CHAPTER 5

DISTINGUISHED SPEAKER: SAFEGUARDING EMPLOYEE RIGHTS IN EUROPE AND THE UNITED KINGDOM

CHRISTOPHER TICKLE *

In 1964, the United Kingdom set up Industrial Tribunals to hear appeals from employers against decisions of Industrial Training Boards, who could levy payment from them for the purpose of training within certain industries. The employers could appeal against the amount of the levy or against being asked to pay a levy at all.

From that small seed, an organization for the resolution of individual employment disputes was developed, so that now the vast majority of such disputes are decided by Industrial Tribunals (known from 1998 onwards as Employment Tribunals) rather than the civil courts.

This was a necessary development in the United Kingdom, which has no history of resolving employment disputes by private arbitration. The nearest the United Kingdom has to that is ACAS—the Advisory, Conciliation, and Arbitration Service—a statutory body created in the wake of the industrial relations legislation of the early 1970s.

The Arbitration Service

ACAS has a wide jurisdiction to give advice—whether requested or otherwise—to employers, employers' associations, workers, and trade unions, on any matter affecting industrial relations. The advisors are based in nine offices nationwide, and frequently give advice over the telephone! The advisor is required to remain impartial.

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*Regional Chairman of Employment Tribunals, Bristol, U.K.; Recorder of the Crown Court; Past President of the Council of Industrial Tribunal Chairmen; Immediate Past President of the European Association of Labour Court Judges, Bristol.

ACAS has formalized Codes of Practice. These do not have the force of law, that is, a breach of the code does not render a person liable to proceedings. The codes set forth recommended good practice and are used in evidence before Industrial Tribunals. There are codes on discipline, disclosure of information, and time off for union duties and activities.

In trade disputes, whether existing or anticipated, any party to the dispute may request the assistance of ACAS with a view toward bringing about a settlement. Such assistance may be by way of conciliation or any other means. However, to effect conciliation, all parties to the dispute must consent to ACAS involvement.

Today, ACAS's main role is in conciliating disputes between employers and individual employees who have brought claims in the Tribunals. ACAS receives copies of all applications, and an officer contacts the parties to try and effect settlement. The officer does not bring them together—rather, he or she communicates the views of each party to the other. The officer remains detached and impartial, must not express a view on the merits of the case, and must not try to produce a particular solution. He or she can give guidance, but has no power to require documents or call witnesses. If settlement is reached by this process—and the majority of applications are settled in this way—the agreement ousts the jurisdiction of the Tribunal and the matter cannot be litigated. The agreement is binding and enforceable at law.

Changes are afoot, however. The Employment Rights (Dispute Resolution) Act, 1998 empowers ACAS to decide small claims if the parties agree. This is designed to relieve the pressure on the Tribunals. How this will work in practice is debatable, since it is vital that ACAS retains its reputation for impartiality. There is a risk that its conciliatory service may suffer, if only by delay. For example, Industrial Tribunals might begin to hear cases that could otherwise have been settled, thereby creating longer waiting lists. Further, there would be no right of appeal from the officer's decision—unlike Tribunal decisions, where appeals on points of law can be brought to the Employment Appeal Tribunal, and thereafter to the Court of Appeal and the House of Lords. I anticipate that Employment Tribunals will continue to deal with the vast majority of contested cases, certainly those of substance and those involving points of law.

How did Employment Tribunals achieve their present position in the legal system, and what changes lie ahead?

The Beginnings

First came the determination of redundancy payments (i.e., unemployment compensation)—a financial award based on years of service. The issues concerned whether the employee was really redundant within the statutory meaning, or was dismissed for some other reason, and whether the worker was an employee—rather than working under a contract for services (e.g., a subcontractor). Continuity of employment (i.e., length of service) was also of import when there had been a change in employer. Was the business carried on after the change, or was it a new business?

Then, as a consequence of the Donovan Report recommending a cheap, informal, and speedy forum for the determination of disputes, the Industrial Relations Act of 1971 laid the real foundation by introducing the concept of unfair dismissal—a right based not on the contract of employment, but on good industrial relations practice and reasonableness. Industrial Tribunals, with support from the Employment Appeal Tribunal, then set the standard for the treatment of employees in the workplace.

