THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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ISSUE 21 April 1998

Dismissal claims to be adjourned pending Seymour-Smith

Davidson v City Electrical Factors Ltd [1998] IRLR 108

R v Secretary of State for Employment ex parte Seymour-Smith currently before the European Court of Justice (see LELR No. 2) challenges the two year qualifying period for unfair dismissal applications on the basis of indirect sex discrimination. Industrial Tribunals across the country have been adopting different approaches to claims for unfair dismissal brought when the applicant has more than one year but less than two years service.

Some tribunals have been striking out unfair dismissal claims unless the applicant can show that s/he comes within the ambit of the Seymour-Smith case. This means that applicants lose their right to bring claims for unfair dismissal forever due to the strict three month time limit for bringing a claim.

In a pragmatic and welcome decision the Employment Appeal Tribunal in Scotland has decided that in these circumstances an applicant can insist on an adjournment.

Mr Davidson was dismissed when he had more than one but less than two years' service. He tried to bring a claim for unfair dismissal relying on the outcome of Seymour-Smith which challenges the validity of the Unfair Dismissal (Variation of Qualifying Period) Order 1985, increasing the qualifying period for bringing a claim for unfair dismissal from one year to two. The challenge in the ECJ is under Article 119 of the European Community Treaty on the basis that the two year qualifying period indirectly discriminates against women.

Mr Davidson argued that if the 1985 Order was found to be incompatible with European Law, the House of Lords could issue a declaration to require the courts to disregard the provisions of the Order. This would have the effect of returning the position to the previous law which provided a qualifying period of one year. He therefore asked for his claim to be adjourned until the decision in Seymour-Smith.

The Employment Appeal Tribunal in Scotland held that any unfair dismissal applicant who has between one and two year's service has an enforceable right to an adjournment pending the outcome of Seymour-Smith. If Mr Davidson's application were not adjourned it would be destroyed, in line with Biggs v Somerset County Council, there was no possibility of re-opening the case.

This welcome decision means that where an employee is dismissed and has between one and two years service an unfair dismissal application should be lodged with the industrial tribunal together with a request for an adjournment of the hearing while we await the decision in Seymour-Smith. It is understood that the Advocate General's opinion in Seymour-Smith is due soon. The decision of the EAT (Scotland) is binding on industrial tribunals in England and Wales.

Where an employee is dismissed and has between one and two years service an unfair dismissal application should be lodged with the industrial tribunal.

New cases highlight inconsistent approach by the courts

Loughlan and Kelly v Northern Ireland Housing Executive [1998] IRLR 70
Clark v Oxfordshire Health Authority [1998] IRLR 125

The scope of application of employment rights is a key issue. The evolution of different types of working relationship has been accompanied by a move by some employers to exclude certain categories of worker from employment protection. Notable examples are casual employees, zero-hours contracts and bogus self-employment.

The Labour Government has shown a welcome willingness to tackle this issue. The National Minimum Wage Bill adopts a broad definition of worker which extends protection to many who would not otherwise be covered (see issue 18).

Two recent cases highlight the importance of the issue and the inconsistency of the present legal position. Loughlan and Kelly decided that a self-employed solicitor could claim discrimination under Northern Ireland's Fair Employment legislation for a refusal to add him to a panel of lawyers doing work for a public body.

This was because he would have been contracting to provide services personally, which brought him within the broad definition of employment in discrimination legislation. The position was different for a partner in a firm of solicitors as she would not be contracting to provide the service "personally".

This broad definition also applies to discrimination laws in England, Scotland and Wales. It has enabled a female barrister to challenge the predominantly male appointments to the lists of government counsel.

This case shows that the concept of engagement to provide personal work or labour is intended to be a wide and flexible one. It demonstrates the broad coverage of anti-discrimination laws.

The scope of application of employment rights is a key issue.

The coverage of other employment rights is not so broad. Rights such as unfair dismissal are based on a narrower definition of "employee", which requires a contract of employment.

The implications of this restriction are apparent from the Court of Appeal's decision in the important case of Mrs Clark. She worked for a health authority "bank" of nurses as a staff nurse.

Her conditions of service stated that bank nurses are not employees and had no entitlement to guaranteed or continuous work. She was paid on Whitley Council terms and tax and National Insurance were deducted from her pay. Her contract included provisions on discipline, grievance and confidentiality.

