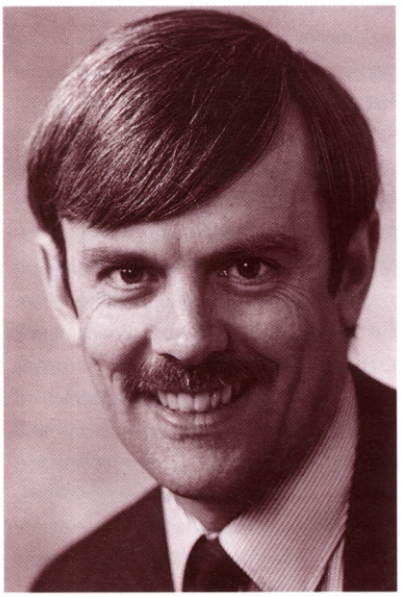
Employment Law

Ethical employment practices

by Martin Edwards



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Pressure on employers to adopt ethical employment practices is beginning to intensify. This is in tune with the mood of the times. The government has proclaimed its commitment to fairness at work and although, at the time of writing, it had not had an opportunity to enact legislation so as to translate that commitment into practice, it is foreseeable that before long there will be a variety of legislative measures which have the effect of penalising employers for unethical behaviour. However significant developments in this area pre-date the 1997 general election. It seems likely that in due course there will be widespread recognition that the *Disability Discrimination Act* 1995 (whatever its shortcomings) was a landmark statute, giving disabled people rights of redress for the first time in respect of unethical treatment by employers. The abolition of the cap on compensation awards in cases of sex and race discrimination has already had the effect of stimulating claims, for example, by victims of sexual and racial harassment. In the past, when the median level of compensation awards for harassment victims was low, there were often strong practical disincentives to protest against unethical treatment. The barriers are starting to be lifted.

The focus of this article, however, is on the judiciary's growing awareness that the continuing development of the common law needs to chime a little more closely with social concerns in this area. The tensions between traditional (and generally rigid) common law doctrines of contract and tort as compared to contemporary notions such as that of 'fairness' in the context of unfair dismissal claims has, for example, long been a source of concern to employment practitioners. Now the tide is turning: a point illustrated by the cases selected for discussion here.

IMPLIED TERMS

In *Malik & Anor v Bank of Credit & Commerce International SA* [1997] IRLR 462, the House of Lords was prepared to interpret an existing and well-recognised implied term in a way that will provide employees with enhanced protection against unethical employer behaviour. The employees were dismissed on the grounds of redundancy by the provisional liquidators of BCCI. Neither had since then been able to obtain alternative employment in the financial services sector. They sought 'stigma' damages for pecuniary loss which they attributed to the Bank's breach of the implied contractual obligation of mutual trust and confidence. They argued that their mere association with the Bank at the moment of its liquidation, and the alleged fraudulent practices within the Bank that subsequently attracted public notoriety, put them at a disadvantage in the employment market, even though they were personally innocent of any wrongdoing. The liquidators rejected the claims and a High Court judge decided that the evidence failed to disclose a reasonable cause of action or a sustainable claim for damages. Affirming that decision, the Court of Appeal concluded that, in reality, the damages claimed were for injury to the employees' previously existing reputations and, therefore, in accordance with the general principles established in *Addis v Gramophone Co Ltd* [1909] AC 488 and subsequent authorities, were not legally recoverable (*Malik & Anor v Bank of Credit & Commerce International SA* [1995] IRLR 375).

It was agreed that the employees' contracts contained an implied term to the effect that the Bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the parties. However, the liquidators contended that there could be no breach of such a term unless three implied limitations were satisfied, i.e.:

- that the conduct complained of was conduct involving the treatment of the employee in question;
- that the employee was aware of such conduct while he was an employee; and
- that such conduct was calculated to destroy or seriously damage the trust between the employer and the employee.

It was submitted that those conditions were not satisfied on the facts of the case and it was further contended that, as a matter of policy, the law does not permit the recovery of damages for breach of contract in respect of injury to an existing reputation.

DECISION REVERSED

Reversing the Court of Appeal's decision, the House of Lords held that damages for loss of reputation caused by a breach of contract may be awarded, provided that a relevant breach of contract can be established and the requirements of causation, remoteness and mitigation can be satisfied. If conduct by the employer, in breach of the implied term of trust and confidence, prejudicially affects an employee's future prospects so as to give rise to continuing financial losses and it was reasonably foreseeable that such a loss was a serious possibility, in principle, damages in respect of that loss should be recoverable. *Addis* was decided in the days before this implied term had been adumbrated. Now that the term exists and is normally

implied in every contract of employment, damages for its breach should be assessed in accordance with contractual principles. An employer which operates its business in a dishonest and corrupt manner is in breach of the implied term: in agreeing to work for the employer an employee, whatever his status, cannot be taken to have agreed to work in furtherance of a dishonest business. The implied obligation extends to *any* conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence. The motives of the employer cannot be determinative or even relevant in judging the employee's claims for damages for breach of the implied terms. Nor is it a necessity for the employee to have known of the trust-destroying conduct while still employed. Some forms of such conduct may have continuing adverse effects on an employee. Nor could it be accepted that there is no breach unless the employee's confidence is actually undermined. Breach occurs where the proscribed conduct takes place: here, operating a dishonest and corrupt business.

