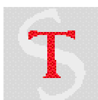
THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 23 June 1998

EDITOR'S NOTE: You will have received several editions recently - We're now up to date and on schedule!



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SOLICITORS

Employee power

Carmichael and Leese v National Power, Court of Appeal, March 1998 (unreported)

Under present legislation, the gateway to most rights at work is employee status: if you are not an employee, you do not qualify. This is an issue addressed in previous editions of LELR covering workers such as auxiliary coastguards (Jones v Coastguard Agency) and bank nurses (Clark v Oxfordshire Health Authority).

The decisions of the courts are not always consistent and the results sometimes appear arbitrary. This makes it difficult for workers and employers to know in advance their legal rights and responsibilities.

There are encouraging signs that the Labour Government has addressed this issue. Both the National Minimum Wage Bill and the draft Working Time Regulations extend rights to "workers". The Fairness at Work White Paper proposes to do likewise for other employment rights.

This is a wider definition than "employees". It covers all those who provide services personally, apart from those who do so as a business to a client.

Until this approach is universally adopted it is still necessary for workers to show they are "employees" to obtain rights to written statements of particulars, itemised pay statements, statutory rights to time off for certain activities or duties and protection against unfair dismissal and redundancy.

GMB has scored a notable victory on this front in a Court of Appeal decision concerning two guides working for National Power. Their job was to show visitors round Blyth Power Station.

They applied for the job on an application form, were interviewed and received a written offer which they accepted. The job was described as on a "casual as required basis".

The employers, National Power, argued that this meant that the two women were not employees, although they paid their tax and National Insurance.

The Industrial Tribunal and Employment Appeal Tribunal accepted this argument. They said there was no employment because their was no "mutuality of obligation": National Power was not obliged to provide work or pay them when no work was available; the guides were not obliged to attend when asked.

One of the Court of Appeal judges shared this view but he was out-voted by his two colleagues.

The decision of the majority of the Appeal Court has major implications for casual workers. They decided that a contract to work on a "casual as required basis" creates an obligation on the employer to provide a reasonable share of work to each guide when it became available and an obligation on the guides to carry out a reasonable amount of work.

The employer was required to give reasonable notice of the work to be carried out and if such notice was given the guides were required to attend and carry out the work.

On this basis, the Court said that there was a "mutuality of obligation" which pointed towards a contract of employment. This was a "global" or "umbrella" contract for the whole of the period of employment, as opposed to a series of separate contracts each time the guide was asked to carry out a tour and agreed to do so.

This is a welcome contrast with the more restrictive approach taken by the Court of Appeal in the bank nurse case (Clark v Oxfordshire Health Authority [1998] IRLR 125).

These mutual obligations will arise in most, if not all, casual employments. This is a major step towards recognition that working on a "casual as required basis" must be treated as "employment" for the purpose of statutory rights: and treated as such for the whole of the period of the relationship between employer and casual worker.

Industrial Tribunals will still have to apply the normal tests for establishing employment status. It is worth pointing out that Ms Carmichael and Ms Leese clearly worked under the control of the employer, paid tax and N.I. and were on the national pay scale: all indicators of employment status, which may not be present in every case.

However, the key advance made by this case concerns the nature of obligations between employer and casual worker which should mean that cases brought by casual workers will not in future "founder on the rock of mutuality of obligation" as the IT and EAT believed this case had done.

Unfair dismissal compensation

Whelan v Richardson [1998] IRLR 114

Working out compensation for unfair dismissal is fraught with difficulties. A recent case highlights the issues and resolves at least one of the problems.

Julie Richardson was employed as a shop assistant in an off licence until the termination of her employment on 4 August 1995. She earned £72 per week. Following her dismissal she was unemployed for two weeks. She then got a new job as a shop assistant earning only £51.60 per week.

Ms Richardson did this job for 18 weeks and then started a new job on 27 December 1995, again as a shop assistant but earning £95.82 per week more than she had earned in the off licence. She continued in this job until the remedies hearing in November 1996.

The Industrial Tribunal found that Julie Richardson had been unfairly dismissed. She was awarded a basic award and a compensatory award including loss of earnings and loss of statutory rights.