The Employment Appeal Tribunal had decided in Mrs Clark's favour that she was continuously employed, even over those periods where she did not work but took what was effectively unpaid leave. The Court of Appeal overturned this.

The appeal court said that there was not a global contract of employment covering the whole period, because there was no "mutuality of obligation" during the periods when Mrs Clark was not working. During those periods the Authority was under no obligation to offer work and the nurse was under no obligation to accept it.

This left open the question of whether Mrs Clark should be regarded as an employee for the periods when she was working which could be regarded as a specific engagement which amounted to a contract of employment.

This appears to leave the unsatisfactory situation that an individual may be an "employee" for periods when she is working, but not for periods when she is not in situations where the employer avoids any liability to offer work or pay a retainer.

This fails to recognise the overall reality of the relationship between the worker and the beneficiary of her work and fails to give proper regard to the pattern of service over a period of time. It is a recipe for avoidance by employers and should be eradicated by adopting a broad definition of worker in line with the current flexible labour market.

Sex discrimination laws used to challenge age discrimination

The Government has announced there will be no legislation outlawing age discrimination in employment, but a voluntary code of practice. In the absence of specific age discrimination legislation sex discrimination has been used successfully in one Industrial Tribunal to challenge a normal retirement age of 65 (Nash v Mash/Roe Group Limited).

Under Section 109 (1) of the ERA the right not to be unfairly dismissed does not apply to the dismissal of an employee if on or before the effective date of termination she/he has obtained:-

(a) In a case where:

(i) In the undertaking in which the employee was employed there was a normal retiring age for an employee holding the position held by the employee and,

(ii) The age was the same whether the employee holding that position was a man or a woman,that normal returning age and

(b) In other cases, the age of 65.

There are almost identical provisions concerning the right to a redundancy payment (Section 156 (1) ERA).

Mr Nash was 69 when he was dismissed after he had been off work following an injury to his leg. There was no normal retirement age applicable and therefore the default age of 65 came into play.

At the Tribunal Mr Nash produced statistics showing the number of men and, separately, women over the age of 65 who are economically active.

The Tribunal found on the basis of the statistics that there is indirect discrimination against men - there is a disproportionate effect and considerably more men than women are excluded from unfair dismissal rights and the right to a redundancy payment than women.

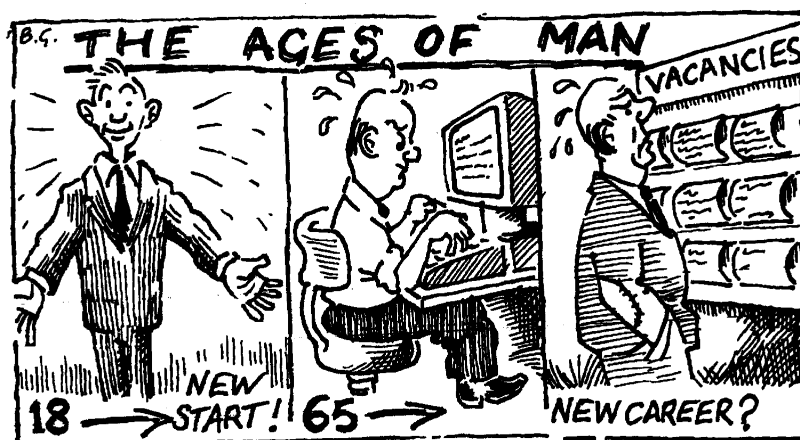
Mr. Nash was 69 when he was dismissed following an injury to his leg.

The Industrial Tribunal took the unusual step of inviting the Secretary of State for Trade and Industry for representations as to the social policy implementations justifying the default retirement age of 65, but the Government did not make any representations. The employers were not in a position to know the Government's thinking behind the legislation and therefore no objective justification had been made out in the case.

The Tribunal held that both redundancy payments and unfair dismissal compensation were classified as pay under Article 119. By directly applying Article 119 of the Treaty of Rome they disregarded the domestic legislation as it was incompatible with European anti-discriminatory legal obligations.

The case is almost certain to be appealed, but in the meantime consideration should be given to lodging claims for those over the normal retirement age. Where the default retirement age of 65 applies the national statistics provided in Nash can be relied on to demonstrate a disproportionate adverse impact on men.

