Chapter 5: The nature and content of the personal employment contract
Page 161

1. Consult the sample collective agreement on the Online Resource Centre. To what extent do you believe that it is possible to divide the collective from the individual content of that agreement? What bearing does your answer have on the rule that a provision of a collective agreement must be apt for incorporation into the contract of employment?

Author's answer: A provision of a collective agreement will be apt for incorporation where it pertains to individual matters which can be attributed to the employment relationship or regulate working conditions, such as hours of work, payment terms, or absence management provisions rather than *collective or procedural* matters regulated by the collective agreement (such as redundancy planning, enhanced redundancy payment provisions, redundancy selection procedures, or conciliation and dispute resolution procedures). For example, clauses 2.3 and 3.1 of the UCU collective agreement on the Online Resource Centre which relate to the payment terms of the salaries and holiday pay of part-time workers would be sufficiently individual in nature to be apt for incorporation. This can be contrasted with clause 17.2 which is more procedural in nature and governs the mechanisms for the monitoring and review of the terms of the UCU collective agreement.

2. Distinguish a trade custom from a single employer custom and practice. Are you convinced that the legal distinction between these two typologies of custom and practice is necessary, and to what extent are you of the view that the legal tests for ascribing contractual status to these two forms of custom and practice are truly distinct?

Author's answer: A 'single employer custom and practice' involves a unilateral action or practice on the part of an employer, e.g. where an employment contract provides for Statutory Sick Pay but the employer continues to pay full wages during periods of absence due to illness. This can be contrasted with a trade custom, which is industry standard, e.g. deducting wages for poor work in particular industries. The test for establishing a trade custom is quite high: it must be 'reasonable, notorious, and certain'. In general, it is more difficult for an employee to establish a 'single employer custom and practice' than a trade custom since the requisite criteria which are necessary to establish it can be more easily inferred. For example, in the case of a 'single employer custom and practice', the courts are unwilling to contractually commit employers to gratuitous practices (e.g. *ex gratia* bonuses or enhanced redundancy payments) or practices that are simply illustrations of repeated patterns of behaviour.