CONTENTS

THOMPSONS
LABOUR AND EUROPEAN LAW REVIEW

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Look smart - casuals have rights too

Convey and Others v Saltire Press Ltd and Anderson Key Printers Ltd

The Court of Session in Scotland has upheld an Employment Appeal Tribunal (Scotland) ruling that 11 "casual" newspaper printers were employees and so entitled to protection under the Employment Rights Act 1996. In a GPMU backed case run by Thompsons, the court also upheld the earlier ruling by the Employment Tribunal.

It is a significant case which clearly demonstrates that an Employment Tribunal is entitled to look at all the circumstances of a work relationship and reach its own conclusions as to employee status. It serves as a stark reminder to employers that "casual" does not necessarily mean "no rights at work".

Once enacted, Clause 21 of the Employment Relations Bill will give the government power to extend employment rights beyond "employees". A most welcome and long overdue change which will eventually render unnecessary lengthy and expensive cases of this type and abolish two tier worker status.

Mr Convey and ten other printers claimed unfair dismissal and redundancy in connection with the transfer of the printing of the Scottish Daily Record Newspaper from Anderson Quay Printers Ltd to Saltire Press Ltd. At the time of the transfer the printers were sacked and received neither TUPE protection nor a redundancy payment.

At a preliminary hearing in the Employment Tribunal, both Anderson and Saltire argued that the printers were not employees and therefore not entitled to any employment protection. The employers argued that the GPMU was primarily responsible for controlling the casual list, none of the applicants had been issued with contracts of employment, the printers regularly carried out work on other newspapers, and none of them were obliged to attend work at the newspaper. They also argued that there were occasions when months passed when no work was provided.

Arguing that an employment relationship did exist, the printers said that they were provided with wage slips and tax and national insurance was deducted at source. They also pointed to the fact that they were issued with a locker on starting work and received training.

The printers said they were regularly contacted directly by the employers and there was a clear expectation on their part that they should be provided with work. Indeed, evidence was heard that many of them had worked for the company over a period of between four and 11 years and had received mortgages on the strength of their income.

They argued that they were employees. The Employment Tribunal agreed.

Anderson and Saltire appealed to the EAT on the grounds that the Employment Tribunal had erred in law by concluding that the printers were employees. The EAT upheld the Employment Tribunal's decision and the employers appealed to the Court of Session (Scotland's equivalent of the Court of Appeal in England).

The Court agreed that the Employment Tribunal were entitled to make the decision they did on the facts available to them, refused the appeal, and remitted the case back to Employment Tribunal to consider the full case on the basis of the casuals being employees with full rights.

Time is on my side

Schultz v Esso Petroleum Co Ltd (1999) IDS Brief 636

The Court of Appeal has reached a landmark ruling which could herald a different approach to unfair dismissal time limits by the judiciary. Courts have applied the rule strictly against late claims, but in Schultz the court took a different and more liberal approach.

Unfair dismissal claims should be lodged in the Employment Tribunal within three months of the date of termination of employment. The time period can only be extended if 'it is not reasonably practicable' to bring the claim in time.

In Schultz v Esso Petroleum, the Court of Appeal had to consider the impact of ill health on whether a claim could have been presented in time.

Mr Schultz was dismissed on 25 July 1996 and applied to the Tribunal on 17 April 1997. Not a very promising delay, and the Tribunal found that it would have been reasonably practicable to lodge the claim in time.

Mr Schultz was suffering from depression and had been too ill to work since August 1994. He was too ill to attend his disciplinary hearing on 15 July, but his solicitors submitted an appeal on 30 July and wrote again in September stating written representations would follow shortly.

In February 1997 Mr Schultz recovered and his solicitors (not Thompsons we stress) wrote again to Esso in March asking for an appeal and return to work. The employer would not reconsider the decision and so tribunal proceedings were lodged a month later in April.

The original tribunal decided that Mr Schultz was well enough to instruct his solicitors in the Summer of 1996, but his condition deteriorated in the Autumn, crucially in the last 6 weeks before the three month period from dismissal expired.

