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Contract

An Offer You Can’t Refuse

Roland Fletcher*

Introduction

The general requirements of a valid contract must contain an offer, acceptance, consideration, intention, capacity and if necessary the correct formation, eg, does the contract have to be in writing. The focus of this article will be on offer, acceptance, consideration and an invitation to treat when dealing with contracts concluded during an auction.

Invitation to Treat

In order to prove a contract exists it must be shown there was a definite offer made to either a particular person or to the public at large, which has been accepted. However, what may appear to be an offer may constitute an invitation to treat. An invitation to treat, in law, is not an offer but is inviting offers from the public, eg, an advertisement, usually, goods on display in a shop window and a self-service. Bowen LJ attempted to distinguish the difference between an offer and invitation to treat as:

“It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer.”

Arguably, this definition does not assist the courts when dealing with auctions, eg, when the auctioneer requests a bid for an item, which will be sold to the highest bidder – does this constitute an offer or merely an invitation to treat? The application of this distinction was tested in the case of Payne v Cave and was found to be an invitation to treat and not an offer. The bids constituted the offer and acceptance would take place on the fall of the auctioneer’s hammer. This has been given statutory authority under the Sale of Goods Act 1979, which states:

“A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until the announcement is made any bidder may retract his bid.”

Therefore, common law and statute have set the legal rules, the auctioneer’s request for bids constitutes an invitation to treat and the bids an offer, which is accepted upon the fall of the hammer. However, there are exceptions to the general rule if goods are sold at auction using the wording: with reserve or without reserve.

Auctions With or Without Reserve

If an auction is said to be “with reserve”, a minimum price must be reached before acceptance is deemed to be valid. If the auctioneer accepts a bid which is lower than the reserve price there will be no contract between the seller and buyer. However, if an item is advertised stating “without reserve” case law has not only suggested this is a definite offer but also a collateral contract between the auctioneer and bidder (purchaser). Thus, in such circumstances if the auction is held and a prospective purchaser makes a bid, this is deemed to be an acceptance to an offer the auctioneer cannot refuse.

A Definite Sale to the Highest Bidder

The case of Barry v Davies is an interesting case that deals specifically with the issues and effect of a sale by auction, which is expressed to be “without reserve”. The auction advertised two Alan Smart Engine Analyser. Both machines were new and were being sold by customs and excise due to the manufacturer’s liability for unpaid VAT. The machines were worth £14,521 each and customs and excise had informed the auctioneer, Mr Cross, to sell the machines “without reserve”, and this was the basis of the sale. During the auction Mr Cross informed the audience the machines were worth £14,000 and suggested bids begin at £5,000; there was no bid; he then requested £3,000 but still no response. He then invited bids from the audience and the plaintiff bid £200 for each machine and no other bids were made. Mr Cross responded by withdrawing the machines and defended his actions by stating:

“I could not see how I could sell for as little as this, even though it was without reserve. I think I am justified in not selling at an auction without reserve if I think I could get more in some other way later. I did not take up [the offer of] £400. I thought they were worth more.”

The machines were eventually sold a few days later for £750 each after advertising them in a magazine. The plaintiff brought a claim on the basis that the machines were advertised “without reserve” and he was the highest bidder. He claimed the value of the machines, £28,000, less the value of his bid of £400, resulting in damages of £27,600. Based upon common law the Judge held:

“[I]f I think I could get more in some other way later, I did not take up [the offer of] £400. I thought they were worth more.”

When the auction is held and a prospective purchaser makes a bid, this is deemed to be an acceptance to an offer the auctioneer cannot refuse.

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1 Partridge v Crittenden [1968] 2 All ER 421.
3 Carlill v Carbolic Smoke Ball Co Ltd [1893] 1 QB 256, CA.
4 (1789) 3 Term Rep 148.
5 SS 57(2).
6 McMans v Fortescue [1907] 2 KB 1.
7 Walpole v Harrison (1859) 1 E & E 309, obiter dictum, that in such cases the auctioneer is making a pledge to sell to the highest bidder.
8 Barry v Davies (trading as Heathcote Ball & Co) and Others [2000] 1 WLR 1962.
9 Ibid.
10 Ibid, p 1964, at para C.
“... it would be the general and reasonable expectation of persons attending at an auction sale without reserve that the highest bidder would and should be entitled to the lot for which he bids. Such an outcome was in his view fair and logical. As a matter of law ... there was a collateral contract between the auctioneer and the highest bidder constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made.”

This view was supported on appeal by Sir Murray Stuart-Smith who was also of the opinion that a collateral contract may exist, in such circumstances, between the auctioneer and bidder. For these reasons the original Judge's decision on liability was upheld.

Consideration: Quid Pro Quo

Mr Moran, counsel for the defendant, criticised the court's decision on a number of grounds, eg, there was no offer – this was an invitation to treat, there is no contract until the auctioneer's hammer falls and any bids may be withdrawn before such time. He supported the latter point with section 57(2) of the Sale of Goods Act 1979, and most importantly, he argued there was no consideration for the auctioneer's promise. For a contract to be valid it must be supported by consideration, ie, an exchange of value: quid pro quo. The law will enforce a bargain, ie, a contract supported by reciprocal consideration, where both parties are able to demonstrate a benefit and detriment on both sides.

Mr Moran argued that there was no consideration for the auctioneer's promise to sell to the highest bidder. He was of the opinion that the bid in itself would constitute consideration as the person bidding is not giving anything in return and that bids are merely a collateral contract between the auctioneer and person making the highest bid. Mr Moran attempted to negate the auctioneer's liability under the rules of agency:

“where an agent is acting for a disclosed principal he is not liable on the contract ... if there therefore is any collateral contract it is with the principal [customs and excise] and not the agent [Mr Cross].”

The court rejected Mr Moran's argument, based on the principles of agency, with reference to the case of Warlow v Harrison and reinforced their decision by quoting from the judgment:

“In a sale by auction there are three parties, viz: the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder ... We think the auctioneer who puts the property up for sale upon such a condition [without reserve] pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder; and, in case of breach of it, that he [the bidder] has a right of action against the auctioneer.”

Regarding the issue of consideration the court found it to be present, in this instance, based on the following:

“... in my judgement there is consideration both in the form of detriment to the bidder, since his bid can be accepted unless and until it is withdrawn, and the benefit to the auctioneer as the bidding is driven up. Moreover, attendance at the sale is likely to be increased if it is known that there is no reserve.”

The Market Rule: Damages

Mr Moran attempted to reduce the plaintiff's damages and argued the original Judge was in error when he awarded the plaintiff £27,600. Mr Moran was of the opinion that no more than £1,600 should have been awarded. The original Judge's assessment was based on the market rule, ie, to compensate the plaintiff for loss of bargain and put him in the position he would have been in had the contract been fulfilled.

Sir Murray Stuart-Smith examined the original Judge's assessment on damages which was based on the following:

“The plaintiff is entitled to be put in the position in which he would have been in if the contract had not been broken, that is, he would have had two newly manufactured engine tuning machines. ... The defendant's contention is that the value of these machines, ie, the measure of the plaintiff's loss, was only £1,500, [representing the price they were eventually sold for] but that sum would not put the plaintiff into possession or into a position to obtain possession of two brand new £14,000 tuning machines. ... I find that the measure of the plaintiff's loss is indeed £28,000, less the £400 of his bid, namely £27,600.”

Therefore, the market rule prevailed and the plaintiff was awarded damages accordingly.

Conclusion

Applying the above legal rules a contract is not concluded until the auctioneer's hammer falls, which signifies acceptance of the bidder's offer. However, there are exceptions to the general rule and lessons to be learnt from the case of Barry v Davies. This case demonstrates the courts are prepared to reverse the process when goods are offered using the wording “without reserve”, which may result in an offer you can't refuse and a collateral contract between the auctioneer and person making the highest bid.

11 Ibid, p 1964, at para F.
12 Ibid, p 1968, at para A.
13 Judge Charles Harris QC siting at Northampton County Court.
14 A compensation, or the giving of one thing of value for another thing of like value.
15 Barry v Davies, supra, n 8 at p 1965, para D.
16 E & E 309.
17 Ibid, at p 1965, para E.
18 Ibid, at p 1966, paras B, C and E.
19 Ibid, at p 1967, para H.
20 Ibid, at p 1968, paras E, G and H.
Employment Law

The Potential Impact of the Human Rights Act 1998 on Employment Law

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L.L.M.

Introduction

New legislation, the impact of European Community laws, and changing political ideologies have brought about substantial changes to the employment relationship during the last thirty years. Employers are obliged to comply with a plethora of new laws which regulate the workplace and take account of common law principles such as the developing area of mutual trust and confidence. Section 1 of the Human Rights Act 1998 incorporates Articles 2-12, and 14 of The European Convention on Human Rights into UK law, thus making Convention rights enforceable in the UK courts. This potentially provides a catalyst for the development of a new rights culture for employees, emphasising the importance of the dignity and liberty of individuals. Human rights issues are no innovation in the employment sphere and individuals have previously taken matters to the European Court of Human Rights (ECHR) in Strasbourg.

This article considers how the Act will be applied with reference to previous case law, and reviews those provisions of the Convention which will impact upon the employment relationship. These include Articles 4 and 6, and Articles 8–11.

Application

The Human Rights Act 1998 enforces the rights of the Convention by firstly providing in section 3 a general duty on the domestic courts to interpret all legislation consistently with the Convention “so far as it is possible”. If this is not possible, the legislation cannot be set aside, but the House of Lords, Judicial Committee of the Privy Council, the High Court, the Court Martial Appeal Court, or the Court of Appeal, may make a declaration of incompatibility under section 2(4) that the law on the particular issue is inconsistent with Convention rights. The rationale being that the government would speedily review and amend the existing legislation to ensure compatibility.

