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Code breakers beware

Lock v Cardiff Railway Company Ltd IRLR (1998) 358 EAT

Industrial Tribunals must take into account the ACAS Code of Practice on Disciplinary Practice and Procedures and a failure by employers to implement the Code will render any dismissal unfair say the Employment Appeal Tribunal.

Mr Lock, a train conductor, had a child removed from a train who did not have the ability to pay a £1.25 excess fare, leaving him alone at an unknown station to be collected by his parents resulting in him getting home three hours late. The employers dismissed him on the grounds that it was a failure to follow instructions on excess fares and a failure to follow the employer's policies on courtesy and safety. An industrial tribunal found this decision was in the range of reasonable responses of a reasonable employer and therefore fair.

The EAT overturned the decision of the tribunal, substituted a finding of unfair dismissal and remitted the case back to the tribunal to consider re-engagement. The EAT pointed out that the tribunal had made no explicit reference to the Code of Practice and pointed out that S.207 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 requires tribunals to take into account the provisions of the Code of Practice.

The EAT felt that there were at least two breaches of the Code, namely paragraph 8 which provides:-

"employees should be made aware of the likely consequences of breaking rules and in particular they should be given a clear indication of the type of conduct which may warrant dismissal."

and second, paragraph 10(b) which says:-

"ensure that, except for gross misconduct, no employees are dismissed for a first breach of discipline."

The EAT pointed out that the tribunal had made no explicit reference to the Code of Conduct. The EAT felt that there were at least two breaches of the code.

There were no findings by the tribunal that the conduct of Mr Lock amounted to gross misconduct or had been identified as gross misconduct by the employers. Accordingly the EAT held that no reasonable employer would have dismissed someone for a first offence of this kind.

In fact the employers in this case had a very detailed disciplinary Code of Practice which had been agreed with the relevant trade unions. The EAT held that the unions could not, by agreement, deprive Mr Lock of the benefit of good industrial relations practice. In other words agreed procedures must also ensure that they comply with the ACAS Code.

The employers argued that there should be a Polkey reduction because of Mr Lock's conduct. This was also rejected by the EAT as they found that no reasonable employer would have dismissed for a first offence without first having told the employee that this would happen. This was therefore not simply a procedural error but a substantively unfair dismissal.

Men benefit from womens equality

Jesuthasan v London Borough Council of Hammersmith & Fulham, Court of Appeal (1998) IRLR 373

Legislative measures which have been declared incompatible with European law because they have an indirectly discriminatory effect, must be disapplied for all employees regardless of sex, the Court of Appeal has held.

This case concerned a male part-time teacher employed by the local authority at Wormwood Scrubs prison. He worked 8 hours a week for three years until his fixed term contract expired on 30 July 1993 without being renewed.

At this time, the Employment Protection (Consolidation) Act 1978 prevented him from bringing a claim for unfair dismissal or redundancy because he worked insufficient hours. He did bring a complaint of race discrimination.

In March 1994 the House of Lords decided in R v Secretary of State for Employment ex parte EOC that the hours per week qualifying thresholds were incompatible with European Community Law because they indirectly discriminated against women. Fewer women than men could comply with the hours requirement and this prevented a disproportionately high number of women from claiming unfair dismissal or redundancy payments.

The Employment Appeal Tribunal decided that the regulations only applied to dismissals after the Regulations came into force in February 1995.

As a result, the qualifying hours thresholds were removed by the Employment Protection (Part-Time Employees) Regulations 1995 in force from 6 February 1995. In April 1995 Mr Jesuthasan sought leave to amend his tribunal application to add a claim for unfair dismissal and a redundancy payment, relying on the new regulations.

The Employment Appeal Tribunal decided that the regulations only applied to dismissals after the Regulations came into force in February 1995. The Court of Appeal agreed that Mr Jesuthasan could not rely on them because he was dismissed before they came into force.

However, could he rely on the declarations made by the House of Lords in the EOC case? The Court of Appeal held that, even though the applicant was a man, he was entitled to rely on the House of Lords decision in the EOC case that the weekly hours qualifying thresholds were incompatible with article 119 of the EC treaty and the equal pay and equal treatment Directives because of indirect discrimination against women.