When he became well again in February 1997, he had delayed submitting his claim for another two months. The tribunal refused to extend time on the ground that it had been reasonably practicable for Mr Schultz to submit his claim in time.

The Court of Appeal took a different view. It decided that the correct approach to whether it was practicable, what could be done, meant what was 'reasonably capable of being done'.

The tribunal also failed to take into account the surrounding circumstances, especially the fact that Mr Schultz had tried to avoid litigation by resolving the dispute by way of the appeal procedure. The court took the view that it was reasonable to use the first weeks after the dismissal to raise the issue internally and he should not be penalised for not having put his claim in then, when he was well enough to do so.

But as always, it is far better to bring the claim to tribunal in time and put the case on hold - "stay" in the jargon - while the appeal procedures are exhausted, than risk losing the right to bring the case because it has been submitted out of time.

"Mind the gap" says EAT

Sweeney v J & S Henderson (Concessions)Ltd [1999] IRLR 306

Any week during the whole or part of which an employee's relations with her or his employer are governed by a contract of employment counts towards the period of continuous employment and preserves continuity (section 212(1) Employment Rights Act 1996).

Mr Sweeney resigned with immediate effect on a Saturday. He started a job with a different employer straight away, but returned to his original employer on the next Friday. Did the gap of five days count towards Mr Sweeney's period of continuous employment and was continuity preserved? A "week" is a week ending on Saturday (section 235). Both relevant weeks therefore satisfied the conditions of section 212 - they both therefore counted towards Mr Sweeney's period of continuous employment and continuity was preserved.

Continuity announcement

Lassman and others v Secretary of State for Trade and Industry [1999] ICR 416 (EAT)

The continued uncertainty surrounding the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) means there are often disputes over whether there is a transfer or whether the employees are redundant. This sometimes means the employees receive payments described as "redundancy payments", where it is subsequently determined or agreed that TUPE applied to the transaction.

Do redundancy payments break the employees' continuity of employment? That was the issue in the case brought Mr Lassman and his ten colleagues.

In 1988 the company they worked for became insolvent. They were dismissed by the official receiver and obtained redundancy payments from the Statutory Fund operated by the Secretary of State.

The business was sold and the new owner employed Mr Lassman and his colleagues on the same terms and conditions. In 1995 that company became insolvent and the individuals were all dismissed. The insolvent company could not meet the redundancy payments, so the employees made a claim against the Statutory Fund.

An Employment Tribunal concluded that the redundancy payment broke the continuity of employment, so that the applicants were only entitled to redundancy payments calculated on the period since 1988.

The Employment Appeal Tribunal disagreed. The issue turned on the wording of the section relating to continuity of employment for the purpose of redundancy payments. The Secretary of State accepted that continuity had not been broken so far as entitlement to statutory notice pay was concerned.

The entitlement to a redundancy payment arises only where there has been a redundancy dismissal. The effect of the transfer of undertaking was that the employees' contracts were treated as transferred automatically with no dismissal.

"A mistake should not deprive employees of rights which are given to them by statute"

This meant that the payment could not properly be regarded as a redundancy payment and therefore could not break continuity. This confirms the approach in Senior Heat Treatment v Bell [1997] IRLR 614.

The government argued that the position was different when the government made the "redundancy payment" from the Statutory Fund. That meant that in 1988 the government was satisfied that there was a genuine redundancy dismissal, otherwise the payment would not have been made.

This was rejected by the EAT. Continuity is only broken where there is a redundancy payment in respect of dismissal. Here there was no dismissal. The contract continued because of TUPE. The applicants were entitled to the full amount of redundancy.

Employers may object (and the Secretary of State did) that this means that the employees had twice received redundancy payments from the State which covered the period of employment up until 1988. That is true, but a mistake by the employers or the government should not be allowed to deprive employees of rights which are given to them by statute and can only be taken away where the strict provisions of the legislation say so.

The political climate in 1988 - when the original payments were made - was also different. The Tory Government was very hostile to TUPE.