Where a lower retirement age applies, it will be necessary to obtain statistics from the individual employer in relation to the gender of the workforce over the relevant age. If these show indirect discrimination, the onus shifts to the employer to demonstrate objective justification for the retirement age policy.



COURT GIVES GREEN LIGHT TO ROGUE EMPLOYERS

BBC v Kelly Phillips Court of Appeal 1469/98 Case No. EAT RF 971051 CMS3 (Unreported)

The Court of Appeal has given the green light to unscrupulous employers to extend the abuse of waiver clauses in fixed term contracts to deny workers unfair dismissal rights and redundancy payments.

In general, the law does not allow workers to sign away their statutory rights to employment protection. The exception is for rights to claim unfair dismissal and a redundancy payment at Industrial Tribunal. These rights can be signed away where workers are employed on a fixed term contract of one year or more for unfair dismissal rights and two years or more for redundancy payments where the worker agrees in writing before the expiry of the fixed term contract to waive their rights.

These agreements are known as waiver clauses. Waiver clauses apply only to dismissal by reason of expiry of the fixed term contract and do not stop a worker claiming unfair dismissal if they are dismissed during the term and not at the end of the fixed term contract.

The question in this case was where a worker is employed on a series of fixed term contracts can the employers add the different contracts together to create a contract for a year or more or does the last fixed term contract have to be for a year or more to make the waiver clause valid?

Ms Kelly-Phillips worked for the BBC on a series of four fixed term contracts renewed one after the other, the last contract being for a fixed term of three months. All four contracts contained waiver clauses.

As concerns had arisen over her capability, the fourth contract was not renewed and she was dismissed. She was given no proper opportunity to challenge the capability concerns, no disciplinary action was taken against her, the contract was simply not renewed.

She wished to pursue a claim of unfair dismissal to the Industrial Tribunal and argued that as her last contract was only for three months the waiver clause was not valid. The BBC argued at the Industrial Tribunal that the clause was valid because the tribunal were entitled to aggregate earlier contracts to create a fixed term contract of a year or more.

The tribunal found for Ms Kelly-Phillips commenting, "We have to be astute to ensure that the protection afforded to an employer by the use of fixed term contracts is only used in proper circumstances and not permitted or encouraged by judicial laxity to be used so as to have the effect of undermining the intention of the employment protection legislation. The use of fixed term contracts could have this effect if they were used consecutively, continuously and over several years".