Secondly, section 6(1) imposes a duty on public authorities to ensure that they do not act incompatibly with a Convention right. Consequently, an employee of a public authority will be able to enforce Convention rights directly against his employers provided the matter does not concern access to the civil service. In both Kosiek v Germany and Glasenapp v Germany the applicants were refused employment in the civil service because of their political persuasions. The ECHR decided these cases on the basis of whether the individuals possessed the necessary qualifications for the positions. A public authority is defined in section 6(3) to include a “court or tribunal” and “any person certain of whose functions are functions of a public nature ...”. This provision is to be interpreted broadly to include as much protection as possible.

Palmer states that government departments, local authorities, the police and immigration would be covered, although the situation is more uncertain in relation to quasi-public bodies such as Railtrack, which performs both public and private functions. It is suggested that the employment function of such bodies would probably be considered private. In this sector, employees will have only indirect protection as “courts or tribunals” must not act in a way which is incompatible with convention rights under section 6(1), and hence a duty to interpret the law in accordance with Convention rights under section 3.

An analogy can be drawn between the horizontal and vertical direct effect in European Community law using the example of the definition of a public body in Foster v British Gas. Thus a private worker would not be protected under Article 9 against a dismissal on the grounds of religious belief, yet a public sector employee would have a direct right of action. However, if a dismissal occurred, the applicant could bring the matter to an employment tribunal which would make a judgement taking into account Convention rights. This concept is not new; the UK courts have previously construed domestic law in line with The Convention.

Ultimately, the fact that Article 1 of The Convention provides that States should secure Convention rights to everyone within their jurisdiction, indicates that disputes in employment law whether in the public or private sector will be covered. Further, it has been argued that in:

“...practice it will make no difference whether the defendant is a public or private body since the courts giving judgment will have a duty to uphold convention rights regardless.”

Hence our common law will develop in line with these decisions.

The rights are provided in Articles 2–12 and those

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1 See for example, Young James and Webster v UK [1981] IRLR 408 and Ahmad v ILEA [1978] IQB 36.
2 (1987) 9 EHRR 328.
4 The Lord Chancellor, HL Deb Vol 582 Vol1232 (3 November 1997).
6 See n 5, at p 173.
7 Included within the definition of a public authority in Human Rights Act 1998 s 6(3).
9 See for example, Rantzen v Mirror Group Newspapers [1993] 4 All ER 975 and Middlebrook Mushrooms v TGWU [1993] IRLR 612.
relevant to the employment relationship will be considered individually. These rights are not absolute and each article contains further qualifications to enable States to justify the interference which must be “necessary in a democratic society”. The latter has been interpreted to mean that the State should demonstrate a “pressing social need” and must satisfy an identifiable and legitimate public interest. All measures are subject to the principle of proportionality. The Strasbourg Court also allows states some “margin of appreciation”; thus the UK is allowed some control over its own ethics and standards.

Article 4 of the Convention

Article 4 provides that:
1. No one shall be held in slavery or servitude;
2. No one shall be required to perform forced or compulsory labour.

This does not include military service or work carried out as part of one's civil obligations.

Comment

It is very unlikely that this article will have much relevance to employees in the UK, although the ECHR has emphasised that the idea of forced labour or compulsory labour may change over a period of time and that Article 4 must be interpreted “in the light of the notions currently prevailing in democratic states.”

Only a few cases brought under this article have been successful, partly because of the difficulties of the definition of forced labour.

Article 6 of the Convention

Article 6 provides that “... (in) determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...”

Several difficulties have transpired with regard to which employment issues may or may not amount to a civil right. With regard to the private sector it has at least become settled law that employment disputes are civil disputes within the meaning of Article 6(1). This would also include employees who may be employed by a public authority, providing they are not technically civil servants. Previous case law has decided that only disputes which have a decisive impact on the ability of the individual to continue his job are covered. This would include questions relating to dismissal, or disbarment, and those where significant economic interests are at stake. In the public sphere, the court has adopted a very narrow interpretation of “civil right” and case law in this area is quite difficult to reconcile. Generally, disputes relating to the recruitment, employment and retirement of public servants are outside the scope of Article 6. In contrast, this Article has been held to apply to disputes relating to purely economic issues, such as the payment of a salary or pension, or essentially economic issues.

Comment

Previous decisions have created confusion and uncertainty with regard to the application of this article. As Morris suggests, it would be preferable if the protection were extended to all public and private employees, especially as employment rights are shared across both sectors in the UK. However, its requirements will now “provide a touchstone against which the activities of courts and other decision makers will need to be judged.”

Article 8 of the Convention

Article 8 provides a right to respect for private and family life. The concept of private life has been interpreted broadly and extends to “private space, especially the home - to encompass personal security, self-fulfilment and identity.” Previous case law of the ECHR has indicated that matters relating to sexual identity, personal information, telephone calls from business premises, and personal identity, are protected rights under Article 8. Further, employers who want to obtain information about their employees' previous criminal convictions, or want to conduct random drug testing, psychometric testing or body searches, may violate this freedom.

In relation to sexual preference, the impact of this article has been significant in providing an action for those dismissed from the armed forces on the grounds of their homosexuality. However, the intrusive interview techniques used were taken into account and thus it is uncertain whether “less favourable treatment
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on the grounds of homosexuality” will amount to a breach of Article 8 per se. This problem has now been overcome by the recent case of MacDonald v MOD where “sex” within The Sex Discrimination Act 1975 was interpreted to be broad enough to include sexual orientation. In Halford v UK a violation of Article 8 occurred when an employer, unbeknown to the employee, listened to the applicant’s telephone calls at work. Similar action would extend to interference with personal correspondence, electronic communication, and close circuit television. As this right is not absolute, the employer may argue that the interference was reasonable, has a legitimate business purpose, such as health and safety, or security, and is necessary for the smooth operation of the business, or the protection of others. However, States are allowed a margin of appreciation to determine which rights ought to be protected. In Halford the Strasbourg Court declined to provide guidelines on when such interference may be justified, although it seems more likely that where the employee is informed that monitoring may take place, there is less chance of a breach.

There are also positive obligations on the UK to act in a way which will provide individuals with the opportunity to lead a normal family life. This includes the right to live with one’s family for the enjoyment of each other’s company. Consequently, this right may place obligations on an employer to accommodate employees who want to change their hours of work for family reasons. The obvious example being women returning to work after maternity leave.

Comment
Article 8 has broad application, and provides concrete rights for individuals at work. In practice a balance needs to be struck between employees’ rights, and the employer’s requirement to carry out a business. There is evidence to show that employers do abuse employees’ resources. For example, employees spend at least a half an hour per day surfing the internet for their own private purposes, and businesses with more than 1000 employees, lose up to £2.5 million per year from these activities. As a result, the introduction of The Telecommunications (Lawful Business Practice) (Interception of Tele-communications) Regulations 2000 provides some protection for the employer whereby personal correspondence may be monitored without violating Article 8. For example regulation 1 provides that the employer should make all reasonable efforts where possible to inform the employee that interception may take place and offer sound reasons for this. It will be interesting to observe the developing case law in this area, as the new Statutory Instrument per se is in conflict with the general remit of the right offered in Article 8.

Finally, the right to privacy has been reinforced by the introduction of the Data Protection Act 1998. This Act tries to strike a balance between an organisation’s need to know, and a data subject’s right to privacy. Employers have a duty to ensure that personal data relating to employees is only obtained and used for specific lawful purposes. This includes manual and computerised records which must be relevant and up to date. There are limitations and restrictions on disclosure of this information to others, which would be particularly relevant to employee references.

Article 9 of the Convention
Article 9 provides a right to freedom of thought, conscience, and religion. This is an absolute right and includes a right to change religion and belief, either alone or in a community with others. However, the right to manifest religion or belief in worship is qualified and subject to limitation as prescribed by law and necessary in a democratic society in the interests of public safety, public order, health or morals or for the protection of others. It has not been interpreted by the Commission or the Court to impose substantial burdens on the State. It covers many beliefs but does not protect “each and every act which is motivated or influenced by religion or belief”. In Ahmad v ILEA, there was no violation of this right when the applicant Muslim complained that he was not allowed to be absent from work for 45 minutes each Friday to attend his local mosque. Likewise, in Stedman v UK, a refusal to sign a variation to the contract of employment was not a breach of Article 9. The applicant refused to work Sundays because she thought this day should be devoted to non-commercial family and religious activities. In both cases the employer had carefully considered the situation; Ahmad had been offered part time work to provide him with the opportunity to freely attend the mosque, and Stedman’s dismissal was held to be on the grounds that she could not work certain hours.

Comment
Currently, there is no UK legislation which protects individuals against discrimination on the grounds of religious belief. Although certain religions may be regarded as a racial group for the purposes of the Race Relations Act 1976, for example Sikhs, and Jews. Thus, The Human Rights Act may become more significant in this area. However, case law of the ECHR to date suggests that Article 9 has been narrowly interpreted particularly where there is no specific persecution of a religious belief. Additionally, provisions within the European Community, under Article 13 EC, indicate that there may soon be

34 (2000) IRLR 748.
35 See n 29.
36 Marks v Belgium (1979) 2 EHRR 330 para 31.
38 The Times 11 January 2000 “Who’s reading your email?”
39 Infosecurity 99, Secure Computing Magazine
40 Internet Solutions Inc.
42 Arrowsmith v UK (1978) 19 DR 5.
44 Singh v Mackintosh (1979) ICR 554.
45 Seide v Gillette Industries (1980) IRLR
46 Case Comment Stedman v UK EHLR 1997 5 544-46.
Taking a more sympathetic approach, it is no substitute for carefully tailored legislation on the subject of protecting a worker’s right to religious beliefs.

