Two bites at the cherry?

When will the EAT ask employment tribunals for further reasons? Oliver Hyams and Diya Sen Gupta report

Where an employment tribunal (ET) is alleged to have failed to deal with an issue at all, or to have given no reasons or inadequate reasons for its judgment, the Employment Appeal Tribunal (EAT) has adopted the case management practice of inviting the ET to provide additional reasons for its decision before the matter proceeds to the full hearing of the appeal. This practice of referring a case back for further reasons is distinct from remitting a case for re-determination or further determination after the final determination of the appeal.

This practice of referring cases back to the ET has been adopted by the EAT since 2002, following the Court of Appeal's judgment in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 WLR 2409. In endorsing the procedure in relation to appeals from the High Court, the Court of Appeal there held (in para 24):

> "We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons."

The lawfulness of the EAT's practice of referring cases back to an ET for an amplification of its reasons has remained unclear and has been the subject of inconsistent decisions of the EAT. The Court of Appeal (Buxton, Brooke, Dyson LJJ) has now had its first opportunity to consider the issue in the case of *Barke v SEETEC Business Technology Centre Ltd* [2005] EWCA Civ 578. The court held the practice to be

Oliver Hyams and Diya Sen Gupta are barristers practising from Devereux

Background

[2000] 1 WLR 377, the Court of Appeal allowed an appeal on the sole ground that the judge had failed to give adequate reasons for his decision. The trial had involved a stark conflict of expert evidence. The judge had preferred the expert evidence of the defendants to that of the plaintiffs, without explaining why. The Court of Appeal ordered a retrial. *Flannery* marked a development of the common law in relation to the giving of reasons by a judge in the 'ordinary' civil courts, and it inspired a large number of applications for permission to appeal on the ground of inadequate reasons. In English, the Court of Appeal sought to limit the scope for successful 'reasons' appeals.

In *Tran v Greenwich Vietnam Community Council* [2002] ICR 1101, the Court of Appeal stated that the EAT does not have the power to remit a case to the ET for the giving of fuller reasons at the end of the substantive hearing of the appeal. Section 35 of the Employment Tribunals Act 1996 confers a power on the EAT to remit a case to the ET "[f]or the purpose of disposing of an appeal". In the view of the majority of the court in *Tran*, the EAT would not be "disposing" of an appeal by making such an order. It would be retaining it. Sedley LJ dissented on this issue, and held that the power to remit under s 35 is not confined to orders made at the conclusion of an appeal. It exists, he said, "for the purpose of disposing of an appeal" and can therefore be exercised at any appropriate stage. The judgments in *Tran* were handed down seven days before the Court of Appeal's decision in *English*.

In *Burns v Royal Mail Group plc* [2004] ICR 1103, Burton J made it clear that the EAT had adopted the procedure recommended and approved by the Court of Appeal in *English*. The

Court of Appeal's decision in *English*, said the EAT, was clearly intended to be of "universal application". The EAT considered that "remission, carefully controlled, makes... entire sense".

However, in *Sinclair Roche & Temperley* [2004] IRLR 763, Burton J stated that he recognised that there are dangers in remitting a case to the same ET after a successful substantive appeal. He stated that the following factors needed to be taken into account when deciding whether to do so: proportionality; passage of time; bias or partiality; and whether the decision was totally flawed. He also said (para 46.5):

> "If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult, if not impossible, task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say, 'I told you so'."

However, the ET's 'professionalism' could be relied upon in most cases to justify the remission of the case to the same ET (para 46.6).

Public law cases

This is in marked contrast to the approach taken in some public law cases. In *R (Ermakov) v Westminster City Council* [1996] 2 All ER 302, judicial review was sought of the decision of a local housing authority that the applicant had become homeless intentionally. The statute required the decision and the reasons to be given at the same time. The authority submitted evidence which purported to give the true

reasons for the decision – reasons which differed from those stated in the decision letter. The question was whether the court should take account of the later 'true' reasons. The court's approach was restrictive. Hutchison LJ, who gave the leading judgment, stated (at 316):

"Section 64 [of the Housing Act 1985] requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is *prima facie* entitled to have the decision quashed as unlawful. There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings."