In assessing compensation the tribunal had to decide whether her loss of earnings should be calculated up until 27 December 1995 when she first got the higher paid job, less the money earned from the first job, or whether the loss should be calculated up to the date of the remedies hearing, giving credit for the whole of the income earned during the period from the date of dismissal.

If the second method was used, Julie's claim for loss of earnings would have been be extinguished by the higher pay she had received from 27 December until the remedies hearing. The IT adopted the first method and awarded £511.20 for loss of earnings. The employers appealed.

The Employment Appeal Tribunal held that the IT was correct in calculating the loss of earnings over the period from dismissal to the date she obtained permanent higher paid employment, rather than to the date of the remedies hearing.

The EAT said that as soon as the employee obtains permanent alternative employment paying the same or more than her pre dismissal earnings her loss attributable to the action taken by the employer ceases. It cannot be revived if she then loses that employment either through her own action or that of the new employer.

Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to her taking the new employment. The chain of causation is broken.

The EAT emphasised that they were not seeking to fetter the discretion by ITs on the facts of any individual case. However their guidance is most helpful and should avoid the problem of employer's seeking to avoid paying compensation on the basis of their former employee's success in getting higher paid work.

New codes: same contents

Revised Codes of Practice on:

Disciplinary Practice and Procedures in Employment;

Disclosure of information to trade unions for collective bargaining purposes;

Time off for Trade Union Duties and Activities.

ACAS have revised and updated these three Codes of Practice with effect from 5 February 1998. The changes are very minor indeed and they represent a missed opportunity to modernise the codes in what was hoped to be the spirit of New Labour and strengthened trade union and employee protection rights.

It is interesting that ACAS has decided to update the codes before the Fairness at Work Provisions come into effect.

The revised codes make minor changes to tie up with the new section amendments (primarily in the Trade Union Labour Relations (Consolidation) Act 1992) which have come into effect since the last codes were published in 1977 in the case of both the codes on Disclosure of Information and Disciplinary Practice and 1991 in the case of the code on Time off for Trade Union Duties.

THE MULTI HEADED ERDRA

The Enactment of the Employment Rights (Disputes Resolution) Act 1998 - ERDRA

This Act had its genesis in the then Conservative Government's Green Paper of December 1994 "Resolving employment rights disputes: options for reform". The aim then was to cut costs in the Industrial Tribunal system and to reduce the number of cases being brought.

Nearly four years later, and with some of the more extreme suggestions omitted, the proposals have now become law. Enacted, but largely not in force with no implementation date yet announced, but anticipated by the summer.

Of immediate effect, however, is the right of appeal against Tribunal decisions in breach of contract cases to the Employment Appeal Tribunal. When ITs were given the power to hear breach of contract claims in the Industrial Tribunal's Extension of Jurisdiction Order 1994, no appeal procedure from Tribunal decisions was set out.

Appeals from ITs have been stayed in the EAT as they had no power to hear them as confirmed by the EAT case of Pendragon Plc v Jackson [1998] IRLR17.

The way is now open for the EAT to hear these cases and the power is made retrospective to deal with those cases which have been stayed.

RENAMING

ERDRA renames "Industrial Tribunals" as "Employment Tribunals". The knock on effect is that Chairmen will now be Employment Tribunal Chairmen and the Industrial Tribunals Act is renamed as the Employment Tribunals Act.

ARBITRATION

The Act enables ACAS to provide, fund and promote a scheme for the arbitration of unfair dismissal disputes. It is not at all clear how this will work in practice.

ACAS have not yet drafted a scheme, but are aiming for April 1999. The scheme will be voluntary: it will only be available where both parties agree to opt for it, and whether it will be attractive to Applicants or Respondents will depend upon the final terms.

A significant difference from current tribunal proceedings would be that the scheme will be confidential. ACAS have stated they intend the scheme to be free from legalism, but since lawyers will not be excluded from representing parties, this may be merely wishful thinking.

There will be no appeal on a point of law and the scheme can be entered by one of two routes - through an ACAS COT3 settlement or Compromise Agreement which refers the case to the ACAS arbitration scheme.

It remains to be seen whether the arbitration system will provide an effective alternative dispute mechanism to the tribunal system. It seems unlikely, however, since the arbitration scheme is likely to use the same legal tests and be stuck with the band of reasonable responses approach to unfair dismissal cases.

