even after the changes in the Employment Relations Act 1999);
- trade unions' ability to discipline and expel members who refuse to take part in official and lawful strike action,
- Trade Union election procedures; and
- Union expulsion rules

Article 14:
The Right not to suffer discrimination.

Article 14 is not a general "equal treatment" guarantee. It states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, associating with a national minority, property, birth or other status". The European Convention on Human Rights contains no free-standing prohibition of discrimination. Article 14 only requires that access to other Convention rights must be equal. This means that Article 14 can only operate in conjunction with another Convention right.

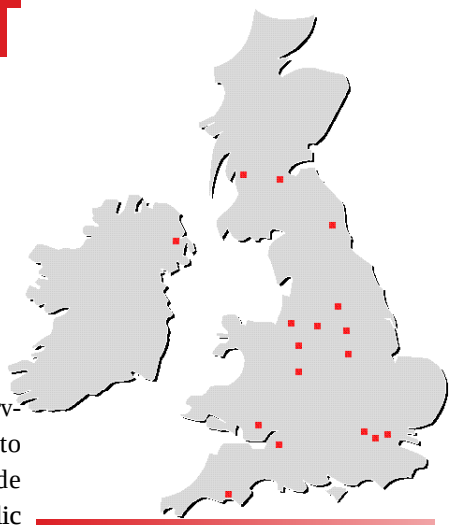
However, the grounds of discrimination outlawed by Article 14 are much wider than domestic discrimination law. Article 14 might be used to interpret, for example, Part Time Worker (Prevention of Less Favourable Treatment Regulations) 2000, if "grafted onto" another right and rights for dependant's pensions to gay and lesbian partners.

Protocol 1: The right to enjoyment of property

Protocol 1 creates a right to the peaceful enjoyment of one's possessions which is a qualified right.

Protocol 1 is particularly relevant to pensions and a contributory pension scheme is likely to be a "possession" although the position with a non-contributory scheme which creates expectations contingent upon scheme rules and conditions prevailing, is less certain. In the employment context, Protocol 1 rights are likely to be grafted onto Article 14 to gain equality for non-married and same sex partners/dependant's pension rights.

Blowing the whistle on elderly care



Bladon v ALM Medical Services Ltd (Manchester Employment Tribunal, IRLB 648)

ELDERLY PEOPLE in residential care homes are among the most vulnerable in our society. A Tribunal in Manchester, in one of the first whistle blowing decisions has shown it is prepared to be robust when interpreting the legislation to protect those workers who are brave enough to report their concern.

In 1999 Brian Bladon, an experienced charge nurse, started work for ALM Medical Services Limited at Lowther View Nursing Home in Lytham, Lancashire. He was soon asked to "act up" into a senior role.

Almost immediately he became very concerned about a number of issues in relation to the residents' care. These included issues of physical and verbal abuse of residents, failure to complete drug records, failure to order necessary drugs and a failure of a residents wound to be properly treated.

Mr Bladon raised his concerns by telephone with a personal assistant to the owner of the home. He was asked to put his comments in writing which he did.

Mr Bladon received no reply to his concerns at all. He became increasingly worried. He therefore telephoned the local authority and spoke to the Social Services Inspectorate who then took responsibility for the matter. They carried out an inspection which upheld many of Mr Bladon's concerns.

Meanwhile Mr Bladon was summoned to a disciplinary hearing where he was given a final written warning. He was then sacked one week later. The reason given for his dismissal was that he was "not acting with the company's best interests at heart". He was denied an appeal against his dismissal.

As Mr Bladon had less than one year's service he had to establish that the decision to dismiss him was made because he had made a protected disclosure under the Public Interest Disclosure Act 1998.

The Tribunal was satisfied that both Mr Bladon's complaint to his employer and to the Social Services and Health Services Inspectorate were qualifying and protected disclosures.

The Tribunal also found he suffered a detriment as a result of his protected disclosures – both the written warning he received and the lack of opportunity for an appeal against his dismissal. Most importantly, they also considered that the reason for his dismissal was the protected disclosure he had made and that his dismissal was automatically unfair.

At the remedy hearing, the Tribunal decided it had power to make an award for both injury to feelings and an award for aggravated damages for the detriment, in addition to his compensation for dismissal. This was a positive and imaginative interpretation of the act.

The Tribunal awarded £10,000 injury to feelings to include aggravated damages plus loss of earnings including interest of £13,075 The total compensation was therefore £23,075

The Tribunal took into account that the applicant had been employed in various positions in the health service for 20 years, with an unblemished record when he was dismissed. He was both shocked and distressed by the termination of his employment.

This case shows that the Tribunal was prepared to send a clear signal to employers who sack employees when they whistle blow on poor standards of care and was not prepared to tolerate such behaviour.

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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