Article 10 of the Convention

Article 10 provides the right of freedom of expression, and includes the right to hold opinion, receive and impart information without interference from a public authority. This is a fundamental right which is necessary in a democracy for the public good, but not absolute. Under Article 10(2) a State may impose “formalities, conditions, restrictions or penalties” on this right providing they are in the interests of the general public and the State. For example, restrictions on the grounds of national security, prevention of disorder, protection of health, or protection of the reputation of others would be covered. In Morissens v Belgium a teacher openly criticised her superiors, without proper grounds and proof, claiming she had not been promoted because of her sexual orientation. The ECHR found that the employer had not breached Article 10 by dismissing her and ruled that teachers, generally, have to accept certain restrictions on this right because of the nature of their job. Further, in Glasenapp v Germany, the offer of a teaching post was revoked when it was discovered the candidate was a member of the Communist Party. There was no violation of Article 10, as the case concerned access to the civil service and it was held that individuals in such positions should uphold the free democratic constitutional system in Germany. This case can be contrasted with Vogt v Germany, where a teacher of several years experience was dismissed on the grounds that she was an active member of the Communist Party. Her right to freedom of expression was violated as there was no evidence to suggest she was trying to exert improper influence on her pupils.

Article 10 has broad application, covering expression of ideas, presentation of information, words, pictures, image and even dress.

Comment

The impact of incorporation of this right may be significant in relation to dress codes. Currently, the application of the Sex Discrimination Act 1975 to such disputes has not been without difficulty. This is partly due to the requirement of a comparison with the opposite sex, and evidence of “less favourable treatment”. Consequently, cases such as Smith v Safeway may be decided differently in the future, as only where there are justifiable reasons for imposing a dress code will Article 10(2) be satisfied. Smith, a delicatessen assistant, was fairly dismissed for refusing to have his hair cut even though it was tied back in a ponytail. Already it seems that our domestic courts are taking a more sympathetic approach, and it will become much more difficult to dismiss an individual who does not conform to employers’ dress codes within this new rights era.

Finally, the right in Article 10 has been strengthened by the introduction of the Public Interest Disclosure Act 1998. This has provided new rights for whistle blowing employees against dismissal or detriment where disclosure of information is in the public good. This may occur in circumstances where an employee reports that a criminal offence has been or is likely to be committed at work, or where the health and safety of individuals may be at risk.

Article 11 of the Convention

Article 11 provides the right to freedom of peaceful assembly, association, and the right to join a trade union. This is a positive obligation on the State but not absolute. Lawful restrictions may be prescribed by law if they are “necessary in a democratic society” in the interests of national security or public good. These may be imposed on members of the armed forces, police, or of the administration of the State.

Ewing suggests that this right appears to be the most significant for labour law, yet its interpretation has been “disappointing and effectively used as an instrument for undermining trade union security”. For example, the ECHR has held that Article 11 does not guarantee protection for any particular form of activity which trade unions choose to undertake. Instead, it has protected individuals who have suffered disadvantage because of non-membership and specifically protects their right to form and join trade unions; although the union member is not guaranteed any particular treatment. Likewise, the trade union has a right to be heard, yet the collective agreement will not necessarily be concluded. Further, although there is no general right to engage in collective bargaining,


52 See n 3 supra.


54 Stevens v United Kingdom (1986) 46 DR 245.

55 Sex Discrimination Act 1975, s 1(1) (a).


58 Employment Rights Act 1996, s 43B.

59 Arzte fur das Leben v Austria (1985) 44 DR 65, 72.


62 National Union of Belgian Police v Belgium (1975) 1 EHR LR 578; Schmidt & Dahlstrom v Sweden (1975) 1 EHR LR 637; Swedish Engine Drivers Union v Sweden (1975) 1 EHR LR 617.

63 Young, James and Webster v UK [1981] IRLR 408.

64 The National union of Belgian Police v Belgium (1975) 1 EHR LR 578.
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the employer cannot refuse to do so. There is also confusion over whether the Convention includes a right to strike; following views contained in the International Labour Organisation and The European Social Charter, it seems fairly likely that this right would be covered.

Comment

Article 11 has not been successfully challenged with regard to the actual effectiveness of a union in protecting members' interests, but instead has protected individuals by upholding freedom of association. It is submitted that this Convention right will have limited impact in view of the protection offered in national law. The Employment Relations Act 1999 has made significant changes to this area of employment law, with a view to promoting a new culture of partnership in the workplace. For example, the legislation provides for compulsory recognition of trade unions in certain circumstances and an employee is protected from dismissal during the first eight weeks of lawful industrial action.

Conclusion

In practice, The Human Rights Act 1998 may have a limited impact on the employment relationship. However, it will consolidate and contribute to the individual rights culture, which has been developing within the employment arena during the last thirty years. This is a far cry from the master servant relationship of the early twentieth century, and is complimented by the European Union approach as laid down in the Community Charter of the Fundamental Social Rights of Workers. The Lord Chancellor endorses this reasoning in suggesting that incorporation of the Act will raise awareness of human rights implications of all legislation and promote a rights culture. The employment relationship is highly regulated; employees already have many rights: a right not to be unfairly dismissed, a right not to be discriminated against on the grounds of sex, race, disability, or trade union membership. New European Community directives provide further protective rights in the area of race and ethnic origin and will continue to develop within the framework of the Social Charter. However, the Human Rights Act may provide legal protection for the individual where national law fails. For example, most protective rights are only available to individuals employed on a contract of service, qualification periods are required for certain rights to materialise, and cases brought under the discrimination laws sometimes fail because of the absence of a comparator, and the strict interpretation of "less favourable treatment". Potentially, there are no such restrictions where an individual may claim under the Act bearing in mind the difficulties of the public/private divide. Additionally, where a public authority is acting in a private capacity as an employer, an employee is precluded from bringing judicial review proceedings. The Human Rights Act provides a direct action in respect of any violation of Convention Rights for employees of public authorities.

As previously stated, difficulties arise over the status of quasi-public authorities, and the courts will be left to determine applicability. To date, the ECHR jurisprudence suggests a broader interpretation to provide wider protection. Clearly, the public/private divide will become a fertile area for uncertainty and argument. Consequently, many applicants may prefer to take action under specific legislation or on the basis of well-established common law principles. Reliance on the expanding implied term of mutual trust and confidence, may provide an easier option where breaches of Article 8, 9 or 10 are concerned. Additionally, the range of reasonable response tests and broad discretion offered to the Employment Tribunals in unfair dismissals cases have strengthened the management prerogative. It remains to be seen how the tribunals will determine such cases having "... a duty to interpret the law in accordance with Convention Rights" under section 3. Where the applicant has a direct right of action under section 6, interpretation of the relevant articles should provide important guidelines for future decisions through the doctrine of judicial precedent.

Finally, the Act rests uneasily in conjunction with employment legislation, for example, breach of a Convention right is not a valid reason for dismissal, and remedies under the Act are limited. Consequently, utilisation of current protective legislation will be a more certain and viable option, and the flavour of the enhanced rights culture will be transposed indirectly under section 3, taking into account any outcomes of cases under section 6, ultimately contributing to a common set of standards.

66 See n 63
69 S 238A(3) TULR(C)A 1992.
70 HL Deb Vol 583 Col 1228 (3 Nov 1997).
72 S 6(1) Sex Discrimination Act 1975.
73 S 4 Race Relations Act 1976.
75 S 2A Sex Discrimination Act 1975.
77 Dir 2000/43 racial or ethnic origin.
80 One year's service required for a right not to be unfairly dismissed s 108 Employment Rights Act.
81 Clark v Novacold [1999] 2 All ER 977.
83 Costello-Roberts v UK (1993) 19 EHRR 112 para 27.
85 Midland Bank v Madden [2000] 2 All ER 741.
86 S 98(2) Employment Rights Act 1996.
Friend or Foe? The FSA and Credit Unions

Nicholas Ryder*

Abstract
The aim of this article is to assess how the Financial Services Authority (FSA) intends to regulate credit unions in the UK. Initially, the article defines what is meant by a credit union and provides a brief overview of the Credit Union Act 1979. Then the article gives a brief overview of the statutory objectives of the FSA under the Financial Services and Markets Act 2000.

Introduction
A credit union is not normally perceived as a mainstream financial institution within the UK, it is traditionally referred to as a poor persons’ bank. It is this stigma which the credit union movement in the UK has fought against for over thirty years. In contrast, throughout many parts of the world credit unions have developed into well-established forms of financial institution and have a high market share compared to the traditional forms of financial services providers such as banks and building societies. For example, in the Caribbean there are over 380 credit unions with 1,115,594 members, in the Republic of Ireland, there are 536 credit unions with over 2,200,00 members, Romania has 4,653 credit unions with 1,822,548 members, in Canada there are 796 credit unions with 4,190,029 members, the United States has the largest number of credit unions for one country with 10,171 and 73,893,871 members and Australia has 207 credit unions with 3,029,500 members. On a global level, the number of credit unions is 37,623 and 100,752,861 members.

A credit union can be defined as a unique financial institution that it is organised by and comprised of members of a particular group or organisation, who agree to save their money together and to make loans to each other at reasonable rates of interest... A credit union is a democratic organisation controlled for the benefit of its members, according to democratic principles, for the purpose of encouraging savings, using pooled funds to make loans to members at reasonable rates of interest, and providing related financial services to enable members to improve their economic and social condition. Furthermore, a credit union has been defined as: “... a co-operative society offering its members loans out of the pool of savings built up by the members themselves.”

A credit union is a unique financial institution that it is based upon the trust of its members, it is a co-operative organisation, it aims to provide its members with loan and savings facilities and that the credit union is a democratic organisation controlled for the members by the members. It is clear that a credit union is vastly different from other types of financial institutions such as banks and building societies in that the interest rates that a credit union charges its members on loans is regulated by legislation to 1% per annum and because credit unions are based upon a series of operating principles that apply to credit unions throughout the globe.

The Credit Union Act 1979

The Credit Union Act 1979 was intended to be simple in its form and content by limiting the size of membership, shareholding and loans to small amounts consistent with the formative years of credit unions. It is not surprising that the Credit Union Act 1979 was drafted narrowly as the impact of credit unions at the time was minimal.