The Organisation of Employment Tribunals

There are Employment Tribunals in 11 regions of England and Wales, and in Scotland. In Northern Ireland they double as Fair Employment Tribunals dealing with discrimination arising from the religious divide in the Province.

Tribunals usually comprise three members. There is a legally qualified chairman—not yet restyled "chair"—appointed by the Lord Chancellor, selected for the most part from experienced barristers and solicitors. Chairmen are our labour judges, and are responsible for advising the two lay members on the law, presiding over and regulating the hearings, and giving the decision orally at the conclusion of the hearing. The chairman then prepares and signs the written decision, required in every case, either in summary or extended form. In certain types of cases, specified by statute, chairmen sit alone, without members.

There are about 90 full-time chairmen in England, Wales, and Northern Ireland, and another 6 in Scotland. There are also about 250 part-time chairmen who sit for up to 50 days a year. They are practising solicitors or barristers. Lay members are selected from lists submitted by trade union and employer associations. They

have personnel, not legal experience, and they play a full part in Tribunal decisions.

Industrial Tribunals handle 90,000 or so applications a year, just under a third of which proceed to a hearing. Of these, about half relate to unfair dismissal. Breach of contract cases account for about 20 percent of the work. There are about 7,000 sex and race discrimination cases a year, and about 1,000 cases under the Disability Discrimination Act of 1995.

The Hearing

The procedure is designed to be cheap, speedy, and informal. Lengthy and complex pleadings are rare, though sometimes necessary in difficult discrimination cases. Time limits are short—in most cases, 3 months from the date of termination or the alleged discriminatory act. This contrasts with years in the civil courts.

Representation of parties occurs in only about 50 percent of cases. It is varied—trade union officials, employers' representatives, Citizens Advice Bureaux officers, friends or relatives—all usually unqualified. Solicitors and barristers do appear more frequently these days, as the law is more complex. Holding the balance between these disparate forces requires a special skill. It is a tribute to the system that many litigants are confident enough to appear unaided. Since Legal Aid is not available in Tribunals, however, for some parties this is not by choice.

Hearings are public and last anywhere from 5 minutes to days, if not weeks. Multiday cases are common. I chaired a discrimination case involving an Asian police officer who was complaining about not being appointed a detective. The hearing lasted 81 days. There were 75 witnesses and over 4,000 pages of documentation. Legal submissions lasted 6 days. The lay members and I took 20 days to reach our decision: we had to find the facts—our primary duty. The written decision ran to over 500 pages. It was worth it. The decision was not appealed. It was widely reported, and influenced practise in police forces throughout the country. Moreover, the police officer subsequently became a detective and received a commendation.

In complex cases, interlocutory hearings are held to give directions to prepare for the hearing. We may order discovery of documents, the exchange of witness statements, schedules of agreed facts, and written legal argument, for example.

Increasingly, witnesses give evidence by reading from witness statements. The chairman and members frequently ask questions, and adopt an interventionist role in the proceedings. This contrasts with the civil courts, where judges tend to leave it to the advocates to conduct their cases.

We aim to hear cases within 6 months from the date of the presentation of the application. Over 80 percent of cases are heard within this target—often much sooner.

Remedies

Our financial jurisdiction is unlimited in discrimination cases. Redundancy pay is limited to a maximum of £6,600, and unfair dismissal to £18,600 though there are proposals to increase it to £50,000. For breach of contract, awards are limited to £25,000, though the claims may greatly exceed this sum. Many decisions involve millions of pounds, especially when they involve mass redundancies, industrywide pensions, and equal pay. Class actions are not yet permitted.

We have power to order reinstatement of an unfairly dismissed employee, with increased financial penalties if the orders are not followed. Reinstatement orders are rare, however, mainly due to the length of time between dismissal and the hearing.

Jurisdictions

Employment Tribunals are primarily concerned with the dismissed employee. Only in disputes involving trade union members or officials are Tribunals authorised to enforce contracts, and even then only when action has been taken against them because of their trade union activities. Some discrimination cases involve applicants who are still employed, as do equal pay cases in the main.

Dismissal includes "constructive dismissal," where employees resign as a consequence of employer actions and consider themselves dismissed. Employees must prove their employers were fundamentally in breach of contract, and that they resigned as a consequence.

