Employment law brief

Ian Smith admits he's been wrong and reviews recent decisions covering unfair dismissal, politics and the parallel universe of TUPE

The theme for this month's rant is—it's amazing how wrong you can be in life. Employment law has a nasty habit of not only springing completely new law on you, but also going back on the odd basic rule or nostrum in an uncomfortable way. On a personal level, this particularly affected your humble author when the online revolution hit *Harvey* and suddenly all my old bulletins (previously accessible only to those who assiduously kept them when told to discard them—a category of person best described in the terms of my children's generation as "saddos") became easily recalled, replete as they may have been with analytical errors, shortcomings and false prophecies, not to mention the odd definable libel.

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The effect of an appeal

The first example of wrong-headedness arose in relation to the fairness of a dismissal (under the general law, not the statutory procedure) and when an unfair hearing can be "cured" by a fair appeal. The wisdom of the ages has been that this will only rescue the employer if the appeal takes the form of a complete rehearing of the case, not just a review of the original decision. This has been part of the furniture for so long that, naively or otherwise, your author included it in the relevant place in *Halsbury's Laws*. Now however, the Court of Appeal has disapproved this view in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, partly by revisiting the matter on first principles and partly (in Boris Karloff style) by invoking the "curse of the unreported case".

The employee, a disabled person through deafness, was found guilty of serious misconduct by misuse of computer access. After a hasty disciplinary hearing which he had difficulty understanding, he brought an appeal which was heard some time later and at greater length. The tribunal found that the first hearing was unfair and that it was not cured by the appeal. Its reasoning was the widely-understood approach that a fair appeal will only cure a bad hearing if it takes the form of a rehearing, not merely a review of the dismissal. Here, the tribunal characterised the appeal as a mere review. The Employment Appeal Tribunal (EAT) agreed that the tribunal reached the right decision.

The rehearing/review principle has usually been held to flow from *Whitbread & Co Ltd v Mills* [1988] ICR 776, [1988] IRLR 501, EAT and can be seen in later cases such as *Clark v CAA* [1991] IRLR 412, EAT. However, the Court of Appeal considered this matter afresh, drawing on the unreported decision of the EAT under Morison P in *Adivihalli v Export Credits Guarantee Dept* (EAT/917/97) where it was said that *Whitbread* established no such rule of law, and that a tribunal must look at whether, in all the circumstances, the later stages of a procedure were sufficient to cure any earlier unfairness. The Court of Appeal, in a judgment by Smith LJ, adopted this approach and held that a tribunal must not fall into the error of solving this point only by seeking to categorise the appeal as either a rehearing or a review. This is seen at para 38 where it is said that *Whitbread* and subsequent cases may have misunderstood the point, and that ultimately a tribunal must look at the overall fairness of the procedure, in particular the "thoroughness and the open-mindedness of the decision-maker".

This is an important statement of principle. In light of several of the "misunderstanding" cases, over so many years, it may well still be that an appeal is more likely to cure a bad hearing if it takes the form of a full rehearing—which therefore might still be the best advice to give to an employer—but the case establishes that this is not a rule of law and must no longer be applied by a tribunal as if it were. One final point of interest is whether this case will also be applied (if ever relevant) to the statutory disciplinary procedure, which requires the offer of an appeal but says nothing as to how it is to be conducted.

TUPE and a transferred collective agreement

The second example of wrong-headedness concerns those of us who thought the transfer of undertakings (protection of employment) (TUPE) decision in *Whent v Cartledge Ltd* [1997] IRLR 153, EAT to be strange but logical—at least under the logic of the parallel universe of TUPE. This was the case where the transferred employees' contracts incorporated terms agreed in collective bargains involving their previous (transferor) employer. Their new employer derecognised the relevant union but failed to show a variation of the individual contracts. The employees subsequently sued successfully for a pay rise negotiated between the union and their previous employer, despite the fact that their new employer was not a party to any of the negotiations. This odd result seemed to be entirely in line with the regime of automatic transfer of contractual terms—a principle found just as strongly in this year's TUPE Regulations (SI 2006/246).

Now, however, doubt has been cast on this by the European Court of Justice (ECJ) in *Werhof v Freeway Traffic Systems GmbH* C-499/04 [2006] IRLR 400, [2006] All ER (D) 145 (May). Factually this case was close to *Whent*, but the ECJ held that the transferred employee did not have the right to use the Acquired Rights Directive 77/187 to claim the benefit of a future collective agreement. They held that in such a case the directive safeguards the employee's rights under the existing incorporated collective agreement, but does not extend protection to any rights under any agreement subsequent to the agreement in force at the date of transfer, which were categorised as merely expectations or hypothetical advantages for the future. They disapproved any "dynamic" interpretation, as in *Whent*, including on the ground that freedom of association means that (in its application to the employer, not just the employee) it would be improper to hold an employer liable under an agreement to which it was not a party. The ECJ decision, on a German reference, concerning German TUPE provisions differently cast from ours, re-interprets the directive's requirements, which arguably means that *Whent* is wrong, as opposed to being merely an example of UK law going beyond a minimum standard set by the backing directive.