The Act is divided into seven parts. The first part of the legislation deals with the registration of a credit union with the Registry of Friendly Societies. The second part concerns the rules that apply to the members of a credit union. The third part deals with the operation of a credit union. The fourth part of the Act deals with insurance against fraud and dishonesty. The fifth part of the Act deals with the power of the Registry of Friendly Societies in complying with its statutory requirements under the Act. The remainder of the sections deal with

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3 Ibid.
4 Hereafter WOCCU.
7 For a more detailed discussion of the Operating Principles see
8 Ss 1 to 3 of the Credit Union Act 1979.
9 Ss 4 to 6.
10 Ss 7 to 14.
11 Ss 15 and 16.
12 Ss 17 to 20.
transfers, amalgamations, general and miscellaneous provisions.13

Under the Credit Union Act, the Registrar of Friendly Societies14 regulated credit unions. In its annual report the Registrar stated that in 1999-2000, the credit union movement continued to increase in volume and this has led to a greater interest from the financial sector in the way in which credit unions can combat financial exclusion.15 Furthermore, when the Financial Services and Markets Act 2000 comes into force16 the responsibility for the registration and regulation of credit unions will be transferred from the Registrar to the FSA. However, it should be noted that the new and more comprehensive regulatory regime for credit unions would not fully come into force until mid 2002. Over the course of time the powers of the Registry of Friendly Societies are being transferred to the FSA.17

The Financial Services and Markets Act 2000

The most innovative and important aspect of the Financial Services and Markets Act 2000 has been the development of the statutory objectives that have been imposed upon the FSA.18 For instance, section 2 of the Act outlines the general duties of the FSA. In particular, under section 2(1), in discharging its functions, the FSA must as far as is reasonably possible act in a way that is compatible with its regulatory objectives. The FSA is to have four statutory objectives under the Financial Services and Markets Act 2000:  
- to maintain market confidence in the financial system;19
- to increase public awareness;20
- to ensure consumer protection;21 and
- to prevent and reduce financial crime.22

Section 3 – To Maintain Market Confidence in the Financial System

Under section 3 of the Financial Services and Markets Act 2000, the FSA is required to maintain market confidence. The markets confidence regime is defined as maintaining confidence in the financial system.23 This includes financial markets and exchanges, regulated activities and connected activities. The term confidence is said to provide investors and potential investors with confidence in the integrity and orderly conduct of the market. The first statutory objective of maintaining confidence in the UK financial system is shared jointly with the Bank of England, and which according to the FSA can be delivered effectively within the framework document.24 This co-operation is further enhanced by the cross membership arrangements made by the Treasury, which exists between the FSA and the Bank of England.

Section 4 – To Increase Public Awareness

Under section 4 of the Financial Services and Markets Act 2000 the FSA is required to promote public understanding of the financial system.25 This will include the awareness of the benefits and risks that are associated with different kinds of investment and financial dealing.26

Section 5 – To Ensure Consumer Protection

This section deals with the protection of consumers. Under section 5(2) of the Financial Services and Markets Act 2000, the appropriate degree of protection is stated. The factors include the differing degrees of risk which are involved in different kinds of investment or other transaction; the differing degrees of experience and expertise that different customers have; the needs of consumers may have in relation to advice and accurate information and the general principles that consumers should take responsibility for their decisions.

Section 6 – To Prevent and Reduce Financial Crime

The final statutory objective of fighting financial crime will combine the efforts of financial regulation with those of criminal law intelligence, investigation and the prosecution agencies. The function of the FSA will be to ensure that financial institutions have systems and practices in place to protect themselves against being used as vehicles by financial criminals. This provision does not impose any duties on firms.

The number of high profile financial scandals that have plagued and reduced the reputation of financial providers are clearly a reason why the FSA has been charged with reducing the extent to which it is possible for those organisations it regulates to be used in connection with financial crime.27

13 Ss 21 to 33.
14 Hereafter the Registrar.
17 For more detail see FSA (2001), Transfer of the Registry of Friendly Societies to the FSA, FSA: London.
18 For a more detailed discussion of how the Financial Services and Markets Act 2000 has amended the Credit Union Act 1979 see Sch 18 to the 2000 Act.
20 Ibid s 4.
21 Ibid s 5.
22 Ibid s 6.
23 Ibid s 3(1).
24 Memorandum of Understanding between HM Treasury, the Bank of England and the FSA.
The FSA and Credit Unions

The FSA will regulate banks, building societies, insurance companies, friendly societies, Lloyd's, fund managers, credit unions, investment and pension advisers, stockbrokers, derivative traders and professional firms offering investment services. It is quite clear that the creation of the FSA will have a dramatic impact on the credit union movement in the UK. The Association British Credit Unions Limited were fearful of its creation:

"It is not surprising that the Bill [Financial Services and Markets Bill] does not impose on FSA any specific duty to assure that its regulation preserves this necessary diversity among providers of financial services. In the absence of such a duty, we fear that predictable bureaucratic tendencies will result over time in 'one size fits all' approach to regulation". 28

Given the ever increasing demands within the financial services sector the FSA needs to be as diverse as possible to ensure that it adequately serves those people who do not have access to the mainstream financial services. The issue of how the FSA will regulate credit unions is still yet undecided as the full impact of the Financial Services and Markets Act 2000 will not be known until at least 2002. Howard Davies 29 has called for credit unions to stop being referred to as the “best kept secret of the financial sector”. He stated:

"I hope the FSA can help shine more light on the movement, and help it to achieve its full potential to offer low-cost efficient financial services to local people, and make an important contribution to offset the serious problem of financial exclusion. The social aims of credit unions could be pursued more effectively if they are managed on a more business-like footing. Because only if credit unions have a deserved reputation for sound management will they be able to attract the deposit base they need to make a real difference". 30

In December 2000 the FSA launched its first consultation document relating to credit unions. 31 The main features of the proposed regulatory regime for credit unions are six fold. First, credit unions, in addition to the existing requirements for registration, will need to be authorised by the FSA to carry on business. Secondly, the FSA considers that credit unions should be required to comply in full with the Financial Services Authority's Approved Persons regime. Thirdly, credit unions will be required to comply with the rules on systems and controls contained in the Financial Services Authority's general Handbook. This will require credit unions to have in place systems and controls that are appropriate and effective in certain instances. Credit unions will continue to be subject to the restrictions as to the amounts of money that they can lend members and the periods of such loans. 32 The FSA has proposed new requirements for credit unions on capital and liquidity. The FSA claims that these proposals are designed to be flexible and provide members with sufficient protection for members' savings without imposing an undue burden on the credit union. Finally, the controversial issue of fees has yet to be finalised. It is contested that a credit union will pay an annual fee related to the size of its business. 33 Commenting upon the proposals Howard Davies stated:

"We aim to develop a practical and proportionate regulatory system for credit unions which should meet the needs of the credit union movement and its members. We are confident that these proposals will improve consumer confidence in the financial soundness of credit unions and that this will help to provide the positive environment credit unions need in order to grow and pursue their social objectives." 34

The FSA asserts that its aim in relation to the regulation of credit unions is to secure a reasonable level of protection for all members of credit unions. 35 The proposals suggested by the FSA were that all credit unions are compelled to comply with the high level requirements contained in the Threshold Conditions as detailed in Schedule 6 to the Financial Services and Markets Act 2000. Furthermore, that credit unions must comply with the FSA’s Principles for Business. 36 Furthermore, it is perceived that in order for a credit union to undertake its business, the credit union will need to be authorised by the FSA. A credit union will become authorised by obtaining permission to carry on certain types of activity. Under the proposals suggested by the FSA, if a credit union desires to lend amounts to members of no more than £10,000 in excess of a member’s shareholding for a maximum period of 3 years and 7 years, and to offer ancillary services, the credit union will need a deposit taking permission with requirements attached setting

29 Chairman of the FSA.
31 FSA, The Regulation of Credit Unions, FSA (2000).
32 Ibid.
33 It should be noted that the banks and building societies have indicated that they are prepared to subsidise the regulatory fees for smaller credit unions. The FSA states that these discussions are ongoing at the time of writing.
35 Ibid.
36 In order to be authorised under the Financial Services and Markets Act 2000, a firm is legally required to meet the Threshold Conditions. These conditions represent the fundamental requirements that all firms must meet if they are to undertake a regulated activity. The Threshold Conditions are the legal status of the applicant, the location of its offices, the rules and controls (this condition requires the FSA to be satisfied that the applicant can effectively supervise a firm, taking into account the structure of the group to which it belongs or the other firms that have close links), whether or not the firm has adequate resources and the suitability of the firm.
37 The Principles are integrity, skill, care and diligence, management and control, financial prudence, market conduct, consumer interests, communications with customers, conflicts of interest, customers: relationships of trust, customers’ assets and the relationship between the firm and the FSA.
Financial Services

out those restrictions.38 If a credit union wishes to lend larger amounts for a longer period of time and provide wider services to its members it will need to apply for a deposit taking permission with a more permissive set of requirements.39 Further proposals were that credit unions should be compelled to comply in full with the FSA’s Approved Persons regime. The FSA’s proposals here would mean that any individual within a credit union who holds a position of influence or authority will need to be fit and proper to hold that position.40

Some of the proposals contained within Consultation Paper 77 were aimed at the management, systems and controls of the credit union. Under these proposals, all credit unions will be compelled to comply with the rules in the senior management arrangements, systems and controls as contained in Block 1 of the FSA Handbook. Once the proposals have become enacted, a credit union will be legally obliged to take reasonable care to sustain an unambiguous and appropriate distribution of noteworthy responsibilities among the directors and senior managers within the credit union. Furthermore, the directors and senior management will be required to take reasonable care to create and maintain such systems and controls that are appropriate for their business. Finally, the credit union will be required keep and maintain proper and accurate records that provide a true and fair view of the state of affairs of the credit union.41

The FSA has a legal obligation to reduce financial crime42 and has introduced new rules in relation to the prevention and detection of money laundering. The FSA has proposed that the new rules on money laundering will apply to all credit unions as did the 1993 Money Laundering Regulations. It is suggested that credit unions should have no difficulty in complying with the new regime on money laundering as they have successfully complied with the 1993 Money Laundering Regulations.