What constitutes "fundamental breach of contract"? The more obvious examples are nonpayment of wages, unilateral and significant changes to the terms and conditions of employment, and failure to provide work. But Tribunals have implied terms into contracts of employment. The most important is that the employer

will not, without reasonable and proper cause, act in a way calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Though long established, that implied term has only recently been approved by the House of Lords.[1]

This term is wide and includes a refusal to investigate complaints promptly and reasonably, unacceptable abuse, conduct so intolerable that it amounts to a repudiation of the contract, and failing to give employees reasonable support to enable them to perform their duties without disruption or harassment from fellow workers. These are but a few examples.

Other terms may be implied as well. Recently, a nonsmoker complained to her employers about an unacceptable working environment caused by those who smoked. Nothing was done. She eventually resigned and claimed constructive unfair dismissal. It was held that there is an implied term that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment that is reasonably suitable for the performance by them of their contractual duties.[2] The fundamental breach can be a single event or a series of small events leading to the "last straw." Fertile ground for the lawyers!

The Effect of the United Kingdom's Membership of the European Union

There is no limit to the sums that can be awarded in cases of sex and race discrimination. That was the result of a decision of the European Court of Justice (ECJ) in *Miss Marshall's Case No. 2*,[3] which held that United Kingdom law, which then provided the same compensation limit in cases of sex discrimination as unfair dismissal, failed to provide an adequate remedy. The government was obliged to remove the limit altogether. For the sake of consistency, it did the same in cases of race discrimination. How did that come about?

Pursuant to the European Communities Act of 1972, the United Kingdom joined the European Economic Community (EEC; now the European Union) on January 1, 1973. That incorporated the

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[1]*Mahmud v. BCCI SA,* 1997 I.C.R. 606.
[2]*Waltons & Morse v. Dorrington,* 1997 I.R.L.R. 488.
[3]*Marshall v. Southampton & South-West Hampshire Area Health Auth., No. 2,* 1993 I.C.R. 893.

Treaty of Rome (the Treaty) and European legislation into United Kingdom law, and gave supremacy to the ECJ, whose decisions take precedence over national law. This new legal order could create individual rights directly, without the need for national implementing measures. National courts were obliged to uphold and protect rights granted under EEC law over provisions of contrary national laws.

The Treaty involves the EEC in areas of social policy. Most relevantly for employment, Article 48 provides for free movement of workers within the EEC , and Article 119 provides for equal pay for men and women. It also provides for secondary legislation (Directives) under Article 189. These are proposed by the European Commission and approved by the Council of Ministers. They are instructions to member states to ensure national implementation of the result envisaged by the Directive. Member states are obliged to enact timely legislation to implement the Directives. Collective redundancies, equal treatment, and acquired rights (on the transfer of businesses) have been the most important Directives affecting labour law. But the train is still running. The government has just announced legislation to implement provisions of the Social Chapter of the Maastricht Treaty, which includes the Working Time Directive, and rules on data protection entitling employees to know what information is held about them by employers. The government has 2 years in which to implement directives on part-time work, the burden of proof in sex discrimination cases, works councils, and parental leave—all rights to be enforced through Employment Tribunals. Minimum wage legislation is also imminent.

Europe and the Individual Litigant

The ECJ has directed that obligations must be clear, precise, unconditional, and nondiscretionary to be enforceable by individuals. It has held that Articles 48 and 119 have direct effect, the latter in 1976 in *Defrenne*.[4]

Treaty articles have vertical and horizontal effect. When an individual seeks to use a Treaty provision against an employer who is the state or the emanation of the state—a public authority, police authority, health board, for example—that is vertical effect. A privatised utility like British Gas or a water company may be an

[4]*Defrenne v. SABENA,* 1976 I.C.R. 547.

emanation of the state, having special responsibilities for the provision of public services. Horizontal effect enables EEC provisions to be relied on in proceedings against private individuals or businesses.