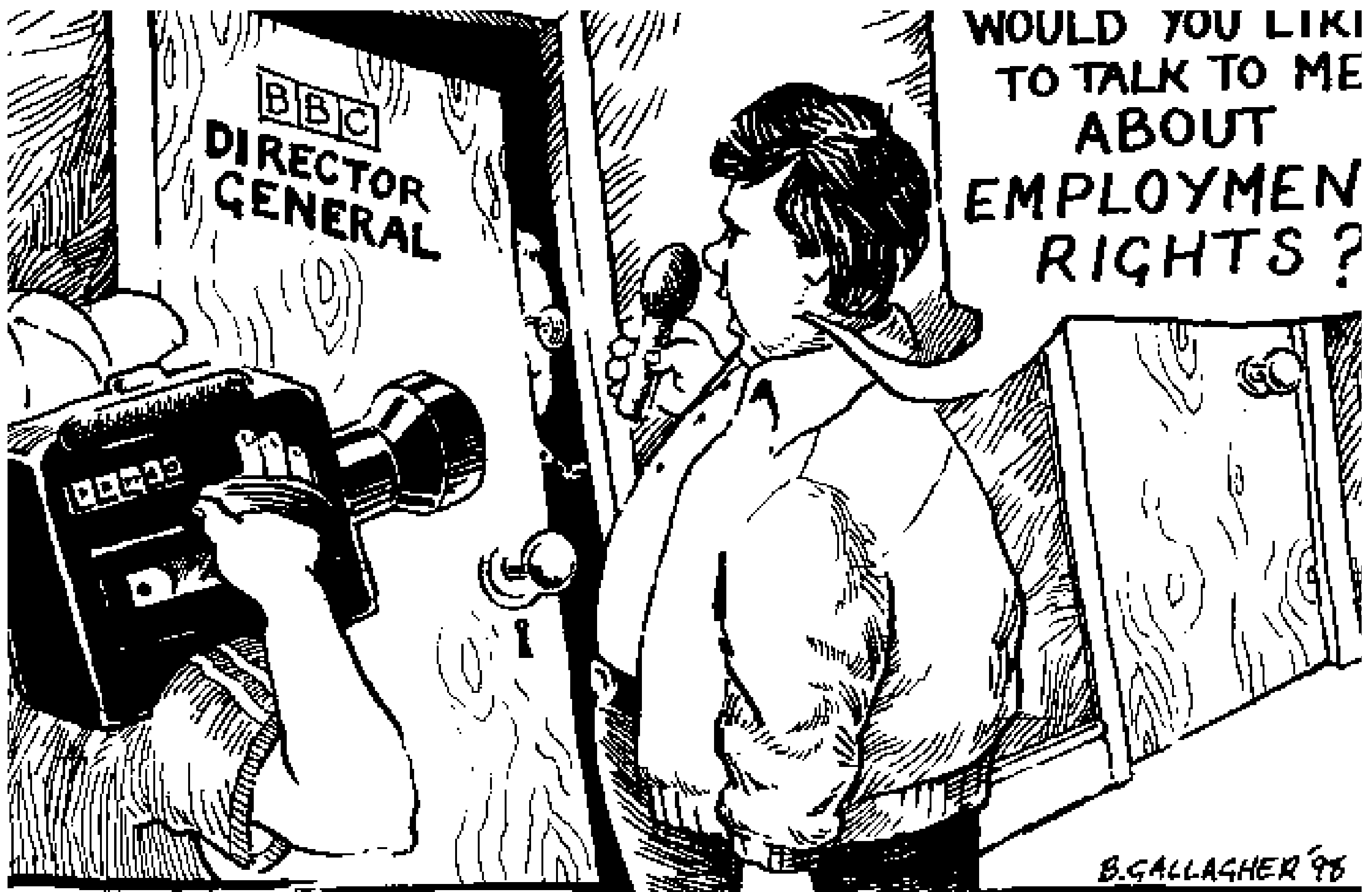
The BBC appealed to the Employment Appeal Tribunal who again found for Ms Kelly-Phillips and affirmed the "Denning test" on this issue established in the case of BBC v Ioannou 1975 ICR 267 CA.

In that case, then Master of the Rolls Lord Denning said: "where a worker was employed on a series of fixed term contracts one must always look at the final contract which expires for the purposes of the waiver clause"; "it matters not whether the final contract is a renewal or re-engagement. It is the final contract alone which matters in this regard".

He said that the BBC's arguments (which resurfaced in Kelly-Phillips) about whether the last contract was a renewal or re-engagement were "too fine a distinction for ordinary mortals to comprehend".

The BBC took Ms Kelly-Phillips' case to the Court of Appeal. The Court said they agreed with the Denning test - that it was the final contract which mattered - but disagreed with what they described as Denning's assumption that the last agreement for an extension is the relevant final contract. In Ms Kelly-Phillips' case the Court of Appeal accept that the last fixed term contract was a contract but say that it did not create a new contract of employment. The last contract they say was only an extension of the earlier contract.

The Court base their decision on their interpretation of Section 197 of the Employment Rights Act 1996 which allows contracting out of employment protection if the dismissal complained of consists "only of the expiry of that term without its being renewed".



Ms Kelly-Phillips argued that that section should be given a literal meaning; that the words "that term" mean that the term has to be "a fixed term of one year or more" so that a worker employed on a fixed term contract of one year and then a fixed term contract of three months should be regarded as being employed on a fixed term contract of one year followed by a further fixed term of three months and not one fixed term of fifteen months.

The court said they could see force in that argument if they could construe Section 197 on its own but felt they had to construe it with Section 95 which provides that for the purposes of unfair dismissal protection an employee is deemed to have been dismissed if "he is employed under a contract for a fixed term and that term expires without being renewed under the same contract".

The court placed great significance on the words under the same contract and decided that the words referred to a renewal including an extension of the term on the same or substantially the same terms as the original contract; section 95 contemplates there being no dismissal where a second fixed term is entered into.

Importing those considerations into Section 197 the court say it follows that (contrary to the view of the EAT) the words "that term" in Section 197 can and do mean "a contract which has been varied by an extension of the term under the same contract".