This made it politically difficult for that Government to claim TUPE applied in these circumstances when it denied it applied in so many more. It was therefore expedient - although more expensive - to make redundancy payments from the Statutory Fund on the basis that TUPE did not apply.

Blow the whistle - but not too loud and only certain tunes

The Public Interest Disclosure Act 1998

At long last workers have been given a degree of legal protection for whistleblowing. The Public Interest Disclosure Act came into force on 1 July 1999.

But in spite of the fanfare and trumpet blowing, the whistleblowing rights are heavily qualified - both by the type of information disclosed and to whom disclosure is made.

WHO GETS PROTECTION?

In keeping with the proposals to extend employment rights beyond employees, the categories of workers protected are wide. Not just employees, but also workers and medical practitioners and work experience students. Also covered is a wide definition of agency workers.

INFORMATION PROTECTED

Only certain types of information are protected from disclosure by the Act. There are five categories.

In each case the worker must reasonably believe the information falls into one of these categories: information about a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, health and safety or damage to the environment.

If the information falls into any of the five categories, or if the information shows a deliberate concealing of one of the five areas covered it is called a 'relevant failure'. The disclosure of a relevant failure is called a 'qualifying disclosure'. Only relevant failures can classify as qualifying disclosures, and only qualifying disclosures are capable of being protected by the Act.

WHO YOU TELL

The general rule is that a qualifying disclosure can only be made to certain people in order to give legal protection to the worker. These are the worker's employer, disclosure through a procedure authorised by the employer, or to the person the relevant failure is about, or someone who has a legal responsibility for the relevant failure. This would include, for example, informing the Health and Safety Executive of risk to individuals or to the police where the worker believes the employer has broken the law.

Workers can also make the disclosure to a Government Minister if certain government appointed bodies employs them. There is also a route to make a qualifying disclosure to a person nominated by the Secretary of State provided the worker believes the information and any allegations in it are substantially true. The Secretary of State has yet to make an appointment so this route is not currently available.

The Act envisages that the disclosure will be in a controlled way effectively through prescribed routes. There are two circumstances when qualified disclosure can be made outside these channels.

A number of conditions have to be met however for these circumstances to apply. Once again the protection only covers disclosure of a 'relevant failure' to be a qualifying disclosure. The worker must reasonably believe in its truth and there must be no personal gain.

In addition the worker must believe either that he will be victimised if the disclosure is made to his employer or to the nominee of the Secretary of State (when one is appointed), or believe that the information would be destroyed or concealed if it was disclosed to his employer, or he has already told either his employer or the Secretary of State's nominee. Even then it also has to be reasonable for the worker to make the disclosure. A number of features including who is told and the seriousness of the allegation determine reasonableness. There are therefore a total of five hurdles to clear before

legal protection is gained outside the usual channels.

EXCEPTIONALLY SERIOUS FAILURE

The other circumstance where the usual channels are not necessary is where there is an exceptionally serious allegation. Then, the disclosure can be made even if the worker does not fear victimisation or has previously made the allegation, but the other restrictions still apply. Once again, the disclosure must be a 'qualifying disclosure', made in good faith, with a reasonable belief in the truth of the allegation, there must be no personal gain and it must be reasonable for the worker to make the disclosure.

Reasonableness is partly determined by whom the information is revealed to.

So the Public Interest Disclosure Act 1998, is not a public disclosure act except in limited circumstances. It is not envisaged that disclosure to the media will be routinely covered.

THE EFFECT OF LEGAL PROTECTION

If the qualifying disclosure comes within any of the categories above, it will become a protected disclosure and gain the protection given by the Act.

The Act makes any clause in an agreement, which seeks to prevent a worker from making a protected disclosure, void. It will have no legal effect and cannot be relied on by an employer. Neither can a worker sign away his or her rights from legal protection under the Act.

Workers will be protected from any detriment by the employer- whether an act or a deliberate failure to act - on the grounds that the worker has made a protected

disclosure. If the worker is dismissed for the reason or principal reason of the protected disclosure, it will be automatically unfair.

There is no limit on the compensation that can be awarded by a Tribunal and there is no qualifying period or upper age limit for claiming protection from dismissal on account of protected disclosures.