Article 119, having both vertical and horizontal direct effect, can be relied on by individuals in cases against private employers. It is not a freestanding right, but is used to disapply, amplify, or interpret national law where it is not clear as to the extent of the obligation imposed, or where national law is in conflict or inconsistent with the Treaty provision. It has been used to establish what constitutes "pay" for the purposes of the Equal Pay Act. The ECJ has held that "pay" includes (1) rights to reduced or free travel on retirement from employment in state railways, (2) payments made by an employer by way of sick pay under national legislation, (3) contributions made to private pension schemes in the name of employees, (4) severance grants made on termination of employment under a collective agreement, (5) pensions payable from an occupational pensions scheme financed by the employer alone, and (6) redundancy or pension payments partially replacing the state retirement pension made from a "contracted-out" private occupational fund financed by employer and employee.

Using Article 119, the ECJ caused the United Kingdom to amend the Equal Pay Act to provide for equal pay based on work of equal value. It is presently considering whether the procedural limits imposed by that Act (time limits for applications, the limit of 2 years' back pay to equalise salaries) provide adequate remedies.

These cases originate in Employment Tribunals, on whom the burden of interpreting and applying European law affecting employees has fallen. Indeed, Industrial Tribunals have been in the forefront of most of the technical developments of European law, particularly in the fields of sex discrimination and equal pay. For example, a Tribunal in Truro referred the question as to whether the Equal Treatment Directive applied to transsexuals to the ECJ.[5]

References ask particular questions, and the court considers those questions and those questions alone. European jurisprudence does not rely on a system of precedent, and each case is treated on its merits and the particular questions answered. However, to achieve consistency, the court considers its previous decisions, its perception of policy, and cost implications. An example

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[5]*P v. S,* 1996 I.R.L.R. 347.

was the court's developing interpretation of "pay" under Article 119, to which I have already referred.

The most far-reaching decision was the case of *Barber*,[6] which held that pension provisions constituted pay for the purposes of Article 119. This was likely to cost insurance companies throughout the EEC billions of pounds to equalise outstanding provisions. The court recognised this, and made a "political" decision. It held that the requirement to provide equality of pensions would not apply retroactively.

Directives

The duty of national courts is to apply community law in accordance with the decisions and principles of the ECJ (Article 5 of the Treaty). National law must be interpreted in accordance with EEC law.[7] National legislation must be interpreted to give effect to the words and purpose of the Directive, so as to achieve the result intended by the EEC provision.

Thus, national courts have power under EEC law to add to, delete from, or hold ineffective, provisions of implementing national legislation to ensure that they give full and accurate effect to EEC law. This requires a purposive construction to legislation.

Just such a case was *Miss Marshall*'s.[8] She had been dismissed by an area health authority. The Industrial Tribunal found that she had been discriminated against on grounds of sex. The Tribunal decided that the remedy it could award, because of the statutory limit in the SDA, was inadequate to fulfill the purpose of the Equal Treatment Directive. It disapplied the limit and awarded compensation in excess of the limit to give effect to the directive. The decision was upheld by the ECJ.

National courts are required to supply, by implication, words appropriate to comply with EEC obligations. There is no need for ambiguity in the national law. If laws are inadequately drafted to implement EEC directives, the national court's duty is to redraft them in the light of the purpose of the European Directive.

Directives, being directions to member states to introduce legislation to achieve the purpose of the Directive, do not have direct effect between individual private parties. However, this purposive

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[6]*Barber v. Guardian Royal Exch. Group*, 1990 I.C.R. 616.
[7]*Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891.
[8]*Supra* note 3.

approach enables private parties indirectly to enjoy the benefits of Directives. A good example was the case of *Litster*.[9] The respondent was a private party involved in the transfer of a business. The 1981 Transfer of Undertakings Regulations (TUPE) were held to have insufficiently implemented the Acquired Rights Directive, whose purpose was to secure employee rights when the ownership of their business changed hands. The House of Lords was prepared to read words into the national legislation to make it conform with the purpose of the Directive.

This offends against the English law of interpretation of statutes—which is to take the literal meaning of the words of the statute, and not go behind them—but is a consequence of our membership of the EEC.

This doctrine is not even limited to legislation passed to implement EEC laws. TUPE was enacted to implement the Acquired Rights Directive of 1977. The ECJ held in *Marleasing*[10] that a national court must interpret national law, so far as is possible, in the light of wording and purpose of the Directive to achieve the results pursued by the directive, *whether the national provisions in question were adopted before or after the directive.* This is particularly relevant in the case of the Sex Discrimination Act 1975 (SDA), which predated the Equal Treatment Directive.