The Court of Appeal recognised that the effect of their decision is that where employees are employed on a series of fixed term contracts it is unnecessary for any of the contracts to be for a year or more - the employer can aggregate them together to create a fixed term contract of one year or more.

The Court of Appeal recognised that there may be potential for abuse of the extensions by fixed term contracts being extended repeatedly but say that it is for Parliament to correct if their interpretation of the statute is seen to be abused.

Help may be at hand from Europe. On the 5 March 1998, a mandate was agreed for negotiations on a Framework Agreement on fixed term contracts. The negotiating group on fixed term contracts had their first meeting in the first week of April.

Any evidence of abuse by employers of fixed term contracts and waiver clauses will be gratefully received by Thompsons (FAO: Stephen Cavalier, Congress House, Great Russell St, London, WC1B 3LW).

An application has been made for leave to appeal to the House of Lords in this case.

Equal Opportunities Policies - Do they have contractual force?

Grant v South West Trains Ltd (No 2) [1998] IRLR 188

Many employers now have equal opportunities policies. They range from general statements of intent to highly developed policies.

After the Employment Appeal Tribunal decision in Secretary of State for Scotland v Taylor [1997] IRLR 608 it appeared that equal opportunities policies could be incorporated into an individual's contract of employment. The High Court in Grant v South West Trains found that South West Trains' equal opportunities policy was not incorporated into Lisa Grant's contract of employment.

The facts in Lisa Grant's case are reasonably well known due to the publicity surrounding her parallel claim to the European Court of Justice (see LELR No. 20).

Lisa is employed by South West Trains. She was refused a travel pass for her lesbian partner, Jill Percey.

Lisa's contract of employment provided that : "You will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and dependants will also be granted travel concessions."

The staff travel facilities privilege ticket regulations provide that: "Privilege tickets are granted to a married member of staff... for one legal spouse... Privilege tickets are granted for one common law spouse (of the opposite sex) subject to a statutory declaration being made that a meaningful relationship has existed for a period of two or more years." Lisa's request for travel concessions for her partner was turned down because her partner was not of the opposite sex.

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South West Trains also have an equal opportunities policy. This states "We are committed to ensuring that all individuals are treated fairly and are valued irrespective of disability, race, gender, health, social class, sexual preference, marital status, nationality, religion, employment status, age or membership or non-membership of a trade union. No one is to receive less favourable treatment on any of the above grounds or is to be disadvantaged by requirements or conditions which cannot be shown to be justifiable. Our aim is to eliminate unfair discrimination."

In parallel to Lisa Grant's claim brought in the Industrial Tribunal, she went to the High Court claiming that South West Trains equal opportunities policy had been incorporated into her contract of employment and that she was entitled to require South West Trains to extend the travel concession to her partner.

The High Court Judge did not accept that the equal opportunities policy had been incorporated into Lisa Grant's contract of employment. He said it was a statement of policy and not of contractual obligations.

He talked of the policy being "in very general, even idealistic terms. It also covers such matters as health and social class which would be alien to employment contractual law." The fact that the policy was issued to employees by letter rather than going through the machinery of negotiation was indicative that no contractual rights were in the minds of the employer or employee's representatives.

The Judge therefore found that there was no evidence of any contractual intention on the part of the employer or employee. In any event, the contract itself specifically provides that travel concessions are granted for one common law spouse of the "opposite" sex. The equal opportunities policy could not be imported to override such an express provision, so as to require the employers to grant a travel

concession to a "spouse" of the "same sex".

This decision will no doubt be used to challenge claims that such equal opportunities policies are incorporated into contracts. However, each case will depend on its own facts.

Where Trade Unions have been involved in negotiating the policy there may be greater force in the argument that the policy should have contractual force. Further, where an employee is seeking to enforce a right under an equal opportunities policy which is less politically sensitive and also where there is existing legislative protection, for example equal pay, then arguments for incorporation may be more straightforward.

DISMISSAL PREVENTION

Injunction prevents dismissals

Anderson v Pringle of Scotland [1998] IRLR 64

It is notoriously difficult to persuade a court to grant an injunction to prevent a dismissal, even where the employer has failed to follow its own procedures. A GMB case in Scotland represents a significant and welcome exception to that rule.

The case involves a number of features which may prove to have wider significance.