But even if the Tribunal can give a full remedy to the worker there are still risks involved over the interpretation of a qualifying disclosure and the very limited circumstances when the information can be broadcast beyond the employer. Workers should be encouraged to check with their unions before making a disclosure. A disclosure made to get legal advice is covered - so union members can consult with their unions for legal advice on how to raise their concerns.

There is also scope for negotiating procedures with the employer so disclosures can be made to a third party respected by the workforce.

It remains to be seen how effective the Act will prove to be in enabling genuine concerns about irregularities to be aired and put right. The fear is that the number of obstacles in the legislation and the emphasis on raising concerns firstly with the employer, will mean that workers remain reluctant to raise legitimate concerns. But the very fact of the existence of the Act may encourage more employer accountability and openness in the workplace and have a deterrent effect.

Collecting terms from union agreement

City of Edinburgh Council v Brown [1999] IRLR 218

Enforcing implied terms from collective agreements into individual contracts of employment has, in recent years, been very difficult to achieve. Since the Employment Appeal Tribunal decision in Airlie v City of Edinburgh District Council (1996 IRLR at 516) the Courts have tended to the view that in order to enforce an implied contractual term - which the employer does not accept is an implied term - you need to look at the contractual intent at the time the agreement was entered into.

This can be especially hard where agreements may derive from collective bargaining arrangements where the written arrangements say that any benefits provided by an employer are at the control of management and within the policy of management as to their operation and effect.

Courts have also stated that policies which are only guidelines are often not contractual terms at all and can therefore be withdrawn by management without consent.

The decision of the Employment Appeal Tribunal (Scotland) in the recent UNISON backed case of Brown run by Thompsons, is therefore a crucial and welcome breakthrough in looking at and returning to the principle of agreed terms which cannot be unilaterally broken even though an employer wishes to do so.

Mr Brown worked in the council's Housing Department. Following re-organisation in 1989 he and other colleagues sought regrading.

At that time a successful regrading was backdated to the date of the original application, even if that was much later and after an Appeal. The EAT confirmed the original Employment Tribunal decision that the arrangement was introduced by collective agreement between the recognised Trade Union (NALGO at that time) and the employer.

The Union had originally suggested that the policy of the Council was unclear and suggested a uniform policy. This was agreed at a JCC, recommended to the council's Personnel Committee and endorsed by the Council in 1987.

So far as the Council Minutes were concerned, this was referred to as policy and there were no documents in the hands of the Council referring to it as a collective agreement. Nevertheless, both the Employment Tribunal and the EAT had no difficulty in accepting that the way this procedure had been arrived at could effectively be regarded as a collective agreement. They went on to hold that it was incorporated into Mr Brown's Contract of Employment.