Where the respondent is the state or an emanation of the state, Directives have direct effect—but only after expiration of the time limit for implementing the EEC provision (usually 2 years). After that, the duty arises to disapply contrary rules of national law, and litigants can rely directly on the terms of EEC instruments.

It has taken some time for the English legal system to come to terms with this principle, established in a series of references to the ECJ. Whole Acts of Parliament may be disapplied.[11] Moreover, the employee may sue the state under the *Frankovich*[12] principle for not implementing the Directive where employment is in the private sector.

Business Transfers and Employee Rights

The main areas of conflict between English and EEC law have been transfers of businesses and equal treatment of men and

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[9]*Litster v. Forth Dry Dock & Eng'g Co.*, 1989 I.C.R. 341.
[10]*Marleasing SA v. La Comercial Internacional de Alimentacion*, 1990 E.C.R. 1-4135.
[11]*Factortame Ltd v. Secretary of State for Transp.*, 1990 2 A.C. 85.
[12]*Francovich v. Italian Republic*, 1991 E.C.R. 1-5357.

women. References to the ECJ have established what constitutes a transfer of a business and the extent of employee protection. The basic principle, stated in *Spijkers*,[13] is that where a business retains its identity such that it could be continued as a business by the transferee, that constitutes transfer of an undertaking, and all the rights and responsibilities hitherto owed to employees by the transferor are transferred automatically to the transferee. The principle applies to employees who were still employed in the business at the time of transfer. The ECJ has dealt with problems arising from the timing of transfer, how it is effected, what constitutes a business entity, and so on.

A major concern of the United Kingdom was the contracting-out of public services to private companies during the privatisation programme in the 1980s. Privatisation was meant to improve efficiency and reduce costs to public bodies. The successful tenderer was sometimes the in-house service, sometimes an outside contractor. The ECJ held that all such transfers were Transfers of Undertakings, and that TUPE inadequately transposed the Directive into national law by limiting its application to transfers of commercial concerns. Employment contracts of council employees providing the service were held to transfer to the incoming contractor. The transferee had to make them more productive to save money. In practise, companies tendering for business took account of this factor in the price quoted, or else agreed with the transferor on suitable compensation terms.

The high point of this approach was *Schmidt*,[14] wherein the ECJ held that a cleaning lady, employed by a company to clean a particular building, was a business entity. Her contract of employment was transferred when the cleaning contract transferred from one company to another. The court has since drawn back from this extreme position, but this has caused some confusion in business and legal circles.

Equal Treatment

Sex discrimination is the most fascinating area of interaction between the United Kingdom and EEC law. The Treaty does not extend to race discrimination as yet.

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[13]*Spijkers v. Gebroeders Benedick Abattoir CV*, 1986 E.C.R. 1119.
[14]*Schmidt v. Spar*, 1995 I.C.R. 237.

The 1976 Equal Treatment in Employment Directive deals with sex discrimination. It covers access to employment, vocational training, working conditions, promotion and dismissal, and prohibits discrimination, either direct or indirect, on grounds of sex or marital or family status. The exception is when sex is a genuine occupational factor. The Directive allows discrimination in favor of women, in relation to pregnancy and maternity, and permits positive action work programmes designed to achieve equality in the workplace.

The SDA was passed before the Directive, but implements it by analogy. It has been amended to take account of ECJ decisions, as has employment protection legislation, to benefit pregnant women.

In 1988, the ECJ held that the refusal to employ women on the grounds that they are pregnant is direct sex discrimination, contrary to the Directive.[15] However, dismissal of a woman on medical grounds because of illness *after* childbirth was not unlawful sex discrimination, because a man who was ill and unfit for work for a similar length of time would have been treated in the same way.[16] Further decisions in this area are anticipated.

The SDA requires comparison between a man and a woman in similar circumstances. But pregnancy is a condition unique to females. The Appeals Court held that Tribunals must compare the pregnant woman with a hypothetical man absent from work on grounds of ill health for a similar length of time, and asked whether he too would have been dismissed. Only if the answer was no, was there discrimination.

