COLLECTIVE AGREEMENTS AND THE CONTRACT OF EMPLOYMENT: DETERMINING THE INTENTION OF THE PARTIES OR DENYING LEGITIMATE EMPLOYEE EXPECTATIONS?

George v. *Ministry of Justice* [2013] EWCA 324

(Lord Justice Maurice Kay, Lord Justice Rimer, Lord Justice Jackson)

INTRODUCTION

A distinguishing feature of industrial relations in the United Kingdom is that, *prima facie*, collective agreements between trade unions and employers are not legally binding as it is presumed the parties do not intend the agreement to be legally enforceable. This principle was confirmed by the Court of Appeal in *Ford Motor Co Ltd v AEUW*[1] and later put into statutory form by s.179(1) Trade Union and Labour Relations (Consolidation) Act 1992. Although collective agreements are not ordinarily of any legal significance between employer and union, if they are translated into a contractual relationship between employer and employee, then they can have legal force at the individual level as a term of the contract of employment. To assume contractual validity the relevant clauses of the agreement must be incorporated into the contract of employment expressly or impliedly and must be of an individual nature; capable of being legally binding between the employer and the employee as an individual term. *George v Ministry of Justice (George)* is the latest case where the Court of Appeal has examined the factors that should be taken into account in determining when the terms of a collective agreement are incorporated into a contract of employment and when such a term is "apt" for incorporation.

[1] [1969] 2 QB 303.

THE FACTS

The crux of this case was a dispute between the trade union (the Prison Officers Association) and the employer (now the Ministry of Justice, previously the HM Prison Service) over the incorporation of a term of a collective agreement in prison officers' contracts relating to overtime provisions. With a view to amending a number of working practices lengthy negotiations had taken place between HM Prison Service and the Prison Officers' Association over a number of years in the 1980's resulting in a detailed agreement (known as Bulletin 8) between the parties in 1987. The particular provision in dispute, paragraph 23 of Annex A to Bulletin 8, replaced paid overtime with "Time Off In Lieu" (TOIL) - prison officers who worked over their normal 39 hour week would be entitled to TOIL for the excess hours worked. The relevant part of paragraph 23 in dispute stated: "Group managers should ensure that individual members of staff do not work high levels of additional hours without being compensated by TOIL. The aim should be for no more than five additional hours to be accumulated in any one week. *Accumulated TOIL will be granted as soon as operationally possible and within a maximum period of five weeks."*

The claimant appealed against the dismissal of his claim for breach of contract when, after working the additional overtime, the employer had failed to offer him TOIL within the 5 weeks' time period outlined in paragraph 23. Judge Wood QC in the county court had held that the failure of the employer to comply with this requirement was not legally significant as there was insufficient documentation adduced in evidence to conclude that paragraph 23 had been expressly incorporated into the claimant's contract of employment. Wood J, nevertheless, did determine that a general obligation to grant TOIL was arguably incorporated by implication as a custom and practice; as payment for overtime was a recognised practice for a number of years and so clearly understood by both parties to be contractually binding. However, as there was

no continuous provision of TOIL within 5 weeks as required by paragraph 23, this specific time frame was not legally inferred.

THE DECISION IN THE COURT OF APPEAL

The Court of Appeal dismissed the appeal. Rimer LJ (who gave the only reasoned judgment) found that paragraph 23 had not been incorporated by express reference as the claimant was unable to produce his original letter of appointment or written particulars of employment or any other documentation addressed to him that expressly introduced Bulletin 8 (and therefore paragraph 23) into his terms and conditions. A later standard form letter had been sent to employees that made express reference to Bulletin 8 and additionally referred to TOIL provisions in the staff handbook. Rimer LJ, however, rejected the letter's significance as the provisions in the staff handbook did not form part of the contract of employment and the failure to provide evidence that George had actually received the letter was fatal to the claim that Bulletin 8 had been expressly incorporated into his contract.

As there was no direct evidence of express incorporation paragraph 23 could only be incorporated by inference; the basis for which was an intention by both parties to be bound by that provision. Counsel for George submitted that the extensive negotiations on the particular wording of this paragraph prior to agreement was part of the factual background that should be considered when determining the intention of the parties – justifying the conclusion that the parties implicitly intended paragraph 23 to be legally binding at the individual level and therefore enforceable as a term of the contract. Rimer LJ, however, rejected Counsel's submissions. The negotiations prior to the subsequent collective agreement were only one source of the evidence of the intention of the two parties and ultimately insufficient to justify implied incorporation.

Rimer LJ also explicitly overruled the decision of the county court that TOIL had been impliedly incorporated by custom and practice. Rimer LJ applied the test from the judgment of Hobhouse J in *Alexander v Standard Telephones*[2] - that intent can be implied from both parties knowledge of the relevant clause of the agreement and subsequent compliance with that provision, particularly where it has a day to day impact. Rimer LJ noted that TOIL, as compensation for additional hours, had been operating for a number of years since Bulletin 8 had been agreed in 1987, but as it was not always the case that TOIL was granted within five weeks this was an inadequate level of compliance to satisfy the test for TOIL *per se* to be an enforceable custom of employment.

Of greater significance was Rimer LJ's view that even if paragraph 23 was intended by the parties to be enforceable it was not "apt" for incorporation – it was not the type of clause that was capable of incorporation as an individual term. The proviso that leave should be available within a 5 week period was a mere 'aspiration or target'; non-binding guidance on the issue of when TOIL would, in normal operational circumstances, be granted. Rimer LJ came to this conclusion by taking account of the generalised language of paragraph 23 and its associated provisions and by the fact that paragraph 23 was contained in a staff handbook ostensibly dedicated to "policies and procedures". Furthermore, Rimer LJ noted that paragraph 23 required TOIL to be provided without taking account of the efficient functioning of the Prison service. Counsel for the employer's observation that if paragraph 23 was applied literally, as an unqualified contractual obligation, it would have "catastrophic" operational consequences, informed his conclusions that such a clause was not legally binding as it was in practice unworkable and thus "... inconsistent with the parties likely intention". [3]

[2] [1991] IRLR 286 at para 27.
[3] *George v Ministry of Justice* [2013] EWCA 324 at para 60.