Under the proposals suggested by the FSA, every credit union will be required to draw up a successful lending policy and those credit unions that will be subordinate to the version 1 requirements will not be permitted to make loans to members of the credit union exceeding £10,000 in excess of the member’s shareholding. Under the proposals the maximum period for loans by a credit union which is subject to the conditions under version 1 will be three years for an unsecured loan and seven years for a secured loan. Those credit unions that are subject to the requirements under version 2 will be permitted to lend members up to £10,000 in excess of the member’s shareholding or 1.5% of the total shares of the credit union in excess of the member’s shareholding, which ever is the larger.43

Other proposals suggested by the FSA concern the capital of credit unions. Here, if a credit union is subject to version 1 requirements, the credit union will be required to have a positive net worth at all times. New credit unions that are subject to the version 1 requirements will be compelled to have a minimum initial capital of £1,000. If the proposals are agreed the FSA will be permitted to vary the capital requirements of individual credit unions at any time. Furthermore, those credit unions that are subject to the requirements

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38 This is referred to in the Consultation Paper 77 as ‘version 1’ requirements.
39 This is referred to in the Consultation Paper 77 as ‘version 2’ requirements.
40 In order for a person to qualify as fit and proper, the FSA’s assessment will include the honesty, integrity reputation, competence, capability and financial soundness of the individual.

41 N 32, supra.
43 N 32, supra.
44 Ibid.
45 The annual costs of regulating credit unions are approximately £1.2 million.
46 N 32, supra.
47 Ibid.
49 Ibid s 4.
Association of British Credit Unions Limited published an Early Draft Position Paper outlining its responses. In principle the Association of British Credit Union Limited welcomed and supported a number of the proposals made by the FSA. It did, however, raise concerns over some of the central proposals made by the FSA. For example, credit unions should have a differentiated regulatory regime when compared to other financial service providers. With the differentiated regulatory regime for the application of approved persons and the FSA's proposed liquidity requirements for credit unions, it is clear that the FSA will have a dramatic impact upon the regulation of credit unions. But its full impact will not be known until 2002 when the FSA completes its consultation with the credit union movement.

Conclusion

The FSA is faced with a difficult dilemma between protecting the uniqueness of credit unions and implementing the Financial Services and Markets Act 2000. The proposals contained in Consultation Paper 77 will require credit unions to become more professional and hopefully permit credit unions to diversify the services a credit union offers to its members. However, whether or not credit unions will be able to fully benefit from the proposed regulatory regime will depend upon the ongoing consultations between the regulator and the credit union movement.

News

Virt-X Recognised As An Investment Exchange

Economic Secretary Ruth Kelly has given the Financial Services Authority (FSA) leave under the Financial Services Act 1986 to recognise Virt-x Exchange Ltd as an investment exchange.

The decision was taken after the Treasury received a report from the Director-General of Fair Trading (DGFT) which concluded that the rules of Virt-x do not appear likely to restrict, distort or prevent competition to any significant extent.

Mrs Kelly said:

"I welcome Virt-x Exchange Ltd addition to the list of Recognised Investment Exchanges in the UK. The decision to move trading of Swiss bluechip shares to a London-based exchange is further confirmation of the UK's pre-eminence as an international financial centre. It is also a clear vote of confidence in our financial regulatory system."

Recognition as an investment exchange under section 37 of the Financial Services Act 1986 (the Act) enables the exchange to carry out investment business in the UK. The Financial Services Authority applied to the Treasury for leave to recognise Virt-x Exchange Ltd under section 120 of the Act.

Under the Act, the Financial Services Authority is responsible for recognising domestic investment exchanges. The Act also requires the Treasury to consider a report by the DGFT on whether the rules of the exchange have, or are intended or likely to have, any significant anti-competitive effects.

The other domestic recognised investment exchanges are:

- London Stock Exchange
- International Petroleum Exchange
- London International Financial Futures and Options Exchange
- London Metal Exchange
- OM London Exchange
- Coredeal
- Jiway

The recognition requirements are laid down in Schedule 4 of the Act. To be recognised, exchanges must, amongst other requirements:

Continued overleaf
Abridged Too Far?

Employment Law

By Holland and Burnett

Blackstone Press, £19.95 PB

It's a “mission impossible” situation. Write an engaging and practical employment law textbook for LPC students which doesn't run to five volumes, and make sure its up to date.

This textbook succeeds in part. All of the main topics are covered, apart from trade union recognition which must, bizarrely, not be on the syllabus. The book was pretty well up to date when it was written (law accurate up to November 2000), but as practitioners will be aware, employment law is in a constant state of flux and so the book is already out of date, notably with regard to status (the Motorola case), transfer of undertakings (Oy Liikenne), maternity and fixed term contracts (proposed legislative amendments).

To its authors’ credit, the book is not written in impenetrable legal jargon and has a useful section on tribunal practice and procedure.

Ultimately, however, this book is let down by its enforced brevity and, in some areas, a lack of clarity.

The overview at the start of the book skims too lightly over the subject and, for me, confused rather than clarified the issues. The layout is unhelpful and the index too brief.

Once qualified, for example, junior solicitors will soon be involved in drafting compromise agreements and COT3 settlements. Neither topic appears in the index, they are both dealt with very briefly and there is no precedent for either.

Finding your way around the various sections can be difficult, as the headings are not particularly user-friendly (instead of “What is an undertaking?”, you have “A business or identifiable part of the business”). Another example is that affirmation of a breach of contract was dealt with in the same section as an employee resigning in response to a breach. Without reading the whole section, this would have been difficult to pick up.

Unfortunately, also, there are some errors: an otherwise helpful table showing maximum compensation which Tribunals can award gave the aggregate of the basic and compensatory awards for unfair dismissal (ignoring PIDA, or “whistleblowing” cases). Dismissal for an “ETO” reason in TUPE situations is described as being for “an additional fair reason” (it is in fact deemed to be “some other substantial reason” under the TUPE regulations) and the book states that an employee who resigns in response to an employer's imposition of new terms and conditions in breach of contract will only be entitled to damages limited to the equivalent of their notice pay (this ignores possible unfair dismissal compensation if the employee has sufficient qualifying service to claim).

The overall impression left by the book was that the authors had too much law to grapple with and too little time, or perhaps insufficient paper, to put it all down on. Ultimately, this book provides an engaging overview of employment law but its layout and, in some areas, lack of clarity means that it is not ideal for use by practitioners.

Emlyn Williams
Partner, Mace & Jones, Solicitors of Liverpool and Manchester.

News – Continued from previous page

- have financial resources sufficient for the proper performance of its functions;
- have rules and practices which ensure that business is conducted in an orderly manner;
- limit dealings to investments where there is a proper market;
- have adequate arrangements and resources to ensure compliance with its rules.

Treasury Press Release 71/01, 21.6.01

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**UK Competition Law**
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**COMPUTERS AND INTERNET**

**Net Learning? “D”-?**

*David Flint*

**Introduction**

Over the last few months I have been looking at various aspects of the Uniform Domain Name Dispute Resolution Policy ("UDRP") (http://www.icann.org/udrp/udrp-policy-24oct99.htm) of the Internet Corporation for Assigned Names and Numbers ("ICANN"). As will be recalled the UDRP applies to all domains registered in the .COM, .ORG, .NET and .EDU Top Level Domains ("TLDs") as well as to domains registered in a number of minor Country Registries ("ccTLDs") such as .nu, .tv, .ws... It does not apply to the .uk domain and Nominet (http://www.nominet.org.uk) has just finished a consultation on proposals for a dispute procedure for the UK.

If you register a domain name in one of the Registries covered by the UDRP you are required to submit to it; there is no alternative; for the domain name owner the threat of a complaint under the UDRP is omnipresent and real.

In Article 4 it is stated:

- **a. Applicable Disputes.** You are required to submit to a mandatory administrative proceeding in the event that a third party (a 'complainant') asserts to the applicable Provider, in compliance with the Rules of Procedure, that:
  - (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
  - (ii) you have no rights or legitimate interests in respect of the domain name; and
  - (iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.”

In previous months I have reviewed a number of cases in which the dispute procedure has been applied (or misapplied); this month I intend to consider just one case, but one which perhaps is amongst the most significant cases in relation to the UDRP ever to have been decided.

**The Panel Decision**

The case, *NetLearning, Inc v Dan Parisi*, was a split decision of a three person panel appointed by National Arbitration Forum, FA 95471 (Nat Arb Forum, 16 October 2000). Two of the panellists considered the complaint to have been well founded and ordered transfer of the name to the complainant, whilst the third panellist not only considered that the complaint had not been established but went so far as to state that he considered the complainant to have been engaged in reverse domain name hijacking.

Nothing particularly strange there; complaint made; panellists appointed; name ordered to be transferred.

What is important in this case is that the Respondent did not take the decision lying down; indeed he sought to have it overturned before the Eastern District of Virginia.

*Partner in the IP and Technology Law Group, MacRoberts Solicitors, Glasgow.*

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The Role of The Court

In terms of Rule 4k of the UDRP, it is provided:

“k. Availability of Court Proceedings. The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be cancelled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel’s decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel’s decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.”

Although the UDRP is commonly referred to as an arbitration and its panellists as arbiters, in fact in the UDRP it is stated clearly in paragraph 4 that what is envisaged is a “mandatory administrative proceeding” (whatever that is). Within the confines of the INTA-List (tmtopics@lists.inta.org) there was a detailed debate on this issue in March 2001. As is often the case in this area, the nub of the problem was identified as much at the request of the TM bar as anyone else, since they believed they would win in court and considered the UDRP to be a risky unknown.”