Then came *Webb v. EMO Air Cargo (UK).*[17] The ECJ held that pregnancy was a condition unique to females, and it was superflous to compare the treatment of the women with a "comparable" man. The House of Lords was required to interpret the SDA in accordance with the Directive, effectively ignoring the comparison. It is not the last word on the subject, since justification might have been possible if the contract of employment had been for a definite period, rather than open-ended as it was.

It was clear, however, that English law was deficient. Employment protection legislation was amended so that it became automatically unfair to dismiss a woman on grounds of pregnancy. Such

[15]*Dekker v. Stichting VJV Plus,* 1990 E.C.R. 1-3941.
[16]*Hertz v. ALDI Marked K/S,* 1990 E.C.R. 3979.
[17]1995 I.C.R. 1021.

claims are still brought under the SDA as well, because of its limitless financial awards and provision for damages to be awarded for injury to feelings.

Sex is not the same thing as sexual orientation, but the ECJ has ruled that it is contrary to the Equal Treatment Directive to dismiss a transsexual because he or she intends to undergo, or has undergone, gender reassignment. The individual is held to be treated unfavourably by comparison with a person of the sex to which he or she formerly belonged.

Whether homosexuals are similarly protected is yet to be decided by the ECJ; the English position is that the SDA does not apply to them.[18] However, the ECJ has recently ruled that an employer who refused to extend travel benefits provided for spouses of employees to a lesbian partner of an employee was not in breach of the Directive.[19] The outlook for the extension of the Directive to homosexuals therefore seems bleak.

The Equal Pay Act also had to be amended in the light of ECJ decisions to include not only comparisons of men and women where they do similar work or work equated as equivalent under a job evaluation scheme, but also work of equal value. There have been a series of major cases in which persons doing quite distinct and different jobs, cooks and welders, for example, brought claims and argued that they did work of equal value.

The court has also been active in limiting defenses employers can use, deciding what differences may be justified. Any difference in pay has to be unrelated to the sex of the incumbents and objectively justified. The needs of the business, judged from an objective economic standpoint, can provide such justification.

The ECJ has also introduced a concept of proportionality in indirect discrimination. If a requirement affects men and women equally, but the proportion of females who can comply with the requirement is less than the proportion of men, then indirect discrimination may have taken place. The proportion is expressed as "considerably fewer": the rule of thumb is 85–90 percent ability to comply. In one recent case,[20] the London Underground introduced a new shift system involving night work. All 2,000 men could work the shifts, but of the 21 women, 1 could not. It was decided that the system indirectly discriminated against women, who had

[18]*Smith v. Gardner Marchant Ltd,* 1996 I.C.R. 790.
[19]*Grant v. South-West Trains,* 1997 I.R.L.R. 206.
[20]*London Underground v. Fitzgerald,* 1997 I.C.R. 271.

greater child care responsibilities than men on the proportionality principle. So much for rules of thumb!

One of the most interesting developments has been the protection from sexual or racial harassment in the workplace. The word "harassment" is not used in the statutes, and protection is derived from the provision that it is unlawful for an employer to do an act that is discriminatory on grounds of sex or race "to the detriment" of the employee.

There is no European legislation on the topic, but harassment has been defined by the European Commission as "unwanted—that is unwelcome or uninvited—conduct of a sexual nature, or other conduct based on sex, affecting the dignity of women and men at work, including the conduct of superiors and colleagues." The definition has been approved by the Employment Appeal Tribunal as guidance to Tribunals.

Tribunals have developed the principle that a working environment that contains discriminatory practises or activities of a sexual or racial nature constitutes a detriment to the employee, offending his or her dignity. They adapted the definition to include racial harassment.

Thus, banter of a racist nature among police officers, said to be part of the "canteen culture," was held to amount to a detriment. Such behaviour was unacceptable, as it perpetuated racist attitudes. Pinups displayed on office walls, suggestive sexual gestures or remarks, unwanted touching of a sexual nature—all have been held to be unlawful discrimination.

The employer is liable, whether aware of the practise or not, because the statutes provide for vicarious liability. Recently, for example, an employer was held liable when two black waitresses were offended at racist and sexist jokes made by a comedian entertaining diners. The event was under the control of the employer, who was aware of the comedian's reputation for such humour. The employer could have arranged for the waitresses to have been withdrawn if the act took its predictable turn. By not doing so, the employer subjected the waitresses to a detriment.[21]

An employee committing the act is also liable, though it is rare for awards other than modest sums to be made against such individuals. The employer can only escape liability if it can show

[21]*Burton & Rhule v. De Vere Hotels,* 1996 I.R.L.R. 596.

that all reasonable steps were taken to avoid the discrimination. Tribunals look for equal opportunities policies, effective equal opportunities training, proper reporting systems, fair disciplinary procedures that do not victimise the victim further, and proper action on complaints.