They declared that legislative measures which had been declared incompatible with EC Law on account of their indirectly discriminatory effects had to be disapplied generally in respect of all employees regardless of sex.

The qualifying conditions in the domestic statute were displaced by the overriding force of EC law, and the applicant's employer, as a emanation of the state, were bound by the direct effect of the Directives and Article 119.

Rights for Union Members

FW Farnsworth Limited v Mcoid (1998) IRLR 362

The existing law does not provide union members and officials with adequate protection against victimisation by employers. This is partly because of changes introduced by the Conservatives and partly because of interpretation by the courts.

The legal protection only applies where the employer has taken action short of dismissal against a union member or official as an individual. Labour proposes to amend the law so that it expressly covers deliberate omissions by employers as well as acts: for example failing to offer a benefit to a union member would be outlawed, as well as removing an existing benefit.

This deals with part of the outrageous decision of the House of Lords in Wilson and Palmer. But it still leaves other difficulties to be resolved.

A union member or official will only succeed if she or he can demonstrate that the action was directed against him or her as an individual. This difficulty was illustrated by the employer's arguments in the case of Mr McCoid, a TGWU shop steward.

The employers purported to "derecognise" Mr McCoid and refuse to deal with him as a shop steward. The employers argued that the action taken against Mr McCoid was not taken against him as an individual, but against the union.

The legal protection only applies where the employer has taken action short of dismissal against a union member or official as an individual.

It was not action which affected Mr McCoid as an employee, but as an official of the union. They argued that an earlier case of Ridgeway v National Coal Board [1987] IRLR 80 meant that Mr McCoid's case must fail.

The Employment Appeal Tribunal rejected this argument and accepted that Mr McCoid was not merely a victim of a general attack on the union, but that the action was directed at him as an individual.

This is a welcome decision, but it is not the end of the case. The applicant must still show that the purpose of the action taken against him was to prevent or deter him from taking part in union activities or penalise him for doing so. This is a difficult test to satisfy, not least as the union official must demonstrate to the Tribunal the purpose of his employer's actions, not merely their effect.

The law as it stands is unnecessarily complex. It places undue obstacles in the path of union members and officials bringing claims. It provides weaker protection than the legislation covering non-union representatives elected to deal with consultation on redundancies or transfers.

Similar protection should be extended to trade unionists. They should also be protected against being subjected to any detriment for belonging to the union, taking part in its activities or making use of its services.

This is a point which Thompsons has made in its response to the Fairness at Work White Paper. The law must be made simpler and easier to use.

Casual about employee status?

You might think that after 100 years the law would be clear as to who was - and who was not - an employee. But recent developments have shown that the picture is still far from clear.

"Employment" has a meaning that must be seen in context. For the purposes of sex, race and disability discrimination, "employment" has a wider meaning than it does in respect of "continuity of employment" for the purpose of statutory rights under the Employment Rights Act.

The scope of "employment" in European Directives remains uncertain. Moreover, in the context of some working arrangements, the common law choice may no longer simply be between a "contract of service" (employment) on the one hand as to opposed to a "contract for services" (self-employment) on the other.

So far as discrimination is concerned, Loughran v Northern Ireland Housing Executive [1998] IRLR 70, holds that the engagement of a solicitor by the Northern Ireland Housing Executive (by placing the solicitor on a panel for work) was within the definition of "employment": although not a contract of service or of apprenticeship, it was "... a contract personally to execute any work or labour ...".

Similar wording is reflected by the White Paper "Fairness at Work", in which the term "employees" is "... generally used to cover all those who work for someone else rather than on their own account, regardless of whether or not they are strictly employed under a contract of employment". This definition is likely to found the basis for minimum wage legislation.

> "Employment " has a meaning that must be seen in context.

But the problem is that it does not (yet) apply to employment rights generally. When looking to see whether flexible, casual, and short fixed term work (and, for that matter, "zero hours" contracts) amounts to "employment" the Courts attempt to reconcile conflicting principles.

First is the desire to avoid circumvention of statutory provisions intended (as a matter of public policy) to protect the weak (as in the health and safety field: Lane v Shire Roofing [1995] IRLR 493). Second is the approach which regards employment as a status, for which there must therefore be a "qualifying condition", linked with a conventional approach requiring mutuality of obligation (whatever that may mean) before a contract of employment is recognised.