Clearly, 18 months on, the UDRP is no longer an unknown and, from the TM bar perspective, not very risky. However, for the registrant the stakes have suddenly increased.

The Court Decision

On 30 October 2000, Parisi filed a declaratory judgment action seeking a declaration of lawful use under the US Anti-Cybersquatting Consumer Protection Act (“ACPA”), 15 USC § 1114(2)(D), and the Federal Declaratory Judgment Act, 28 USC § 2201, as well as a declaration of non-infringement under the Lanham Act, 15 USC § 1125(a). Parisi also sought an order directing the USPTO to refuse Net Learning Inc’s pending trademark application for the “NETLEARNING THE ULTIMATE LEARNING SYSTEM” mark, an award of fees and costs, and further relief as the Court deems “just and proper.”

As the court noted:

“Although ICANN exerts quasi-governmental sway over the growth and administration of the Internet, the UDRP is enforced through contract rather than regulation.”

Net Learning moved for dismissal of the action for declarator on the sole ground that the complaint constituted an improper motion to vacate an arbitration award. Specifically, the defendant alleged that Parisi failed to assert any grounds cognisable under the Federal Arbitration Act (“FAA”) for setting aside an arbitration award and that, in any event, Parisi’s action was time-barred under the FAA because it was not served on the defendant within three months of the panel’s ruling.

The critical issue was therefore whether the UDRP decision was an arbitral award, and thus under the FAA, or something else outwith the FAA.

“Federal courts apply the FAA, first and foremost, to effectuate contracting parties’ expectations for resolving disputes. This is fundamentally a matter of contract interpretation. Arbitration is a creature of contract, a device of the parties rather than the judicial process.”

“ASCertaining the scope of an arbitration agreement is primarily a task of contract interpretation....”

Because the FAA does not define ‘arbitration’, courts have liberally construed that term to encompass various diverse dispute-settlement mechanisms. “If the parties have agreed to... then there may be special rules of jurisdiction, procedure, and especially in the US, special presumptions of correctness of the decision. It was clearly the intent of the UDRP to avoid those presumptions – [as] much at the request of the TM bar as anyone else, since they believed they would win in court and considered the UDRP to be a risky unknown.”

submit a dispute for a decision by a third party, they have agreed to arbitration.\(^3\) (emphasis added) An arbitration agreement may, by its own terms, be amenable to enforcement through some provisions of the FAA, but not others. The Fourth Circuit recently distinguished “mandatory arbitration, as a prerequisite to initiation of litigation” from “binding arbitration, where the parties must accept an award or decision of the arbitrator.”\(^4\) Commitments to participate in such “mandatory” proceedings are regularly enforced by compelling arbitration, or staying litigation\(^5\) pending arbitration.\(^6\) (“[I]f one party seeks an order compelling arbitration and it is granted, the parties must then arbitrate their dispute to an arbitrator’s [sic] decision, and cannot seek recourse to the courts before that time.”).\(^7\)

Netlearning argued that the UDRP “administrative proceedings” should be deemed an “arbitration” as envisioned by the FAA and that Parisi’s declaratory judgment complaint should be treated as a motion to vacate an arbitration panel’s award which must comport with the requirements of § 10 and § 12 of the FAA. Netlearning argued that because it was served with Parisi’s complaint over three months after the UDRP panel issued its decision, any motion to vacate is time-barred under 9 U.S.C. § 12. Netlearning further argued that the complaint articulates no cognizable ground for vacating an arbitration award under the FAA. Parisi countered that the FAA does not apply to the UDRP and that his complaint raises issues far beyond the scope of the UDRP panel ruling.

As the court pointed out in its decision:

“Clearly, the UDRP creates a contract-based scheme for addressing disputes between domain name registrants and third parties challenging the registration and use of their domain names. However, in our view, the UDRP’s unique contractual arrangement renders the FAA’s provisions for judicial review of arbitration awards inapplicable.”\(^8\) (emphasis added)

First, there is no reason to ‘stay’ litigation \(^9\) because, quite simply, the UDRP contemplates parallel litigation. Nothing in the UDRP restrains either party from filing suit before, after, or during the administrative proceedings. See UDRP, 4(k). If litigation commences during the course of a proceeding, the panel has ‘the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision.’

Second, it would not be appropriate to ‘compel’ participation in UDRP proceedings under § 4 as a prerequisite to litigation because UDRP complainants, as strangers to the registration agreement, are under no obligation to avail themselves of the UDRP\(^9\). Only the registrant is obligated to participate in a UDRP proceeding if a complaint is filed. If a registrant declines to participate in the panel process, the panel may simply ‘decide the dispute based on the complaint’. UDRP Rules, 5(c). Although the UDRP describes the process as “mandatory” in the sense that a registrant’s refusal to participate may lead to an uncontested loss of the domain name, the process is not “mandatory” in the sense that either disputant’s legal claims accrue only after a panel’s decision.\(^9\)

Third, because the remedies available through the UDRP are so narrow and specific, we find no basis for confirming and enforcing a UDRP panel decision through § 9 [FAA]. Moreover, the FAA only permits entry of judgment if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.\(^9\) 9 USC § 9. The UDRP nowhere suggests such agreement. It not only countenances parallel litigation; it mandates a judicial forum for challenges to UDRP decisions. To initiate UDRP proceedings, a complainant must first agree to litigate any challenges to the panel’s ruling in either the jurisdiction encompassing the registrar’s principal place of business or the jurisdiction encompassing the registrant’s record address. See UDRP Rules 3(xiii). An aggrieved registrant can effectively suspend the panel’s decision by filing a lawsuit in the specified jurisdiction and notifying the registrar in accordance with 4(k) of the UDRP.

Finally, we specifically hold that judicial review of UDRP decisions is not confined to a motion to vacate an arbitration award under §10 of the FAA. To begin with, the FAA’s structure\(^{16}\) and basic tenets of contract interpretation limit the extreme deference of §§10 and 12 to proceedings intended by the contracting parties to be binding. The UDRP’s contemplation of parallel litigation and abbreviated proceedings does not invite such deference.

... More importantly, the UDRP itself calls for comprehensive, de novo adjudication of the disputants’ rights. Registrars will move forward with a panel’s decision only after a competent court or arbitration panel determines that the original registrant does “not have the right to continue to use” the disputed domain name. This implies more than a review of the procedural soundness of the UDRP decision under §10 of the FAA; it implies resolution of the parties’ overarching trademark, contract, and other claims and defenses. WIPO’s Final Report specifically recommended that the

\(^{3}\) See AMF Inc, 621 F Supp at 460.


\(^{5}\) See Harrision v Nissan Motor Corp, 111 F 3d 343, 350 (3d Cir 1997).

\(^{6}\) Wolsey, Ltd v Foodmaker, Inc, 144 F 3d 1205, 1208 (9th Cir 1998) (relying on Brunswick Corp and Harrision to conclude that an agreement which did not permit recourse to the courts before the decision of a third party constituted arbitration)

\(^{7}\) See BroadBridge Media, LLC v Hypercd.com, 106 F Supp 2d 505, 509 (SDNY 2000).

\(^{8}\) See Bankers Insurance Co, 2001 WL 293669, at *4.
availability of the administrative procedure should not preclude resort to court litigation by a party. In particular, a party should be free to initiate litigation by filing a claim in a competent national court instead of initiating the administrative procedure, if this is the preferred course of action, and should be able to seek a de novo review of a dispute that has been the subject of the administrative procedure.¹⁰

Conclusion and Analysis

On the basis of its analysis the court concluded that the Federal Arbitration Act’s limitations on judicial review of arbitration awards did not apply to civil actions seeking review of UDRP panel decisions concerning domain names.

What then does the decision mean for the UK registrant and its advisers? First, it means that, even if a party has gone to the considerable expense of defending a UDRP complaint, a disgruntled trademark owner can still file suit in a competent court and reargue the same issues, albeit under a different legal head – trademark infringement. Given that there is likely to be an imbalance of financial resources between the plaintiff and the defendant in such cases, the plaintiff may well succeed the second time around by default.

Secondly, perhaps if the decision were by one of the more “creative” panellists, it might be in the interest of the defendant to have the entire case considered again, but this time in a court where the registrant is located. In this regard it should be noted that the UDRP 4k states that actions must be brought either in the court of the location of the Registrar’s principal office or of the Registrant’s address as shown in the Registrar’s Whois database.

Thirdly, it may be advantageous to move Registrars to one in a territory less unfavourable to Registrants than the Eastern District of Virginia.

There have been a number of other recent domain case developments and I shall return to these in future months.

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CONSUMER PROTECTION

The OFT Is Watching You!

Introduction

Half of all UK websites could be in breach of the new Distance Selling Regulations 2000 (the “Regulations”) (SI 2000/2334) according to a survey by the Office of Fair Trading (OFT). It conducted a sweep of 637 UK sites selling goods and services and found that more than half failed to give easily accessible information concerning refund or exchange policies. While most of the sites examined did provide basic business contact details and details of costs, many fell short in providing information on both refund and exchange policies, and how they would handle customers’ personal details.

The Distance Selling Regulations

The Regulations apply to any business which sells goods or services to consumers using any form of distance contracting, eg by mail order, telephone sales, television shopping or the internet. They set out the extent of the information which the supplier must provide to the consumer both before an order is placed and before delivery is made. The Regulations also provide the consumer with a standard “cooling-off” period of seven working days during which the consumer has a right to cancel the contract, return the goods and demand a full refund. However, the cooling-off period may extend up to three months and seven working days from the date the consumer receives the goods if the supplier fails to provide the consumer with the information specified in the Regulations.