Employees are also protected from victimisation. If they are disciplined or dismissed, that is to say less favourably treated, because they have brought proceedings, or indicated that they intend to, for example, then they can pursue the matter before an Industrial Tribunal.

Remedies

What is the redress for proven discrimination? Tribunals have the authority to award damages for injured feelings and compensation for financial loss. Damages for injury to feelings have been rising, though the average is still only about £2,000. That said, awards in excess of £20,000 have been made recently and upheld on appeal. Compensation for financial loss may involve much greater sums. For example, females dismissed from the armed forces because they had become pregnant received, in some cases, in excess of £100,000. But these are isolated cases and do not represent the norm.

Proof of Discrimination

Proving discrimination is not easy. Statutory bodies such as the Equal Opportunities Commission, the Commission for Racial Equality, and, in Northern Ireland, the Fair Employment Commission, do offer assistance. They advise applicants, and even provide free representation in what they consider to be important cases of principle.

The discrimination acts also provide a questionnaire procedure whereby an applicant can ask the respondent questions about the facts of the case, practises in the workplace, the ethnic, sexual, or religious makeup of the work force, and the like. The questions and answers are admissible as evidence, and a Tribunal may draw inferences from any failure, without reasonable cause, to answer the questions, or from answers that it considers evasive or equivocal. This is a powerful and much used weapon for applicants.

The process by which tribunals decide whether discrimination has been proven is now well established. Having found the facts of the case, the Tribunal asks itself whether the applicant has been less

favourably treated than others have or would have been. Then it asks whether that less favourable treatment might appear to have been because of race, sex, or religion. If so, there is a prima facie case. The Tribunal then looks to the respondent's explanation for the less favourable treatment. If the explanation(s) is adequate and satisfactory, the case fails. If not, then the Tribunal asks on the basis of the entire record whether it is legitimate to draw the inference that the less favourable treatment was based on race, sex, or religion. Such findings are characteristic of cases that reach this stage.

Conclusion

There is no doubt that industrial relations in the United Kingdom have improved dramatically over the last 25 years. I have highlighted just a few of the developments. Industrial Tribunals rightly take much of the credit for this, though they have been aided and abetted by the ECJ. They have been and still are engaged in social engineering for the workplace. Their decisions have affected millions of employees over the years. They have set standards of behaviour that are now followed by sensible and responsive employers. Irresponsible employers know they proceed at their peril. It is a privilege to contribute to this process.

Comment:

HERBERT L. MARX, JR.*

On behalf of the Academy, may I offer profuse thanks to Chris Tickle not only for joining us here but especially for his excellent and comprehensive summary of some astonishing new developments in British and European Community approaches to employee rights. In renewing acquaintance with Chris, I have the opportunity either to remind you or inform you that the Academy and the Council of Industrial Tribunals have had an ongoing relationship for the past decade. Through our International Studies Committee, Academy members and Tribunal chairmen have

*Member, National Academy of Arbitrators, New York, New York.

been encouraged to exchange visits and observe each other's hearings. While this arrangement has not been active of late, I am confident Chris Tickle and his colleagues would welcome a revival of interest.

It was on this basis that, in 1993, I sought to make arrangements to attend a Tribunal hearing while visiting London. I ended up being invited by Chris to address the Council's annual conference at Oxford. This is a long way around to telling Chris we did not get his titles quite right in our program. Perhaps he will accept our apology when I remind him that, on the 1993 program at Oxford, I was listed as a member of the *Natural* Academy of Arbitrators.

The framework within which labor and employee dispute resolution operates in North America differs widely from that utilized in Britain. My brief comments are intended not to measure the worth of one against the other but rather to offer some perceptions as to how we might extend our own effectiveness. (I will let Chris contemplate whether it might also work in the other direction.)