The first key element was the judge's decision that the terms of the collective agreement on redundancies were incorporated into individual contracts of employment. The agreement was specifically referred to in the employee's statutory statement of employment particulars.

The judge said that this incorporated the whole agreement. This included the method of selection, which provided for 'last in, first out'. This is significant.

Other cases have doubted whether collective agreements on redundancy are incorporated (see Alexander v STC [1998] IRLR 55) and the issues where agreements have been regarded as incorporated tend to revolve around entitlement to enhanced severance payments. A decision that the method of selection is an individual contractual right is a welcome positive step.

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The second significant point was the judge's willingness to grant the Scottish version of an injunction, an interdict, preventing a selection for redundancy on any basis other than last in, first out. The judge accepted that the mechanisms of dismissal rather than the principle of dismissal were in dispute.

This was not a case where the employer had lost trust and confidence in the employee and could not be expected to retain him. The judge observed: "It may be very difficult or inconvenient for the [employers] to abide by the priorities they have agreed to, but they can hardly call it unfair to be held to their own bargain."

This is a sensible and fair approach. It would be welcome if it were adopted by other judges. If so, it opens the way for actions to restrain redundancy dismissals in breach of agreed procedures. It may be possible to extend this to protect against dismissals without following agreed, contractual consultation procedures.

A few words of caution. This was an emergency decision by the equivalent of a High Court judge in Scotland. It is not binding on other judges in Scotland, England or Wales.

As it was an emergency decision the judge did not need to make final findings on the contractual position, merely decide whether the case was sufficiently strong to justify a temporary order. Nonetheless, this is a decision which may be deployed to the benefit of unions and employees.

Dismissing without notice

Morran v Glasgow Council of Tenants Association [1998] IRLR 67
Janciuk v Winerite Ltd. [1998] IRLR 63

In two recent cases the court had to consider what should be done to put right a breach of contract by an employer.

In Morran v Glasgow Council of Tenants Associations (1998) IRLR 67 Richard Morran was sacked without notice when he was three weeks short of two years needed to qualify for unfair dismissal rights. He had a contract of employment giving him 4 weeks notice of dismissal. The contract also said that his employers could pay him wages in lieu of notice.

When the case reached appeal, it was agreed that he should not have been dismissed without notice and that he should therefore be paid four weeks wages. But it was also argued for Mr Morran that the employer's breach of contract had deprived him of his unfair dismissal rights and that he should be compensated for too. If they had given him the notice provided in the contract he would have stayed employed until he had two years services and could challenge the fairness of the decision.

This argument had been considered by judges in earlier cases, but there had never been a decision on the point.

Nor was there in this case. The judges relied on Laverack v Woods [1967] 1QB 278 CA for the proposition that where a contract was broken, damages had to be “what the plaintiff would have gained in money or money's worth if the defendant had fulfilled his legal obligations and had done no more”. In Richard Morran’s case the employer had a contractual right to pay wages instead of giving notice. His employers could have dismissed him lawfully before he had unfair dismissal entitlement, and so he could not claim that he had been deprived of that by their dismissal.

Although this fine detail meant Mr Morran was unsuccessful, the judges carefully said that this was not a ruling on cases where the employers had not specified in the contract that wages could be paid in lieu of notice. So in a similar case it would be worth taking a careful look at what the contract says.

The Laverack case was relied on by the Employment Appeal Tribunal in another case where a claim was made for damages for breach of contract. In Janciuk v Winerite Ltd. (1998) IRLR 63, Mr Janciuk had a contract which set out a disciplinary procedure which had to be followed. He was summarily dismissed without this, though given two weeks wages.

This case was about contract. If it had been about unfair dismissal the Polkey principles would have been followed.

Mr Janciuk’s lawyers argued that if they had followed the disciplinary procedure he might not have been dismissed and he was entitled to compensation for loss of that chance.

The argument was rejected. In contract all the employee could get was his entitlement had his employers gone about it lawfully. They would have followed procedure and then dismissed him a week later. The court would not speculate about what the outcome of that might have been - though they did say that this might be different if there was evidence they had acted in bad faith.

This case was about contract. If it had been about unfair dismissal the Polkey principles would have been followed, and there would have been an assessment of what difference it would have made. The lesson of these cases seems to be to read the contract carefully and see what the least an employer had to do to comply with the letter of the law. Beyond that the tribunal will not go.

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