To remit or not to remit?

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The Court of Appeal's recent judgment in Kuznetsov brings back into sharp focus the thorny issue of remittal and, in particular, the circumstances in which the EAT may substitute its own decision for that of the tribunal below.

Background: Jafri

Jafri held that where on appeal the EAT identifies a legal error, it must remit to the employment tribunal unless it concludes either i) that the error could not have affected the result and was therefore immaterial or ii) that although the result would have been different without the error, it is able to conclude what the result would have been, flowing from the findings of fact made by the tribunal and supplemented, if at all, only by undisputed or indisputable facts.

The decision in *Jafri* had closed down the suggestion in a series of earlier cases that there should be a reconsideration of the conventional approach and a more relaxed test applied to the question of remittal. However, in *Jafri*, although the conventional approach was ultimately upheld, concern was expressed, albeit *obiter*, about the restrictions of that approach.

Burrell

This concern was picked up by a differently constituted Court of Appeal in *Burrell*, which had heard arguments before *Jafri* had been promulgated. Notwithstanding a reluctant acceptance that the court was bound by the decision in *Jafri*, Maurice Kay LJ went on to reiterate, *obiter*, the observations of Underhill LJ in *Jafri* as to the appeal tribunal taking a robust approach to the remittal and also as to the encouragement of parties to consent to the appellate tribunal disposing of the case pursuant to its powers under s.35(1)(a) ETA 1996, even where the appeal before it was not an 'only one outcome' case.

Maurice Kay LJ advocated a softening to the conventional approach to remittal, relying on the judge-sitting-alone feature articulated by Underhill LJ in *Jafri* and the introduction of the overriding objective into the employment tribunals' jurisdiction, which requires that matters be dealt with proportionately, flexibly, cost-efficiently and timeously. A further suggestion was also advanced, namely that, even where remittal was necessary, the appeal tribunal in recognition of the overriding objective might limit the scope of remittal by identifying narrow issues for determination or limiting the introduction of further evidence.

Kuznetsov

In *Kuznetsov*, Elias LJ adopted the 'robust' approach advocated by Underhill LJ in *Jafri* and Maurice Kay LJ in *Burrell*, observing: 'It behoves an appellate court to take a robust and realistic approach to the issue of whether an error of law was material in this context, not least because of the additional delay and cost involved in a remittal (and the possibility of further appeals). It seems to me that on a fair reading of EJ Glennie's judgment, his reasons for refusing the amendment were not based on a narrow assessment of the extent to which it would involve fresh evidence. That was one factor but other important factors included the fact that the claims were out of time and there was no justification for extending time, that there had been substantial delays and that it was a fresh claim which had at no point been floated.

'Remitting the case simply creates more delay and adds to the time and costs of the litigation. It is not conducive to achieving the overriding objective. Where findings of fact are in issue, remittal will almost inevitably be appropriate since the [employment tribunal] is the fact-finding tribunal. But where the issue is, as here, the correctness of a case management order, there is no advantage in the matter being remitted to the [tribunal] judge who is no better equipped than the EAT judge to determine the issue' (paras 32-34).

Where are we now?

In *Kuznetsov*, the key distinction relied upon by Elias LJ was that the decision under challenge did not involve a

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finding of fact, in which case remittal to the first instance tribunal – as industrial jury – would have been inevitable. Rather, this was a case management decision which involved the multifactorial balancing exercise inherent in the determination of an amendment application, which, it was observed, the tribunal was in no better a position to judge than the appellate tribunal.

It appears that the tides of judicial authority are turning towards a softening of the conventional approach to remittal, depending on the extent to which the circumstances permit the appeal tribunal to take a 'robust' approach to disposal. Relevant to that consideration will be:

- whether the issue relates to a finding of fact – in these circumstances remittal will almost inevitably be appropriate unless it can be said that the fact is immaterial to the determination of the legal issue. Parties should be alive to the attempts of appellants to introduce new facts on appeal which, it is argued, would have been material to the first instance tribunal's fact-finding function such that remittal is required;
- whether it can be argued that the case falls within the 'only one outcome' variety. It is in respect of this species of case that parties will no doubt be inviting appellate tribunals to take a robust approach, relying on the dicta of Elias LJ in *Kuznetsov* in order to mitigate the effect of the discernible error;
- if it is not an 'only one outcome' case, the matter must be remitted by the EAT even where the EAT is in as good a position as the tribunal to decide the matter, unless the parties agree to the EAT's disposal of the issue.

Conclusion

For now, *Jafri* remains good law until, as Elias LJ makes clear in *Kuznetsov*, Supreme Court authority or legislation stipulates otherwise. However, it looks likely that its effect stands to be diluted, either by way of encouragement to parties to consent to disposal by the appellate tribunal or by the EAT taking a 'robust and realistic' approach to whether and to what extent an error of law at first instance can be said to have fallen within the parameters of inconsequentiality.

Alice Mayhew appeared on behalf of the respondent in Burrell and Kuznetsov.

KEY:

Kuznetsov	*Kuznetsov v The Royal Bank of Scotland* [2017] EWCA Civ 43
Jafri	*Jafri v Lincoln College* [2014] ICR 920
Burrell	*Burrell v Micheldever Tyre Services Ltd* [2014] ICR 935
ETA	Employment Tribunals Act 1996