Two cases reported earlier this year gave little hope that casuals would be regarded generally as employees. They suggested that the Courts would not find a contract of employment simply from the fact of personal work done on account of another.

In the first, Cheng Un Yuen v Royal Hong Kong Golf Club [1998] ICR 131, the Privy Council looked at the situation of a caddy at a Hong Kong golf club, which had trained him and equipped him with a uniform and locker, which exercised disciplinary powers over him and established a system by which he was allocated to individual members on a rotating basis in order to carry their clubs. He was paid in cash by the Club for each round he worked, with the Club debiting the golfer for the amount paid.

However, he was free to attend for work as and when he pleased, and received no sick pay, holiday pay, or pension. Although the

Labour Tribunal in Hong Kong determined that he was an employee of the Club, rather than an independent contractor to them, the Privy Council said it was wrong to regard the case as one of a choice between two alternatives.

Instead, the only reasonable view of the facts (they said) was that the arrangements between the Club and the caddy went no further than to amount to a licence by the Club to permit him to offer himself as a caddy to individual golfers on terms dictated by the administrative convenience of the Club and its members. Because he had no obligation to attend in order to act as a caddy there was between him and the Club "no mutual obligation that the Club would employ him and that he would work for the Club in return for a wage".

In Clarke v Oxfordshire Health Authority [1998] IRLR 125, a bank nurse was held not to be an employee. No contract of employment could exist (said the Court of Appeal) without mutual obligations lasting over the entire duration of the relevant period. However - importantly - although some mutuality of obligation was required, this "need not necessarily and in every case consist of obligations to provide and perform work". Payment of a retainer during periods of non-work would, for instance, be sufficient.

Two cases: two defeats for the individual worker - apparently bad news for casuals. Third time lucky, however. In Carmichael v National Power Plc [1998] IRLR 301, the Court of Appeal importantly set out the questions which an Industrial Tribunal should ask:-

(i) was there agreement between the parties?

(Merely putting one's name on a list of those "available for work" is unlikely to amount to an agreement: there has to be a bargain of some sort between the parties.)

(ii) what were the terms (both express and implied) upon which they agreed?

(iii) in the light of those terms, was the nature of the relationship a contract of employment (as opposed to self-employment, or some other agreement)?

There is a potential appeal to the House of Lords. Legislation remains the ultimate answer.

Carmichael is also important for the implied terms it identifies, which lead to the agreement being one of employment. Mrs Carmichael was engaged on an express "casual as required" basis.

Those words obliged her to work whenever the employer reasonably asked her to do so: in themselves a one way obligation, resting only on the worker, not on her boss. But Ward LJ found that National Power had in the circumstances impliedly agreed on its part to provide a reasonable share of the guiding work that became available from time to time.

Chadwick LJ found both that there was an implied obligation to ensure that work would be offered to those recruited and trained as station guides before being offered to anyone not so trained, and that there was an obligation to allocate work fairly as between the station guides. These obligations arose as a necessary corollary of the acceptance by the station guides of an obligation to work as and when required, and to undergo interview and training for that purpose.

Facts will differ from case to case. In many, a casual worker may not have a continuing relationship with the provider of work. Too much should not be required: after all, employees paid by piecework may have long lay off periods between batches of work. Home workers may be the same. Intermittency of employment does not mean that there is no employment - but it may be an indication of it.

However, though facts may differ, the approach should not. The approach in Carmichael gives any casual worker, where there are arrangements for requiring her to work or where there are arrangements for providing her with work, the prospect that the relationship will be a contract of employment with all its advantages and protections. What will not change - at least before Fairness at Work becomes fairness in law - is the position of the casual worker who secures his work on spec, even though he may do a lot of hours for the same provider of work.

Finally, a note of warning: there is a potential appeal to the House of Lords. Legislation remains the ultimate answer.

Payment in Lieu of notice: Debt under contract or damages for breach of contract?

Gregory v Wallace (1998) IRLR 387, Court of Appeal

Is payment made in lieu of a notice period a debt due under contract as found in Abrahams v Performing Rights Society [1995] IRLR 486, or alternatively is it damages for breach of contract?