Another indicator can perhaps be found in the ACAS recent revisions to the Code of Practice on disciplinary practice and procedures in employment. This has not been substantively amended or updated from the 1977 Code - an indication of more of the same?

Initially the arbitration scheme will be limited to unfair dismissal disputes. But ERDRA provides that the scheme may be extended to other types of dispute including race, sex, disability and trade union discrimination cases. Arbitration awards can be enforced in the County Court.

COMPROMISE AGREEMENTS

The Act enables Compromise Agreements to be signed off not only by Solicitors and Barristers, but also trade union officials and Advice Centre workers. Trade union officials - officers, employees and members will be able to sign off Compromise Agreements if they are a member of an independent trade union and have been certified in writing by the trade union as competent to give advice and are authorised to do so on behalf of the union.

However, this will not cover lay officials who are employed by the other party or where the trade union is itself the other party to the Compromise Agreement. It is also necessary for the union to have an insurance policy in place to cover the risk of a negligence claim against the adviser.

Employers sometimes agree to pay legal costs for solicitors advising the employee: will they pay for the

cost of advice given by trade union officials? Advice Centre Advisers are prevented by the Act from seeking payment from the Applicant, but not from the other side.

It is a welcome extension to enable trade union officials to sign off Compromise Agreements and belatedly acknowledges the role of trade unions in negotiating settlements in unfair dismissal cases and other employment law disputes.

PENALTY CLAUSE

In what is likely to be an ineffective attempt to encourage employers and employees to resolve disputes internally, unfair dismissal Applicants can have up to two weeks' pay docked from a compensatory award if they have failed to use an internal appeal procedure (Section 13). It will apply in the following circumstances:

1. Where the employer provides a procedure for appealing against dismissal; and

2. The Applicant is given written notice stating both that the employer provided the procedure including the details of it either at the time of the dismissal or within a reasonable period afterwards, but

3. The Applicant did not appeal against the dismissal under the procedure (unless prevented by the employer from using it).

The tribunal can reduce the compensatory award by up to a maximum of two weeks' pay (subject to the current £220 limit on a weeks' pay), as the tribunal considers just and equitable. It will be interesting to see how often tribunals in practice make this deduction.

In an attempt at even-handedness, an employer can also be penalised if it provides a procedure for appealing against dismissal, but prevents the Applicant from appealing against the dismissal under the procedure. The Applicant's compensatory award can be increased by up to two weeks' pay because of the employer's failure, according to justice and equity. Ludicrously, there is no penalty on an employer who fails to provide an appeal procedure at all.

EXTENDING THE POWERS OF THE TRIBUNAL CHAIRMAN TO SIT ALONE

ERDRA extends the categories of case where Employment Tribunal Chairmen must sit alone (unless they exercise their discretion to sit as a tribunal of three) in the following proceedings:

- The right not to suffer deductions of unauthorised or excessive trade union subscriptions and political fund subscriptions;
- The employer's failure to pay all or part of a protective award;
- The right to receive a Section 1 statement of employment particulars;
- The right to receive a statement of changes in employment particulars;
- The right to be given an itemised pay statement;
- Guarantee payments;
- The right to remuneration where an employee is suspended on medical grounds (but not maternity grounds)
- Redundancy payments;
- Application for an employer's payment against the Secretary of State in insolvency situation;
- Appointment of unauthorised person where the employee has died intestate;
- Failure to pay compensation under TUPE.

These provisions will undermine the function of the tribunal as an industrial jury. For example, failure to pay a redundancy payment is not straight forward and often requires an analysis of whether or not a redundancy situation exists - an area where the expertise of the lay tribunal members is invaluable.

PROCEEDINGS WITHOUT A "FULL" HEARING

The Act empowers the Secretary of State to make tribunal procedure regulations so that a tribunal can determine cases without a full hearing in certain circumstances:

- Where both parties have given their consent for the proceedings to be determined on the basis of written evidence alone;
- Where the Respondent has done nothing to defend the case;
- Where it appears that the Tribunal has no power to grant the relief claimed or the Applicant is not entitled to it;
- Where the case is bound to be dismissed because of the decision of a superior Court; or
- The proceedings relate only to a preliminary issue.