This is a significant decision. Its realism is welcome. Some commentators have suggested that it will open the floodgates to litigation. That will not necessarily prove to be the case; Lord Steyn expressed the view that it is improbable that many employees would be able to prove 'stigma compensation'. Nevertheless, those employed by organisations which do conduct a dishonest and corrupt business now have a substantial right of redress.

NEW IMPLIED TERMS

The courts have in recent times not only been prepared to interpret existing contractual terms with a degree of creativity; they have also been willing on occasion to discover new implied terms. A striking example can be found in the judgement of Sedley J in *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521. The employers established a generous permanent health insurance scheme; an eligible employee who was wholly incapacitated by sickness or injury from continuing to work would receive an amount equivalent to 75% of the last payable annual salary, beginning 26 weeks after the start of incapacity. Later, Mr Aspden entered into a written contract which contained both a general power to terminate and a specific power to dismiss in the event of the employee's prolonged illness. He was dismissed while on sick leave and before becoming eligible for benefit under the permanent health insurance scheme. He maintained that it was an implied term of his contract that, save for summary dismissal, the employers would not terminate the contract while he was incapacitated for work. The employers argued that the alleged term was inconsistent with the express provisions of the contract and thus could not be implied. Sedley J ruled in favour of the employee's contention and held that both parties knew, or would have realised had they considered it, that the written contractual terms were not comprehensive and that they required qualification. The written contract was neither drafted with the insurance scheme in mind, nor was its aptness in the light of the scheme considered or negotiated. The contract itself was internally inconsistent in its provision for sick pay and termination. The situation in which the contract was entered into was bilaterally known to include a permanent health insurance scheme, which could only work if the employees whom it covered remained in employment for the duration of their incapacity, or until some other terminating event specified in the policy took place, and it was the unambiguous mutual intention of the parties that this should be so. That mutual intent did not impinge upon the ability of the employers at any time to accept the employee's repudiatory conduct as putting an end to the contract and with it the entitlement to insurance benefit. It is noteworthy that Sedley J expressly had regard to 'the justice of the case' which, in his view, meant that the precise mechanism by which effect should be given to that justice was 'of much less importance to a lay person than [to] lawyers'. His primary concern was with a just (or, he might have said, ethical) outcome. More recently, in *Brompton v AOC International Ltd & Anor* [1997] IRLR 639, Staughton LJ said *obiter* that 'there is a good deal to be said' for there being an implied term in the contracts of employees eligible for schemes of the kind supported by Sedley J in *Aspden*.

WORKPLACE SMOKING

Even more significant in its implications is the decision of the Employment Appeal Tribunal in *Waltons & Morse v Dorrington* [1997] IRLR 488.

A long-serving secretary who worked for a firm of solicitors and who was a non-smoker was moved to an area close to rooms occupied by three heavy smokers. She found the smoke a source of nuisance and discomfort and raised her concerns with her employers. They designated a specific smoking area, but in practice, that did not much improve the problem so far as the secretary was concerned. She took the matter up with her employers on a number of occasions with no success and was ultimately told that there was nothing more that could be done and that she would either have to put up with the situation or leave. Distressed by this turn of events, she chose to go and claimed to have been constructively and unfairly dismissed.

An industrial tribunal upheld her claim and the employers' appeal was dismissed by the EAT. The EAT concluded that it is an implied term of every contract of employment that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties. The starting point for the implication of such a term is the duty on an employer under *Health & Safety at Work Act* 1974, s. 2(2)(e), to provide and maintain a working environment for employees that is reasonably safe and without risk to health and is adequate as regards facilities and arrangements for their welfare at work. The right of an employee not to be required to sit in a smoke-filled atmosphere affects the welfare of employees at work, even if it is not something which directly is concerned with their health, or can be proved to be a risk to health. The tribunal had been entitled to find that it was reasonably practicable for the employers to have provided the employee with a working environment suitable for the performance by her of her duties and, conversely, that the conditions in which they were requiring her to work rendered them in breach of the implied term.

The employers in this case did try to accommodate the secretary's concerns and the EAT acknowledged that, whilst finding that the employers failed to treat the employee in a way which was appropriate having regard to all the facts, including her length of service.