Similarly, in para 79 of his judgment in *VK v (1) Norfolk CC and (2) The SENDIST* [2004] EWHC 2921 (Admin), Stanley Burnton J said:

"Furthermore, although I do not suggest that the Tribunal in the present case would tailor its supplementary reasons to meet the appellant's criticisms, if the practice of permitting supplementary reasons were to be followed generally, the temptation would be created."

The current position in public law cases, where it is sought to amplify reasons already given, was neatly encapsulated by Newman J in *R (H) v The Independent Appeal Panel for Y College* [2004] EWHC 1193 (Admin), [2005] ELR 25, at para 19:

"It is not permissible to provide reasons for a decision which go beyond the reasons already given. Clarification and a measure of elaboration on the reasons already given will normally be permissible."

Barke v SEETEC

Mrs Barke's claim was of unfair dismissal and disability discrimination. The ET dismissed both claims, and Barke appealed to the EAT. At the sifting stage, Burton J made an order requesting the chairman of the ET to provide answers to a list of questions arising out of the Notice of Appeal. Barke appealed to the Court of Appeal on the basis that the EAT did not have jurisdiction to make such an order, or alternatively that, if it did, the manner in which the jurisdiction had purportedly been exercised was unlawful.

The Department of Trade and Industry (DTI), which has administrative responsibility for ETs and the EAT, intervened. Counsel for the DTI emphasised that the EAT considered the *Burns* procedure to be an important case management tool.

Rule 30(3)(b) of the Employment Tribunals Rules of Procedure 2004 provides that "written reasons shall only be provided" in two circumstances, including "in relation to any judgment or order if requested by the Employment Appeal Tribunal at any time". It was submitted on behalf of Barke that the proper interpretation of this provision (read in the light of its context) was that the power to provide written reasons in response to such a request arose only if no written reasons had previously been provided. Alternatively, it was submitted, the power could lawfully be exercised only in accordance with the principles developed in the public law cases as described above. In addition, reliance was placed on what was said by the House of Lords in *Porter v Magill* [2002] 2 AC 357 about the need to avoid the appearance of bias, the proper test for determining whether a relevant decision-maker was biased being "whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

The Court of Appeal agreed with the majority in *Tran* concerning the remission of a case to an ET for an expansion of reasons at the end of the hearing of an appeal. However, the court approved the following of the same practice before the hearing of the appeal, holding (in para 38) that:

"Judges are different from other decision-makers. Their function is to decide disputes between opposing parties in accordance with the law. They are expected to demonstrate a very high degree of professionalism."

This may be right, but it sits uneasily with what the House of Lords said in *Lawal v Northern Spirit* [2003] ICR 856 (in paras 14 and 22) about the importance of maintaining the confidence of the public in the courts:

"The small but important shift approved in *Porter v Magill* [2002] 2 AC 357 has at its core the need for 'the confidence which must be inspired by the courts in a democratic society': *Belilos v Switzerland* (1988) 10 EHRR 466, 489, para 67; *Wettstein v Switzerland* (Application No 33958/96), para 44; *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, 591, para 83. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach... The informed observer of today can perhaps 'be expected to be aware of the legal traditions and culture of this jurisdiction' as was said in *Taylor v Lawrence* [2003] QB 528, 548-549, paras 61-64, per Lord Woolf CJ. But he may not be wholly uncritical of this culture."

Conclusion

It may seem a little odd that a public law decision-maker who has no legal training, and may not be fully aware of the importance of giving sufficient reasons for a decision, may expand on earlier reasons only within limits, whereas professional judges, who may be expected to know the importance of giving proper reasons, may do so apparently without limit. The reasonable and informed observer may be justified in thinking that the interests of the efficient conduct of judicial business have been allowed to prevail over what some might think of as 'justice'. It is to be hoped the House of Lords will be given an opportunity of considering the matter further.