As you have just heard, the Industrial Tribunals are Britain's leading source of remedy for employees who have lost their jobs—having been discharged or having been made redundant (as the British say, but I guess that is no worse than being downsized). The Tribunals are concerned with a variety of laws affecting employee rights, as contrasted with our authority coming from a collective bargaining agreement. The Industrial Tribunals' remedy for improper, discriminatory, unlawful (call it what you will) termination is a monetary settlement. It is, apparently, a foregone conclusion that the employer generally will not be required to reinstate the terminated employee.

When North American unions represent terminated employees in arbitration, they almost always take a quite different view: the principal objective is to restore the employee to the job, with the additional but surely less vital objective being restoration of lost pay, benefits, and seniority. This is certainly understood both by neutrals and by management representatives.

Once in a great while, an arbitrator will not reinstate a grievant but will provide "front pay" (a useful but enigmatic phrase to distinguish from "back pay"). Is the more frequent use of this device worth considering—not just by the neutral as a remedy, but as a neutral's proposal for settlement by the parties? Arbitrators face this dilemma over and over: The discharge action lacks the full measure of just cause, either in procedure or substance; however,

the bright red signals are flashing that the employee and the boss just are not going to make it together if there is a reinstatement. And are there not occasions when the wronged grievant would prefer compensation, but all concerned have been taught to believe this can only occur if there is a return to the job? As I understand it, this never troubles the Tribunals chairman: The only questions are whether the employee has been improperly treated, and, if so, how much pay will compensate for the mistreatment.

You will also have noticed that the Industrial Tribunals are generally tripartite, with the chairman . . . .

Let's pause here. I can tell you from personal experience 5 years ago that a great many Tribunals are chaired by women, but across the broad Atlantic they still call themselves chairmen.

To resume, Tribunals, are tripartite, with the chairman always a solicitor or a barrister. The other two members are generally not legally trained but come, one each, from a labor or management background. In our American experience where tripartite panels still thrive (notably in the airline and railroad industries), the members of the arbitration panel other than the neutral are selected by the parties whose dispute is being resolved. We know this is helpful to the neutral in many ways, but we are also aware that each partisan panel member has a difficult time not being an advocate. In British Tribunals, tripartite members not locally involved sit with a Tribunal chairman over an extended period and hear a great many cases. As a result, they provide the shop-floor knowledge while not being directly involved with the parties to the dispute.

Just a thought: Are there tripartite arbitration panels in your own experience that could be more effective if the members, while generally representing management or unions, did not have to account for their demeanor or decisions to the local chairman or the plant manager?

Chris mentioned the work of ACAS—the Advisory, Conciliation, and Arbitration Service—which is entirely separate from the law-centered Industrial Tribunals. Note, however, that ACAS personnel step in before cases come to Tribunal hearing and, more often than not, settle the matter. Just as we are all learning the value of grievance mediation instead of, or as a prelude to, arbitration, so our British colleagues are doing likewise, although by quite different nomenclature.

Final and binding labor-management arbitration under collective bargaining is not unknown in Britain. For more on this, you are referred to a 1986 address to the Academy by Sheffield University Law Professor John C. Wood, then the Chairman of the United Kingdom Central Arbitration Committee.[1]

Please stay with me on this one: The Sir John Wood just mentioned is not to be confused with another Sir John Wood, who has been President (that is, Chief Judge) of the Employment Appeal Tribunal, the court to which Industrial Tribunals decisions may be appealed. As a reminder, since Industrial Tribunals are concerned principally with law and not labor-management contracts, one would reasonably anticipate the availability of such an appellate course.

By the way, to the best of my knowledge, neither of the John Woods mentioned above is the same person as the fine British actor, John Wood. On the other hand, maybe one or both of them is or are the actor. Who knows?

Surely, we must be in awe of the responsibility affixed on Christopher Tickle and his Industrial Tribunals colleagues. We in the Academy will continue our relatively straightforward controversy about the relationship of the contract and so-called "outside law." How would you like to resolve a dispute while being required to take into account an employment agreement (express or implied), possibly a union contract, a variety of national statutes, the Treaty of Rome, and the precedent-making pronouncements of the European Court of Justice?

Ready to give it a shot? It is easy—just ask Christopher Tickle.

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[1]Wood, *The British Arbitrator—A Question of Style?*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), 8.