Claiming the money as a debt means that any income from a new job could not be offset against it. If it amounts to damages for breach of contract, income from a new job could be offset against it thus reducing the value of the award in line with normal contractual principles.

Mr Gregory was employed as Group Financial Director on an annual salary of £125,000. In August 1992, he was given oral notice of the summary termination of his employment after the company was put into administration. Mr Gregory found a new job and started work on 21st September 1992.

Mr Gregory's Service Agreement provided for two years written notice of termination. It also said that if notice was given to terminate, he would not have to attend the office regularly and may accept other full time employment during the notice period.

Clause 1(c) of the Agreement said: "Upon the giving by [the employer] of such notice to terminate, [the employer] shall be entitled to terminate this agreement henceforth. In such event, [the employer] shall at the election of the executive either (i) pay to the executive in monthly installments in arrears over the two year period of the notice, the executive's gross basic salary at the rate in force at the date of termination of the employment; or (ii) pay to the executive the aggregate of all such monthly installments, discounted to reflect the present value as at the date of termination."

In 1995, Mr Gregory began proceedings against the administrators claiming his entitlement to two years' salary, discounted in line with Clause (c)(ii) of his Agreement, as a debt. Claiming the money as a debt meant that the income received from his new job would not have to be deducted from the two years' salary.

The administrators said that the summary dismissal was a repudiatory breach of contract and Mr Gregory' could only claim damages. They said the damages should be the net value of two years' salary and contractual benefits less income received by Mr Gregory in mitigation of his loss.

The High Court concluded that Mr Gregory was entitled to the sums claimed as a debt without deduction of earnings from other employment. Judgment was given for Mr Gregory in the sum of £227,838 in line with the decision in Abrahams.

The Court of Appeal held that the High Court Judge was wrong in saying that Mr Gregory was entitled to claim the sum as a debt. They said that, as the termination was oral and without any notice, it was therefore not a termination under the terms of the contract - and so could not be treated as a debt - but a deliberate breach of contract and therefore a claim for damages.

The appeal court said that those damages must be calculated on the basis that the contract would have been performed in the way that was most beneficial to the employer. In Mr Gregory's case, the employers would have given him two years notice, and it would have been their choice whether he worked the notice period or they terminated the contract straight away making the payments due under the service agreement.

However, because of the terms of Mr Gregory's agreement, he did not have to give credit for his earnings from other employment during his notice period. This is because if the employer had given notice to Mr Gregory, the terms of his contract permitted him to receive the money from the company and work for someone else. This is an unusual situation which will not often apply.

What are we to conclude from this decision? That whether an employee must give credit for sums from other employment depends on the wording of the contract and how it is terminated.

Deduction of wages for those working on a commission basis

Robertson v Blackstone Franks Investment Management Limited 1998, IRLR 376 Court of Appeal.

A refusal to pay commission arising from work done before the termination of a contract constitutes unlawful deduction of wages, the Court of Appeal has held. The decision is important to all those paid or part paid on a commission basis. But the Court of Appeal also held that an advance payment against future commissions can properly be deducted from future commission earned.

Mr Robertson was engaged by Blackstone Franks Investment Management Ltd as a self employed consultant in their investment advice and assistance business. His contract provided that he would be paid on a 'commission only' basis. The company's procedures stated that 'commission will only be payable during the continuation of this agreement when the business has been completed and commission received by the company. Any business introduced but not completed at the date of termination will be completed on your behalf'.

When Mr Robertson's employment began the company agreed to make an advance against future commissions. But after the termination of his contract nine months later, Blackstone Franks failed to pay him commissions for business he had introduced, but which had been completed after his contract terminated. Mr Robertson applied to the Industrial Tribunal, alleging that refusing to pay him amounted to unauthorised deductions from wages, under Part II of the Employment Rights Act (formerly the Wages Act 1986).

Mr. Robertson was entitled to commissions totalling £14,126.50.

The issue was whether commissions payable after the termination of the contract were 'wages' within the definition of s27 Employment Rights Act and whether the advances could be set off against unpaid commission.

The Industrial Tribunal decided that Mr Robertson was entitled to the commissions arising after the termination of his contract, which amounted to £14,126.50; that those commissions were wages within the meaning of the Act and that, in refusing to pay them, Blackstone Franks had made unauthorised deductions from his wages. The Tribunal decided that the Blackstone Franks could not offset the commissions owed against the £10,000 advance payment.