The implied term identified by the EAT is, however, so widely expressed that it will extend to assist employees who are confronted by various forms of unethical

employer behaviour. For example, an employer who bullies an employee or who sits on his hands whilst an employee is bullied by a colleague, may not only be in breach of the implied duty of mutual trust and confidence, but also in breach of the duty to provide and maintain a reasonably safe working environment.

DISCRIMINATORY TREATMENT

Two relatively recent cases have seen significant extensions to the scope of an employer's responsibility to prevent an employee suffering discriminatory treatment. In imposing higher standards of responsibility on employers to safeguard their employees, and in refusing to allow those employers to shelter behind traditional common law doctrines, the Court of Appeal and the EAT respectively have made potentially important contributions towards the implementation of ethical standards of conduct at the workplace.

The facts in *Jones v Tower Boot Co Ltd* [1997] ICR 254, were remarkable. A young man of mixed ethnic parentage was employed at a shoe factory. During his time there he suffered physical and verbal racial abuse from two colleagues. That abuse consisted, amongst other matters, of burning his arm with a hot screwdriver, throwing metal bolts at his head and calling him racially abusive names. A supervisor moved him to another part of the factory but the abuse continued. The employee resigned and complained that he had been discriminated against by his employers on the ground of his race. An industrial tribunal upheld his complaint, but the EAT reversed that decision, accepting the employers' contention that the principle of vicarious liability at common law was applicable to the phrase 'in the course of his employment' in *Race Relations Act* 1976, s. 32(1) and that, as the acts complained of were not modes of performing authorised tasks, the employers were not liable for those acts.

The Court of Appeal allowed the employee's appeal. Neither the linguistic constructions of s. 32(1) of the 1976 Act, nor its legislative purpose, justified an interpretation that applied the doctrine of an employer's vicarious liability at common law to the words 'in the course of his employment' in the section. It is a question of fact in the circumstances of each case for an industrial tribunal to determine, on the ordinary meaning of the words, whether the acts complained of were done in the course of employment. Waite LJ emphasised that the general thrust of race and sex discrimination law 'was educative, persuasive and, where necessary, coercive.' It was acknowledged that an inevitable result of construing 'course of employment' in the sense for which the employers contended, would be that the more heinous the act of discrimination, the less likely it would be that the employer would be liable. The employers argued that this was all to the good: Parliament must have intended the liability of employers to be kept within reasonable bounds. Waite LJ rejected that submission entirely; it cut across the whole legislative scheme and underlying policy of the measures to deter racial and sexual harassment in the workplace through a widening of the net of responsibility beyond the guilty employees themselves, by making all employers additionally liable for such harassment and then supplying them with a 'reasonable steps' defence which would:

'... exonerate the conscientious employer who has used his best endeavours to prevent such harassment'

and would encourage all employers who had not yet undertaken such endeavours to take the steps necessary to make the same defence available in their own workplace.

THE BERNARD MANNING CASE

Waite LJ also referred to the decision of the EAT in *Burton v DeVere Hotels Ltd* [1997] ICR 1, as a useful illustration of the matters to which employers need to be alert if they are to be able to take advantage of the 'reasonable steps' defence in a harassment context.

In that case, two black waitresses were on duty at a hotel dinner at which the comedian Bernard Manning was the speaker. Mr. Manning made offensive remarks which upset the waitresses; two guests also made racially and sexually offensive remarks. An assistant manager brought the incident to an end and apologised to the two women for what had happened. However they brought complaints of racial discrimination.

An industrial tribunal held that the employers had not discriminated against the waitresses by subjecting them to racial harassment from the speaker and some of the diners. The EAT, however, concluded that there had been discrimination. The tribunal had erred in finding that although the employees had suffered a 'detriment' within the meaning of the 1976 Act; it was not the employers who had subjected them to the detriment, since they had neither knowingly stood by while the employees were abused, nor had they foreseen that the speaker would behave as he did.

According to the EAT, an employer subjects an employee to the detriment of racial harassment if he causes or permits harassment serious enough to amount to a detriment to occur, in circumstances in which he can control whether it happens or not. Foresight of the events, or the lack of it, is not determinative of whether the events were under the employer's control. In order to show that the employer 'subjected' the employee to the detriment of racial abuse or harassment, where the actual abuser or harasser is a third party and not an employee or agent of the employer, the tribunal should ask itself whether the event in question was something which was sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it. If such is the finding then the employer has subjected the employee to the harassment.

In the present case, it would have been good employment practice for the manager to warn his assistants to keep a look out for the speaker and to withdraw the waitresses if things became unpleasant. Events within the banqueting hall were under the control of the assistants and, if they had been properly instructed, the waitresses would not have suffered any harassment, save possibly for hearing a few offensive words before they were withdrawn. The EAT also expressed the view:

'... that it is undesirable that the concepts of the law of negligence should be imported into the statutory torts of racial and sexual discrimination'.

The decision is a graphic illustration of how far employment law has moved in a short time. Employees today have little choice but to take ethical employment practices seriously.

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