The Act also introduces the concept of a Legal Officer. Tribunal procedure regulations can allow Chairmen to act alone and to delegate the function to Legal Officers provided the powers do not extend to determining proceedings or the carrying out of pre-hearing reviews. These will remain as judicial functions.

MISCELLANEOUS

Conciliation Officer's powers have been extended to claims for statutory redundancy payments and the Secretary of State will guarantee statutory redundancy payment disputes which have been awarded after conciliation.

Clause 14 prevents double recovery of compensation for Employment Rights Act and Disability Discrimination Act claims - bringing the DDA into line with the provisions in both the Sex Discrimination and Race Relations Act.

ERDRA does not extend to Northern Ireland.

Protecting whistle blowers at work - the Public Interest Disclosure Bill

Workers have access to a great deal of information which it may be in the public interest to disclose. They are often the first to know if something is seriously wrong in their organisation.

Until now many workers concerns are not heard and many do not speak up at all because of fear of reprisals for "blowing the whistle".

This welcome Private Members Bill, which is presently making its way through Parliament with Government support, seeks to address the issue. It is expected to become law.

It aims to protect workers who blow the whistle about certain issues in the public interest. Workers will be protected from unfair dismissal and from suffering any other detriment if they make a "qualifying disclosure" in a "specified manner".

QUALIFYING DISCLOSURE

A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following six matters:-

1.That a criminal offence has been, is being or is likely to be committed.

2.That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

3.That a miscarriage of justice has occurred, is occurring or is likely to occur.

4.That the health or safety of any person has been, is being or is likely to be endangered.

5.That the environment has been, is being or is likely to be damaged.

6.That information tending to show any of the above matters has been, is being or is likely to be deliberately concealed.

THE TEST

Vitally, the test for a qualifying disclosure contains a subjective test of belief. A worker will be protected if s/he reasonably believes that the information disclosed tends to show one of the above six matters even if this belief turns out to be mistaken.

However, a worker will not qualify for protection if s/he commits an offence by making the disclosure or if the disclosure is one to which legal professional privilege applies.

The Bill does not limit protection to disclosure of information relating to events in the UK alone but to events worldwide; so that, for example, a worker of a pharmaceutical company disclosing information about her/his employer's activities damaging the environment in South America will be protected.

DISCLOSURE: HOW & TO WHOM?

Once a worker establishes that the information which s/he wishes to disclose - in good faith - is a qualifying disclosure s/he must then follow one of the six specified procedures for disclosure to be protected.

First, disclosure to an employer or other responsible person.

Secondly, disclosure to a legal adviser if made in the course of obtaining legal advice.

Thirdly, disclosure to a Minister of the Crown where the worker's employer is an individual appointed under an enactment by a Minister of the Crown or a body whose members are so appointed.

Fourthly, there is provision in the Bill for the Secretary of State to make an Order prescribing individuals to whom protected disclosures may be made. The scope of these proposals is as yet unclear.

It appears to be intended that the Secretary of State will prescribe different individuals for different subject matters and that a worker must be careful to provide disclosure to the correct specified person to obtain protection.

Fifthly, a worker may be protected if s/he discloses information to persons other than an employer, legal adviser or Government Official if s/he jumps through the following additional hurdles.

S/he must establish that s/he reasonably believes that the information disclosed and any allegation contained in it are substantially true; must not make the disclosure for purposes of personal gain and must satisfy the tribunal that in all the circumstances of the case it is reasonable for her/him to make the disclosure. S/he must in addition satisfy a tribunal that any one of the following three conditions are met;

1. That at the time s/he makes the disclosure s/he reasonably believes that s/he will be subjected to a detriment by

her/his employer if s/he tries to follow the employer or prescribed person disclosure route.

2. Where there is no prescribed person for the sort of disclosure which the worker wishes to make s/he reasonably believes that it is likely that evidence will be concealed or destroyed if s/he makes a disclosure to his/her employer direct.

3. That the worker has already made a disclosure to the employer or a prescribed person.

In assessing reasonableness under this fifth route a Tribunal will look amongst other things at the identity of the person to whom disclosure is made.