COMMENTARY

The Court of Appeal in *George* has followed a form of interpretation of the principles of incorporation that has implications for the drafting of collective agreements and their impact at the workplace.

In determining that the standard form letters referring to the TOIL provisions were not significant, the court had arguably failed to construe the documents in context - by reference to the detailed negotiations prior to the agreement on paragraph 23 which provides evidence of an intention by both parties to be bound by its content. Furthermore, in determining the issue of whether the clause had been incorporated by inference, although Rimer LJ had quoted extensively and approvingly from the judgment of Hobhouse J in Alexander v Standard Telephones[4] he had arguably failed to fully apply the principles from this judgment to the facts in *George.* TOIL was an issue of day-to-day relevance (relating to wages and time off) and over a number of years the Bulletin 8 TOIL provisions (stemming from the bargaining process) had been substantially followed. To determine that an aspect of detail of the TOIL provisions contained in Bulletin 8 was not incorporated by inference because it had not been followed in absolute terms seems an overly restrictive approach to the principles of implied incorporation by custom and practice.

Of greater concern is Rimer LJ's decision that paragraph 23 was not "apt" for incorporation. Some aspects of Bulletin 8 were clearly aspirational and not appropriate for incorporation; including the first two sentences of paragraph 23. However, the final sentence of paragraph 23 was clear and specific in its language and not a vague policy orientated clause but one on pay that affected employees on a daily basis. As the wording of the clause was clear and transparent

[4] [1991] IRLR 286.

and was not on an issue that was solely of collective interest and relevant only to the union/employer relationship it ought to have been considered as "apt" for incorporation.

The Court of Appeal's decision in *George* continues the modern trend of the Court of Appeal to emphasise the relevance of the impact of incorporation when assessing whether the clause is capable of incorporation. An earlier example of this approach is demonstrated in *Malone v British Airways plcs*[5] where the disputed clause in the relevant collective agreement prescribed in detail the minimum number of cabin crew to be allocated to specific aircraft. Although the Court of Appeal accepted that the clause in dispute was a clear undertaking, it was held that the employer's unilateral reduction of crew members for individual aircraft below the number outlined in the collective agreement did not amount to a breach of the individual contract of employment - it was merely an undertaking to the union as a collective body and so not "apt" for incorporation. The Court of Appeal declared that the parties could not have intended for the clause to be individually enforceable – taking into account that it could result in grounded flights and "… the disastrous consequences for British Airways which would ensue".[6]

This method - of determining the aptness of a clause based on its practical effect - may be a technique to avoid unfortunate consequences for an employer but it is difficult to see how it can be supported by the application of principle. Case law undoubtedly holds that recognition or facility agreements[7] are unsuited to incorporation as they are areas of concern to the union collectively, as are documents of a general policy nature; for example, on long term redundancy or training issues[8] or clauses in an agreement that are too vague.[9] In all these circumstances the parties would not intend or expect to be bound at the individual level. However, if the clause

[5] *Malone v British Airways plc* [2011] IRLR 32.
[6] *Malone v British Airways plc* [2011] IRLR 32 at para 62.
[7] *Gallagher v Post Office* [1970] 3 All ER 712.
[8] *British Leyland v McQuilken* [1978] IRLR 245.
[9] *Lee v GEC Plessey Telecommunications* [1993] IRLR 383.

is sufficiently individual in scope; on a substantive issue, such as pay, hours of work or other such term expected in a contract of employment, it is prima facie suitable for incorporation[10] unless there is plain evidence that the parties did not intend the clauses to have legal effect.

In *George* (as in *Malone*), the provision in dispute was an issue of an individual nature; unrelated to any collective issue. The evidence of intention of both parties to treat paragraph 23 as enforceable (the clear and specific language, the enforcement of related clauses and the evidence of the negotiation surrounding the agreements) was given little emphasis by the Court of Appeal. What was given emphasis and taken into account when construing the intention of the parties was not the prior negotiations and the surrounding documentation but the organisational and operational implications of the provision. This arguably more subjective analysis in determining whether the parties intended legal consequences to flow from the provision does not, on the face of it, comply with the principles of contractual construction.[11]

One conclusion that can be derived from the decision in *George* (and the earlier *Malone* case) is that clauses that are detrimental to employers' interests are less "apt" for incorporation than clauses that are not. These cases suggest that the courts are entitled to look behind the express obligations in a collective agreement and that terms stemming from collective agreements are worthy of greater scrutiny than other contractual documents. Decisions like George thus arguably undermine the process of collective bargaining as an effective means of regulating workplace issues and determining terms and conditions of employment. In the future those involved in union-employer negotiations need to ensure that the results of negotiations are very

[10] *National Coal Board v National Union of Mineworkers* [1986] IRLR 439; *Kaur v MG Rover Group* [2005] IRLR 40.

[11] The principles of construction relating to collective agreements were succinctly outlined by Sir Thomas Bingham MR in *Adams v British Airways plc* [1996] IRLR 574 at para 22 – "..a collective agreement must be construed like any other agreement … construed in its factual setting as known by the parties at the time".

clearly expressed as definite undertakings so that they can withstand the sort of rigorous contractual analysis demonstrated by *George* and *Malone*.

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