The supplier must provide certain information to the consumer in good time and in a clear and comprehensible form before he or she places an order. This information includes the supplier’s identity (and, if the supplier requires payment in advance of delivery, the supplier’s address), a description of the main characteristics of the goods or services, the price (including all taxes), any delivery costs, the arrangements for payment and delivery, and the existence of the consumer’s right to cancel the contract during the cooling off period.

After the consumer has concluded his or her contract with the supplier (and no later than delivery) the supplier must provide to the consumer further information including:
- the procedure for exercising the consumer’s right to cancel the contract and return the goods;
- the consumer’s obligation to return the goods in the event of cancellation;

Current Comment

- whether the consumer or the supplier will be responsible for the cost of returning the goods or the cost of recovering them;
- the geographical business address to which complaints can be sent;
- details of any after-sale services or guarantees;
- the consumer’s contractual rights to terminate an ongoing contract (if appropriate).

The Length of the Cooling-off Period

If the written information is provided no later than the date of delivery the right to cancel will expire seven working days from the date of delivery. However, if the supplier fails to provide the consumer with information listed above until after delivery, the consumer’s cooling-off period will be extended to seven working days from the date the consumer finally received the information (subject to a maximum cooling-off period of three months and seven working days).

The cooling-off period, however, does not apply to certain contracts including:
(1) contracts for the supply of goods made to the customer’s specifications or clearly personalised or which by reason of their nature cannot be returned or are liable to deteriorate or expire; and
(2) contracts for the supply of audio or video recordings or computer software if they are unsealed by the consumer.

The OFT has the power to apply to the courts to seek an injunction against an individual supplier requiring compliance with the Regulations.

Conclusion

The results of the OFT survey highlight that many companies may require compliance advice to avoid possible action by the OFT.

GAMING LAWS

And the Winner Is!

DLA

Background

Over the last few months, many web site owners have been focusing on new ways to attract traffic to their web sites and then to ensure that those visitors keep returning. Clearly, without traffic, no business will be conducted through the web site. Also, and crucially for many web sites, no third party will be willing to pay for banner adverts on web sites that cannot demonstrate good hit rates.

One solution to this problem has been to take advantage of the public’s love of competitions by offering some sort of online prize competition. Simple and effective as this idea may be, it is very easy to end up operating an illegal lottery or prize competition. It is, therefore, important to realise the crucial legal differences between lotteries, free prize draws and competitions, some of which are quite subtle, as it is very easy to end up breaking the law without even realising it!

The basic difficulty stems from the question of whether or not the winners are selected by pure chance or by some element of skill. If it is a game of pure chance, the likelihood is that the game will constitute an illegal lottery or illegal prize competition.

Looking at each of the options in turn, anybody thinking about offering some sort of prize competition ought to be aware of the following issues.

Lotteries

A lottery involves the distribution of prizes to winners who are chosen by random lot or by chance who will, in turn, have made some sort of contribution to obtain the opportunity to win.

In so doing, the winning of a prize does not depend on the exercise of any skill. Also, the “contribution” made by the entrant need not be money. Rather, the “contribution” may include the cover price of a magazine, a requirement on the entrant to submit his entry via a premium line telephone number, or the requirement to provide some proof of purchase of a particular product which is associated with the promotion.

If these elements are present, the competition will be illegal by virtue of the Lotteries and Amusements Act 1976 (“Act”) unless the competition is exempted as being one of the following: private lotteries (members clubs etc); exempt entertainment (small scale lotteries run at village fairs etc); societies’ lotteries (charitable/non profit making organisations); local lotteries (those promoted by the local authority); and the national lottery.

In addition, an ISP may be prosecuted under the Act if it is “associated” with a lottery. Association is widely drawn. It will not simply be the promoter of the lottery (ie the web site owner) that is liable to be prosecuted, but also the publisher, which could mean an ISP hosting the relevant site.

Free Prize Draw

Free prize draws are legal as they do not meet the criteria relating to lotteries. The fundamental characteristic of a free prize draw is that no contribution is required/made by the entrant (whether direct, indirect or concealed, monetary or otherwise).
Current Comment

Whilst a free prize draw over the internet is, technically, not free because of the cost of the underlying cost of the local call, the risks of the prize draw being regarded as a lottery on this basis are very low. Thus, if a person visits a web site and is offered the chance of winning, for example, a holiday without the need to “contribute” or “pay” for that chance in any direct or indirect way, then this will be a free prize draw and not a lottery.

Competitions

Some competitions are also legal. However, to be a legal competition, the allocation of prizes must depend to a substantial degree “on the exercise of skill”. The level of skill or dexterity, whether bodily or mental, of the entrant need not be that high, though the questions must not be so difficult that answering them is a game of chance! Also, the level of skill must not relate to the forecasting of a future event or any past event where the result is not yet known. The reason for skill in competitions is that it removes the element of chance from determining the winner and this means that the competition does not amount to a lottery. It is also important to realise that the level of skill must be present at all stages of the competition. Thus, competitions where the names of all those who answer the question correctly go into a pot where the winner is chosen at random may be illegal if that element of the competition turns it into a lottery. Thus, the second round must not fall foul of the rules regarding what is and what is not a free prize draw.

Conclusion

ISPs and web site owners must ensure that they do not fall foul of the provisions relating to lotteries and competitions. Lotteries must be avoided and the simplest way of ensuring this is to require entrants to answer questions as opposed to simply pulling their names out of a hat. In addition, no charge (direct or indirect) should be made so that the competition constitutes a fee prize draw.

INTERNET AGREEMENTS

To Link or Not to Link

DLA

The Issue

One of the attractions of the Internet is the ease by which users can move between different web sites by clicking on the relevant hypertext links. Of late, many of these links have taken the form of deep links or frames. A deep link takes the user directly to the page of interest on the linked site rather than to the home page of that site whilst frames make the content from the linked site appear as if it is on the original site.

Both of these practices have been increasingly scrutinised by the courts both in Europe and across the Atlantic. The risks of damaging advertising revenue streams and possible brand confusion have both been cited as reasons for prohibiting these types of practice without the prior consent of the user of the linked web site owner. Recent European case law continues the line taken in the Shetland Times interlocutory decision and highlights the necessity of putting in place a suitable web site agreement. Recent examples include the following:

In a German case the online recruitment company, StepStone, has managed to obtain an injunction against the Danish media group OFiR to prevent it from deep linking to its web site and thereby bypassing the banner advertisements on its homepage.

In the recent French decision of Havas & Cadres Online v Keljob the French judge held that operators implicitly authorised surface linking but that express authorisation to deep link is needed under the French Intellectual Property Code.

Also, in the UK, Haymarket has commenced legal proceedings against Burmah Castrol for linking to two of Haymarket’s web sites, whatcar.com and autosport.com. Burmah Castrol framed the Haymarket’s web pages with its own border, suggesting that the Burmah Castrol web site is associated with the Haymarket web sites.

It is becoming increasingly clear from these cases that a cause of action will be found if the link results in a change to the nature of the targeted content (ie modifies the source code), misleads visitors as to the ownership of the web page or does not alert visitors that they are being redirected to an external web site.

The Essential Provisions of a Web Site Agreement

From all of this, it is apparent that any company wishing to link its web site to that of another company must think very carefully about the way in which the link is made, with deep links and frames being particularly troublesome. As a result, companies must now give some careful thought to formal linking contracts. Failure to do so will, in many cases, result in legal proceedings. Relevant issues to consider include the following:

Specification of the Link

The link may be based on a trade mark and the form and size of the link will be important in maintaining the goodwill associated with the mark. If the link does involve a trade mark, the trade mark holder will need to grant a licence for its use to the other party.
Location of the Mark
The location of the mark will also significantly affect the amount of traffic flowing to the linked web site. The agreement should specify whether, for example, the link will be displayed on the homepage of the web site or in the border framing the site.

Controlling Traffic
Will the flow of traffic be in one direction or will it be bi-directional?

Warranties
The agreement, like any other agreement involving intellectual property, should contain a mutual warranty and indemnity. The agreement should also contain additional warranties regarding the content of the linked web site (e.g., no blasphemous or defamatory material) and may include references to the code of conduct of the Advertising Standards Agency or other regulations peculiar to the industry sector concerned.

Competitors
The agreement may prevent each party from hosting a link to any competitor of the other party. It may be necessary to obtain competition law advice if such a clause is to be used.

Royalties
In the short history of the Internet pay per click has been the favoured method of calculating the revenue owed the web site hosting the link but in recent months an increasing number of agreements have adopted payment on a bounty basis whereby the hosting site will receive payment for each customer which registers or purchases from the linked site. The agreement should also identify the technology which will be used to monitor and report on the visitors to the linked web site.

Cutting the Link
The agreement should specify the grounds for allowing the hosting web site to cut the link to the linked web site. These grounds for termination may well be tied into the warranties regarding the content of the web site.

Affiliate Sites
Some sites, such as mytaxi.com, act as hubs for web surfers, containing links to a variety of approved web sites. Affiliate agreements should also incorporate a monitoring mechanism to enable the host to ensure that the linked sites do not contain immoral, blasphemous or illegal content.

Good Practice
Finally, it is good practice for companies to include a statement of its linking policy on the homepage of their web sites. This policy should state that no authority is given (impliedly or expressly) to deep link to or to frame any of the content that appears on the website or to use a representation of the company’s trade mark as a link button without the express agreement of the company. Also, the company may wish to reserve the right to prohibit links to its homepage in certain circumstances.
Infobank

Competition

New Deadline for Monopoly Report on Banking Services

The Secretary of State and the Chancellor have agreed a request by the Competition Commission for a four month extension to complete their report on the supply of banking services by clearing banks to small and medium sized businesses. This will enable the Commission to consider further arguments and evidence from the banks.

The period for reporting on the monopoly reference has been extended from 19 June to 19 October 2001.