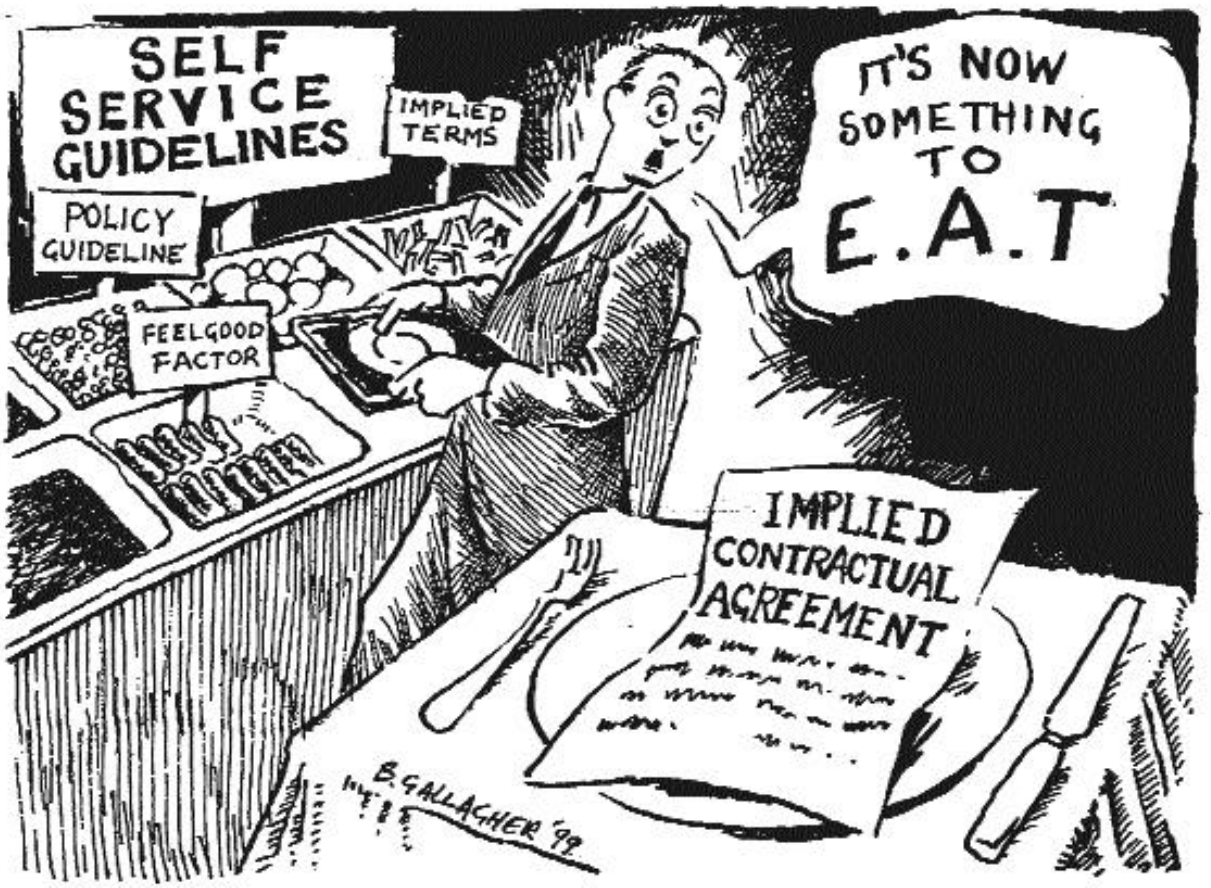
In 1992, the Council unilaterally changed the policy without agreement and despite objection from the union. They introduced what they described as a new policy doing away with backdating and allowing payment on re-grading only from the point in time the decision to re-grade was made.

Given the length of time between a re-grading application and a decision, this could amount to many thousands of pounds in back pay being lost by the employee. There was a great deal of money at stake for individuals and the council.

They would not honour the old policy even for applications for regrading made before they changed the policy, such as in Mr Brown's case. The council maintained that as this was a matter of policy and not a binding agreement, it was not necessary to obtain express agreement to change.

The council argued it was simply conferring a benefit on an employee by means of a non-binding policy which was therefore capable of being removed without consent. The union argued it amounted to a legally binding contractual term which could not be unilaterally withdrawn.

In Brown's case there was no mention in the original policy of circumstances when the arrangement could be changed.



In Airlie the arrangement referred to changes for operational reasons.

The Employment Tribunal and the EAT both held that the arrangement in Brown's case was a contractual term. This judgment reverses the trend set by the previous cases.

Equally importantly, the EAT accepted that "collective agreement" had a wide meaning. To come within the definition of Collective Agreement in the Trade Union and Labour Relations Consolidation Act 1992 there must be negotiation between the parties and agreement, but beyond that, there was no requirement for a particular way the agreement should be reached, the EAT said.

In Mr Brown's case there had been negotiation and agreement in 1987 which set up the re-grading backdating structure whereas the attempted change in 1992 had not been the subject of agreement and very little negotiation.

Significantly the EAT also said that even where an employer announced a detrimental change to a policy which impacts on the terms and conditions of an employee's contract - but which had not been agreed or expressly incorporated - the employee might have a legitimate right to complain because the contract had been effectively varied without his consent.

The variation would be of the implied condition that the employee has a right not to have his contract varied to his detriment without his consent.