The employer appealed. The EAT agreed that commissions payable after a contract has terminated are wages.

However, it held that Blackstone Franks could take into account the £10,000 paid in advance, and therefore they only had to pay the balance between the advance commission and the total commissions owed - £4,126.50

The Court of Appeal has upheld the EAT's judgment. The definition of 'wages' under s27 refers to any sums and any commission payable to a worker, whether they become payable or are paid before or after the termination of the contract; however, the sum must be payable 'in connection with his employment'.

The appeal court also agreed that Blackstone Frank's could take into account the sum which they had already paid to him as an advance against future commissions. Therefore, in future, Tribunals must consider whether an employer has already made a payment 'in respect of a deduction', and the question of whether that payment was made before or after the deduction is not relevant.

Commission based pay is increasingly used by employers, particularly for sales staff. Overall this ruling is helpful in confirming the protection of commission earnings in the wages section of the Employment Rights Act.

Fairness at Work White Paper: Family Friendly Policies

It is quite refreshing to see a chapter of an employment White Paper sincerely devoted to the conflicting pressures of work and parenthood and an acknowledgement of the need to adopt an integrated, rather than piecemeal approach. There is a clear identification of the issues in the employment field: low family incomes, excessively long working hours and greater flexibility for parents.

So far so good. No right thinking person can oppose 'Family Friendly Policies' which are universally acknowledged as a good thing. But the consensus cracks when examining what the term should mean in practice and the extent of coercion needed to enforce it.

The strategy in the White Paper relies mainly on existing measures initiated by Government and European requirements following the signing of the Social Chapter. There is little that is new and no mention of sex discrimination and equal pay legislation or policies. While women bear the brunt of child rearing responsibilities and suffer from 'pin money' syndrome, it is a glaring omission.

It is to be hoped that the Equal Opportunities Commission recommendations, when finalised, can be added on later to rectify the gap. It is only through effective enforcement of equal pay legislation that parents will be able to truly share the burden of childcare and use equality in the labour market to create equality at home.

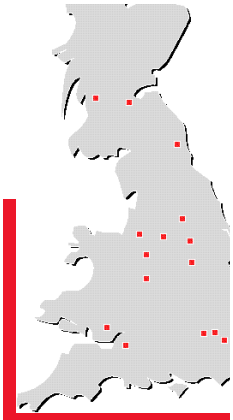
The White Paper contains excellent, essential and long overdue proposals for improving maternity rights, these have been championed by trade unions, Maternity Alliance and (even) the judiciary:

- One year qualifying service for extended maternity leave (29 weeks after the birth of the child) to fit in with the planned lowered service requirement for unfair dismissal. This will give added protection to a large section of the female workforce.
- The continuity of contract during maternity leave which has created problems for women, managers, Tribunals and lawyers. By establishing continuity of contract all sides will benefit from certainty and women will gain added protection both during maternity leave and on their return to work. It also ensures consistency with the 18 week general maternity leave period for those with less than one year's service.
- The provision of 18 weeks maternity leave (an increase from the current 14 weeks) for those with less service with that employer. This not only ties in with the period of statutory maternity pay but also lessens the risk of women being forced to return to work sooner than is good for them or their children.
- The proposed simplification of the employees notification obligations around maternity leave are welcome. Much will depend on the detail of the amendments: they should be both simplified and non-compliance should not automatically deprive women of their rights.

The implementation of the Parental Leave Directive is one of the three European measures which forms the backbone of the White Paper strategy. The other being the Part Time Workers Directive and the Working Time Directive.

The Parental Leave Directive is to be implemented by December 1999 and will provide three months parental leave, unpaid and time off for family emergencies coupled with anti-victimisation provisions for those making use of the rights. The research so far suggests that parental leave that is unpaid will not be extensively taken up and that some mechanism for ensuring that the leave is paid will be necessary to give effect to the intention behind the Directive. Work also needs to be done to ensure maximum flexibility for employees in using the time off provisions to cater for their particular parental needs.

The effectiveness of the Family Friendly Policies will partly depend upon securing proper implementation of wider policy commitments beyond employment law as well as the need to strengthen and underpin labour legislation and discrimination law.



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