EXCEPTIONALLY SERIOUS BREACH

Finally, a worker may leap frog any or all of the above procedures where the disclosure is of an "exceptionally serious breach" and the worker can establish that in all the circumstances it was reasonable for him or her to make the disclosure.

In assessing reasonableness under this final provision the Bill provides that regard must be had to the identity of the persons to whom the disclosure is made. It is proposed that the Bill will protect not only employees but also freelance and agency staff.

PROTECTION

A dismissal for making a protected disclosure will be automatically unfair and a complaint may be made to a tribunal if a worker suffers any detriment as a result of making a protected disclosure.

It is not yet clear what compensation workers will receive if they are successful in complaints to the tribunal. The Bill gives the Secretary of State power to issue regulations setting out a different manner of calculation of compensatory awards from those which presently apply to ordinary unfair dismissal claims.

Transfers and economic dismissals

Warner v Adnet (IDS Brief)

There is an apparent contradiction in the wording of the Transfer of Undertakings (TUPE) Regulations when it comes to dismissals. The Regulations say that a dismissal for a reason connected with a transfer is automatically unfair.

However, they go on to state that a dismissal may be fair if it is for an economical, technical or organisational (ETO in the jargon) reason entailing changes in the workforce. This raises the question of how these two provisions inter-relate.

Many have argued that it is contradictory to suggest there can be two reasons for dismissal. A dismissal is either for a reason connected with a transfer or it is for an ETO reason: it cannot be for both.

Applying this argument, a tribunal which determines that a dismissal is for a reason connected with a transfer would be precluded from deciding that the dismissal is for an ETO reason. A dismissal can only be for an ETO reason if that reason is unconnected with a transfer, in the sense that the reason for dismissal would have arisen in any event even if the transfer had not taken place.

This argument was raised by the Advocate General in the European Court decision of D'Urso. It was pursued unsuccessfully in the Employment Appeal Tribunal in the case of Trafford v Sharpe [1994] IRLR 325. It has now been dealt a further, and perhaps fatal, blow by the Court of Appeal in the case of Warner v Adnet Ltd.

Mr Warner was employed by a computer company which encountered financial difficulties. Administrative receivers were appointed.

The company was unable to pay its debts. A financial report indicated that four employees would have be made redundant, that the receivership would allow the company to trade in the short-term and that the business would be offered for sale as a going concern.

All staff were dismissed. Some were offered re-employment, but not Mr Warner who, along with three other employees, was made redundant and not given the opportunity of re-engagement.

The IT found that the dismissal was for a reason connected with a transfer, but that it was also for an ETO reason with redundancies of non-essential staff being necessary regardless of the transfer. They went on to decide that the dismissal was fair, despite deficiencies in the consultation procedure, as consultation would not have made any real difference in the circumstances.

The Employment Appeal Tribunal and the Court of Appeal rejected Mr Warner's arguments against this decision. They said that when a tribunal decides that a dismissal is for a reason connected with a transfer, it is permissible for the tribunal then to consider whether or not a dismissal is for an ETO reason.

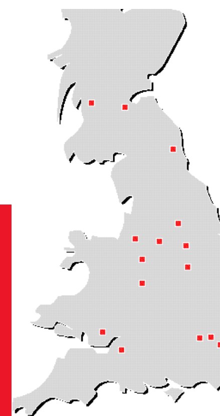
This was consistent with the wording of the Regulations and the Directive, which said that the provision on automatically unfair dismissals "shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce".

There is a danger that this approach can lead to unacceptable outcomes. Reorganisations often take place consequent upon a transfer. If dismissals in connection with those reorganisations are to be regarded as ETO reasons, this could lead to an unacceptable reduction in protection.

It cannot be right that a reduction in the needs for the workforce directly caused by transfer to a new employer is placed outside the automatically unfair dismissal protection.

The Court of Appeal probably did not need to reach its decision in this way. In Mr Warner's case, the economic circumstances leading to the dismissal predated the transfer.

Indeed, the economic circumstances appear to have driven the transfer. This must surely be different from a situation where the economic circumstances only arise as a result of the transfer: in those cases an employee should be entitled to the full protection of the Directive. Employers should not be able to engineer circumstances on the occasion of a transfer which enabled them to dismiss employees and rely upon the ETO defence.



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