The procedures of Local Authorities - generally involving consideration by the Council and recommendation of Committees - meant that for agreement to be reached the recommendations had to be endorsed. Once that was done, however, they could create a binding collective agreement from which terms and conditions applicable to individual contracts could arise and be enforced.

This case underlines the importance in collective bargaining of ensuring that when a change is agreed to by management - after negotiation and agreement with the Union - it can be regarded as an appropriately negotiated collective agreement. Where it has individual effect it can be effectively incorporated into employees' contractual terms and conditions. Negotiators should ensure, where possible, that clauses referring to management's power to withdraw benefits for operational reasons are kept out.

The end result for Mr. Brown happily was that he has received a back payment on his new grade covering a period of six years.

Confronting racism

Sidhu v Aerospace Composite Technology Limited
IDS Brief 637 May 1999 (18.3.99 675/98)

Employers are liable for the action of employees during work-related functions outside working hours and off the employer's premises the Employment Appeal Tribunal has decided. And employers must treat racist motivated violence as racist incidents, and not isolated as simple acts of violence.

Mr Sidhu was employed by Aerospace Composite Technology Limited. He had worked there for a number of years and had a clean record.

At a family day out at Thorpe Park theme park, organised by the Company, Mr Sidhu and his wife were subjected to racial abuse by three white employees, one of whom was a recent recruit to the Company. They attacked him physically, leaving him with his head cut and his glasses broken.

He retaliated by wielding a plastic chair, but did not actually hit anyone with it. He argued that he had been acting in self-defence.

An investigation took place. It was made clear that he viewed the attack as racially motivated, and this was not disputed.

Nonetheless, the Company decided to dismiss both Mr Sidhu and the employee involved in the attack. The basis for them doing this was that violence against members of staff amounted to gross misconduct, and both had been guilty of acts of violence.

Mr Sidhu's internal appeal against dismissal was unsuccessful, and he subsequently pursued a claim for unfair dismissal and race discrimination. The unfair dismissal claim succeeded, but the Tribunal found that there had been no race discrimination: the incident at the family fun day took place "outside the scope" of his employment such that the Company was not responsible for the new recruit's conduct.

Further, the Tribunal found that the dismissal was a legitimate and even-handed response in the context of the Company's policy on violence at work. They did not consider it necessary or appropriate to see the incident in a racial context.

The EAT conclusively overturned this deeply defective decision. In relation to the first point, they decided that the Tribunal adopted too narrow a test.

The question of whether the Company was liable for the incident depended not on the "scope of employment" but on whether the incident took place during the course of employment as broadly defined and this could include work-related functions outside strict working hours and off the employer's premises.

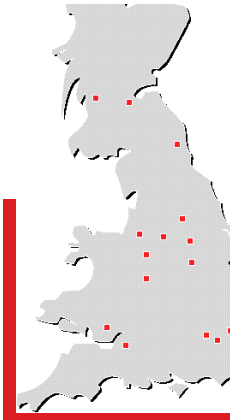
In relation to the second point, the EAT concluded that the Tribunal were wrong to see the incident isolated from its racial context. "A decision to disregard the fact that the cause of an attack, or harassment, or provocation, or anything else, is racial is a "race specific" decision that has a "race specific" effect and is thus "race specific conduct" ".

Therefore the deliberate failure to consider the racial element of the attack itself amounted to an act of race discrimination. It was not necessary to show that a white person would have been treated more favourably because the attack was race specific. There are parallels to be drawn with sex harassment cases where the conduct is gender specific.

The Report of Sir William McPherson into the death of Stephen Lawrence, albeit in a quite different and more devastating context, makes the same point. At paragraph 12 of the Recommendations of the Report, a racist incident is defined as being "any incident perceived to be racist by the victim or any other person".

Accordingly, the incident must be investigated as such by those responsible for carrying out the investigation. A failure to do so, according to the Report, may in itself be an act of discrimination.

For employers, therefore, any attempts to be even handed in the treatment of the parties to a racial attack, may, in the light of this EAT decision, be itself racist and unlawful.



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