No age discrimination before October

The third example of wrong-headedness concerns anyone who expected the decision

of the House of Lords in *Secretary of State for Trade and Industry v Rutherford* [2006] UKHL 19, [2006] All ER (D) 30 (May) to lay down broad guidelines as to how to deal with "disparate effect" generally in indirect discrimination claims under any of the heads of unlawful discrimination.

The Lords unanimously held against the claimants, so that sex discrimination is now not to be used to erect a form of age discrimination in advance of the new statutory scheme coming into force in October 2006. The problem is that the speeches are ambiguous on the wider question of disparate effect, in particular the well-known conundrum of whether, when applying a statistical comparison, you should look at and compare the advantaged group (in, for example, a sex discrimination case, how many men/women can comply?) or the disadvantaged group (how many men/women cannot comply?).

Lord Scott, Lord Rodger and Lady Hale held that this issue did not arise in *Rutherford*, ie there was no basis for comparison in the first place. Lord Walker, after making a particularly tart comment about this (non) reasoning, considers the statistical problem at length and largely comes down in favour of the "advantage-led" approach, on which basis the statistics did not support the claimants. The problem with this—leaving aside the question of the precedent value of one speech when three others have said that the issue does not arise at all—is that Lord Nicholls purports to agree with Lord Walker, but then appears to decide the point on the ground that the statistics did not support the claimants on a disadvantage-led approach. Make of it what you will, which may not be much.

Dismissal, discrimination and political views

The fourth example of wrong-headedness showed the EAT going wrong by taking an overly-principled approach, even if it led to a worrying conclusion. Its decision in *Serco Ltd v Redfearn* [2006] EWCA Civ 659, [2006] All ER (D) 366 (May) had caused some consternation with its holding that an employee dismissed because of his candidature in local elections on behalf of the British National Party could claim to have been racially discriminated against. Part of the consternation was because—leaving aside the policy behind the Race Relations Act 1976 (RRA 1976) itself—it seemed possible that this was the inevitable (boomerang?) result of the well-established principle that a person can be discriminated against because of someone else's race—even though that rule evolved to protect people who refused to discriminate against another. The Court of Appeal, however, allowed the employer's appeal.

The employee in question had not been wrongfully dismissed and lacked the one year's qualifying period for unfair dismissal; hence the rather strained reliance on RRA 1976. This was prevented in Mummery LJ's judgment by placing a relatively narrow interpretation of the leading authority of *Showboat Entertainment Centre v Owens* [1984] ICR 65, [1984] 1 All ER 836, concentrating on what it was actually meant to achieve (in allowing A to claim race discrimination on the basis of B's race) and the policy behind RRA 1976. At para 45 the judge states:

"[The claimant's case] turns the ratio of *Showboat* and the policy of the race relations legislation upside down. It would mean that any less favourable treatment brought about because of concern about racist views or conduct of a person in a multi-ethnic workplace would constitute race discrimination. The ratio of *Showboat* is that the racially discriminatory employer is liable 'on racial grounds' for the less favourable treatment of those who refuse to implement his policy or are affected by his policy. It does not apply so as to make the employer who is not pursuing a policy of race discrimination or who is pursuing a policy of anti-race discrimination, liable for race discrimination."

Having dealt with the principal issue of direct discrimination, the judge went on to rule out indirect discrimination (no "provision, criterion or practice") and to find against an argument for free speech, etc under the Human Rights Act 1998 on the basis of Art 17 of the European Convention on Human Rights (the Convention) which states that nothing in it gives a right to engage in activities which are themselves aimed at destroying the Convention's rights and freedoms.

There is, however, one caveat to this result which may give pause for thought. As seen, this was not a claim of unfair dismissal and so the judge stressed that the case did not raise issues of the reasonableness of the claimant's dismissal. What if it had? At para 10 the judge made this point, which may act as something of a warning in any future cases:

"If this was an unfair dismissal case, there would be substance in the critical comments on the circumstances of Mr Redfearn's dismissal. It is not, in general, fair to dismiss a person from employment for engaging in political activities or for being a member of a political party propagating policies that are unacceptable to his employer, to his fellow employees, to trade union officials and members, or even to most of the population. We aspire to live in peace with one another in a politically free and tolerant society. Unpopular political opinions are lawful, even if they are intolerant of others and give offence to many. The right to stand for political office in a democratic election and to engage in political debate is entitled to respect, however unpalatable the person's political convictions may be to many others."

On the facts, it appeared that the claimant had been a good employee and it was not alleged that he had vented any of his views at work. In such a case, might it perhaps be said that an employer can rid itself of an employee because of his political activities, only provided that the employee does not have a year's employment? Watch this space.

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