The Competition Commission was asked by the Secretary of State and the Chancellor of the Exchequer on 20 March 2000 under section 51 of the Fair Trading Act 1973 to undertake a study of the market for the supply of banking services by clearing banks to small and medium-sized businesses in the UK to identify any monopoly situation and to form a view as to whether any practices which exploit or maintain a monopoly, or are attributable to such a monopoly, operate against the public interest.

Section 55(1) of the Fair Trading Act provides that a monopoly reference shall specify a period within which the Competition Commission is to report.

Section 55(2) of the Fair Trading Act provides that Ministers making the reference may give a direction allowing the Competition Commission an extended period for reporting.

DTI Press Notice P/2001/312, 12.6.01

Employment

CIPD Guide on Employing People with Convictions

The way in which organisations obtain information about criminal records is about to change. The Criminal Records Bureau (CRB) has been set up to improve access to such information through a new service called 'Disclosure'. In light of these changes, the Chartered Institute Personnel and Development (CIPD) has launched A good practice guide on the employment of people with criminal records, produced for the CRB.

The guide's primary aim is to help organisations adapt to new legislation, namely the Police Act 1997, which has introduced the new arrangements for obtaining criminal record information. The CRB provides a single access point – a one-stop-shop service – improving the current arrangements where employers had to approach up to three separate organisations.

The CIPD guidance has been endorsed by organisations such as Apex Trust, Nacro, the TUC and ACAS. The publication offers advice and guidance on how to implement fair and effective policies for recruiting and retaining those with criminal records.

Dianah Worman, CIPD Adviser, Equal Opportunities said:

"While research shows that employment is the single most important factor in reducing reoffending, many ex-offenders remain excluded from the employment market due to poor qualifications and a lack of work experience. Our guidance encourages employers to be open minded and make objective assessments based on merit and ability to do the job".

Whilst providing background information about ex-offenders in the workplace and current legislation, the guide offers good practice recommendations such as when to obtain a 'Disclosure' and how best to handle such sensitive information.

Bernard Herdan, CRB Chief Executive says:

"The aim of the CRB is to promote safer recruitment to protect the vulnerable. Providing employers and voluntary bodies with greater access to criminal record information through 'Disclosure' will help prevent unsuitable people gaining access to jobs where they could harm children or vulnerable adults. Disclosure, however, should be seen as part of an overall package of good recruitment techniques to help reach a judgement on a candidate's suitability.

I believe that this sort of partnership between the CRB and the CIPD – bringing together the required skills and experiences for a specific piece of work – is the way forward. The CIPD has produced valuable and informative guidance material for which I am most grateful."

The CIPD website address is http://www.cipd.co.uk.

Copies of Employing people with conviction can be obtained free of charge by calling Rachel Hansen on 020 8263 3283.

CIPD Press Release, 29.5.01

Extra Help for Working Parents

Parents of disabled children will soon benefit from new measures announced by the Trade and Industry Secretary recently. Their parental leave entitlement is to be increased from 13 to 18 weeks. This will give parents of children with disabilities greater flexibility to strike the balance between working and caring for their child's additional needs. The move is supported by business, parent and disability groups.

Mr Byers also announced that all parents with children under five will soon be able to take parental leave. Previously, this was available only to parents whose children were born after 15 December 1999. This extension will benefit around 2.8 million parents.

Parental leave is the right for parents to take 13 weeks' unpaid leave from work. This can be taken up until the child's 5th birthday, or for the parents of disabled children, until their child's 18th birthday.

The proposal to increase the amount of parental leave for those with disabled children was first put forward in the Work and Par-
Parents of disabled children who receive Disability Living Allowance are entitled to 18 weeks parental leave from work which can be taken up until the child's 18th birthday. This leave can be taken flexibly in blocks of a day or more, up to 4 weeks in total each year. The timing of the leave has to be agreed with the employer and notice has to be given. The extension of parental leave to parents with children under five years old will be backdated to 15 December 1999. Currently, only parents whose children were born or adopted on or after 15 December 1999 are entitled to take parental leave.

These changes will come into force later this year. All parents are able to take time-off to deal with a family emergency, such as their child falling ill or unexpected disruption in their care arrangements, without notice.

DTI Press Notice P/2001/260, 25.4.01

Notes

The information and consultation Directive gives employees the right to be informed about the "recent and probable" development of their organisation's activities and economic situation. They will also have the right to be informed and consulted on:
- the development of employment within their organisation, particularly where there is a threat to jobs; and
- any decisions likely to result in substantial changes in work organisation or in their employment contracts.

The directive is due to be implemented in the UK three years after it is formally adopted, which is expected by the end of this year. The current text provides that organisations with over 150 employees will be covered from that time, while those employing between 100 and 150 people will have a further two years, and those with over 50 but fewer than 100 employees will have a full seven years for implementation.

CIPD Press Notice, 18.6.01

European Union

New Consultation Directive – UK Works Councils Are Not Inevitable

The Chartered Institute of Personnel and Development (CIPD) states that works councils are not an inevitable outcome of the EU directive on information and consultation – something which most commentators believe to be the case. In fact the Directive will not necessarily require UK organisations to establish any form of representative structures for informing and consulting staff.

On 11 June, the EU Employment and Social Council agreed on a Directive requiring organisations to inform and consult their employees on a range of work and business matters. The majority of observers have argued that this will require UK companies to set up works councils, similar to those in most other Member States, including France and Germany. This has caused great concern across UK industry, with fears that it will undermine the ability of managers to manage.

Diane Sinclair, CIPD Adviser, Employee Relations says:

"The directive clearly leaves the practical arrangements for informing and consulting employees to be defined by the Member States. Thus, much will depend upon the way that the Directive is implemented in the UK.

Given its persistent opposition to the proposal, and its abstention from the final vote, it seems very unlikely that the UK government will 'goldplate' the Directive. Indeed, it has already stated that it will take full advantage of the flexibility allowed by the text, which it worked hard to negotiate."

Where management and employees agree, rather than representative structures, organisations may be able to meet the requirements of the new law by communicating directly with employees. For instance, e-mails or letters could be sent to employees informing them of business issues or changes to work organisation, and inviting them to comment. Staff briefings could also be used to inform and consult employees. Ms Sinclair says that research shows that direct involvement and communication with employees is more important for business performance than representative structures. Good employers know the value of effective communication and consultation with staff.

"For the government’s part, it must take a practical approach to implementing the Directive, which is based on the European social model in which works councils play a starring role. There is no reason why the UK should be led down this path. Rather, it must learn from the best in Europe, and maintain the most effective features of its flexible systems and practices."

Finance Bill: Limited Liability Partnerships

The Chief Secretary to the Treasury, Andrew Smith MP, has tabled new clauses for the Finance Bill (New Clauses 16 and 17) to ensure that limited liability partnerships
(LLPs) are in general treated as partnerships for tax purposes and to prevent tax loss through LLPs used for investment and property investment.

**Details**

New Clause 16 ensures that LLPs incorporated under the Limited Liability Partnership Act 2000 are in general treated as partnerships for tax purposes. It amends section 118ZA ICTA 1988 and section 59A TCGA 1992 that were introduced by the Limited Liability Partnership Act 2000. It also introduces a new section (169A) to the Taxation of Chargeable Gains Act to prevent chargeable gains held over on business gifts from falling out of charge when an LLP goes into liquidation.

New Clause 17 and New Schedule 2 prevent tax loss through LLPs used for investment and property investment. Definitions of investment and property investment LLPs are introduced. Interest relief for investments by individuals in investment LLPs is removed by amending section 362(2)(a) ICTA 1988. This aligns the treatment of investment LLPs with limited partnerships registered under the Limited Partnership Act 1907. Exemptions for income and gains will not apply for pension funds, the pension business of life insurance companies and the tax exempt business of friendly societies where the income and gains are received in their capacity as a member of a property investment LLP.

The government’s intention to bring forward rules to prevent tax loss was set out in the Pre-Budget Report Press Release Inland Revenue 5 “A More Competitive Environment for Business” published on 8 November 2000.

The intention to clarify the tax rules at section 118ZA ICTA 1988 and section 59A TCGA 1992, and further details about the rules to prevent tax loss were set out in the Budget Press Release BN 14 “Limited Liability Partnerships” published on 7 March 2001.


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The Explanatory Notes accompanying these New Clauses may be found at [http://www.inlandrevenue.gov.uk/menus/legalmenu.htm](http://www.inlandrevenue.gov.uk/menus/legalmenu.htm).

Finance Bill New Clause

**Interest on Unpaid Tax, etc: FMD**

The Chief Secretary to the Treasury, Andrew Smith MP, has tabled a new clause to the Finance Bill which confirms that businesses will not have to pay interest on tax deferred as a result of financial difficulty brought about by the outbreak of foot and mouth disease. Businesses who are suffering severe disruption or financial distress as a result of the outbreak need to be able to put tax and NICs issues to one side during the outbreak, so those with concerns are urged to contact the joint Inland Revenue/Customs and Excise Foot and Mouth Helpline on 0845 300 0157.

**Details**

The new clause will provide specifically for the charge to interest to be removed where the Inland Revenue have agreed, because of the effect of the foot-and-mouth disease outbreak, to defer payment of tax.

Current legislation requires interest to be charged on all unpaid tax from the date it becomes due until the date of payment. The Inland Revenue can defer payment of tax, and both tax and interest can also ultimately be written off or remitted in certain circumstances. This new clause will ensure that the Revenue can waive interest charges in all the circumstances of the foot-and-mouth disease outbreak.

Regulations will also be introduced to provide that interest is not charged on National Insurance contributions deferred in the same circumstances.

A joint Inland Revenue/Customs & Excise press release was issued on 14 April confirming that businesses will not have to pay interest on tax or National Insurance Contributions deferred as a result of serious financial difficulty brought about by Foot and Mouth disease.

The draft regulations on interest on deferred National Insurance contributions are available on the Inland Revenue web site at [http://www.inlandrevenue.gov.uk](http://www.inlandrevenue.gov.uk).