Browne Jacobson

Supreme Court shines a light on collective agreements

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In the space of a week, we have seen two Supreme Court decisions relating to collective agreements.

In National Union of Rail, Maritime and Transport Workers and anor v Tyne and Wear Passenger Transport Executive t/a Nexus, the question before the Court was whether it was possible to rectify the record of a collective agreement on the basis that it inaccurately reflected the agreement reached between the recognised trade unions and the employer, which had then become incorporated into the individual contracts of employees.

Nexus recognised the RMT and Unite trade unions for the purposes of collective bargaining. In 2012 an agreement was reached to consolidate a productivity bonus into basic pay. This was set out in a Letter Agreement which Nexus sent to the unions. However, Nexus took the view that the incorporated bonus shouldn't be taken into account when calculating shift allowance. A number of employees therefore brought unlawful deduction from wages claims. The claims were upheld as the Employment Tribunal was satisfied that the Letter Agreement, which was incorporated into employees' contracts didn't redefine the calculation of shift allowance so that it excluded the productivity bonus. Nexus brought a claim in the High Court, arguing that there was a mistake in the Letter Agreement in relation to the productivity bonus and therefore it should be rectified. The claim was allowed to proceed but subsequently dismissed by the Court of Appeal on the basis that rectification was not available for a collective agreement that was not intended to be legally enforceable.

The Supreme Court disagreed and held that although the Letter Agreement was not itself legally enforceable, rectifying it would alter legal rights and obligations given that the agreement had been incorporated into individual contracts of employment. However, the appeal was dismissed because Nexus had brought the claim against the unions and not the individual employees. Therefore, as the legal rights of the individual employees would be affected by the rectification it was contrary to the most basic principle of procedural justice to make an order that would alter the legal rights of employees without giving them the opportunity to respond. The appeal was therefore dismissed.

In Secretary of State for the Department for Environment, Food and Rural Affairs v Public and Commercial Services Union and ors, the question before the Court was in what circumstances does a trade union have the right to sue as a third party for breach of a contract of employment between an employer and employee?

The trade union, PCS is recognised for collective bargaining purposes by the Home Office, DEFRA and HMRC. Union members subs were deducted at source from their salary through payroll and then paid to the union by the employers (all of whom are government departments). The origin of this agreement lay in the collective agreement between the union and the Government reached in the 1960s. In 2014 and 2015 employers, without agreement, stopped making the deductions leaving the employees to make their own arrangements to pay their union subs. This resulted in a significant reduction in the unions income. The individual employees brought breach of contract claims and the union brought a separate claim stating that it was entitled to enforce the contractual check-off arrangements pursuant to the Contract (Rights of Third Parties) Act 1999. The individual breach of contract claims succeeded and were upheld on appeal. However, whilst the High Court initially upheld the unions claim, the Court of Appeal allowed the appeal by the employers predominantly on the basis that the check-off arrangements derived from the collective agreement which was not legally enforceable and therefore the employer and employee didn't intend for the check-off arrangements to be enforceable by the union under the Contracts (Rights of Third Parties) Act 1999. To allow a claim via the Rights of Third Parties Act would circumvent this.

The Supreme Court disagreed and held that the union was entitled, under the Contracts (Rights of Third Parties) Act 1999 to enforce terms in the contracts of employees. The individual contracts of employment did not include any indication that the joint intention of the parties was that the term should not be enforceable by the union and no such term could be implied. Therefore, the appeal succeeded. (It is worth noting that, under the Employment Rights Bill, the government intends to repeal Section 116B of TULRCA 1992, which placed requirements on public sector employers in relation to providing a check off service).

Whilst the issues determined by the Supreme Court in these cases are rare, these decisions are nonetheless important as they demonstrate that although collective agreements aren't themselves legally enforceable, mechanisms exist to enforce rights arising from them where they impact upon individual employment rights.

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