Employment

A flight of fancy?

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report on collective agreements in employment contracts

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IN BRIEF

- Ruling that cabin crew contracts are not breached by crewing reduction.
- Incorporation of collective agreements in contracts of employment.
- Test for aptness involves discerning objective intention of the parties.

In 2009 British Airways (BA) was facing serious financial difficulties as a result of the collapse in premium business travel and the rise in fuel prices. BA started to negotiate cost savings with all sections of its workforce and needed to make saving from cabin crew costs of £140 million. In February 2009 negotiations began with UNITE the Union. Two rival sections within the union, BASSA and Cabin Crew 89, were separately represented at the talks. BA proposed a reduction in crew complement (the manning levels on each particular flight) as a cost-saving scheme to enable cabin crew members to take voluntary redundancy or become part-time workers. Counter proposals put forward by UNITE were not acceptable to BA and negotiations did not make progress. Unfortunately there was a serious disagreement between BASSA and Cabin Crew 89 and talks stagnated and then collapsed when BASSA and Cabin Crew 89 refused to negotiate together at ACAS.

After these months of unsuccessful negotiations (although having achieved some success with other employee groups), BA announced it would make a reduction to the crew complements on its Eurofleet and Worldwide Fleet flights without the agreement of the union. The unilateral reduction to crew complements was implemented from November 2009 and large numbers of crew volunteered for redundancy or part-time working. Approximately 5000 claimants, all UNITE members, alleged that the crew complements which had been collectively agreed were incorporated into their individual contracts of employment. The claimants sought a declaration of their contractual terms, an injunction to prevent BA implementing the crew complements and damages. The interim injunction application before Butterfield J in November 2009 was unsuccessful and at the speedy trial in early 2010 Sir Christopher Holland found that the crew complements were not apt for incorporation into the claimants' contracts. The union also called for strike action, unsuccessfully at Christmas due to balloting failures, but successfully in the spring.

The Court of Appeal's decision

The Court of Appeal, Smith LJ giving the leading judgment with which Jackson LJ and Ward LJ agreed, dismissed the claimants' appeal and upheld the decision of the High Court. Her Ladyship began by considering the claimants' contracts of employment and the relevant collective agreements. Typically the claimants' contracts of employment provided that their employment was governed by relevant collective agreements, which were expressly incorporated 'as appropriate' into the contracts of employment. It was common ground between the parties that the relevant question was whether crew complement provisions of the collective agreements were apt for such incorporation.

Next, Smith LJ went on to consider the two relevant collective agreements, the Worldwide Scheduling Agreement (WSA) and the Eurofleet Cabin Crew Manual (ECCM). These set out unusually detailed arrangements for cabin crew, including crew complements and the duties, obligations, rights and expectations of BA and crew members. The collectively agreed crew complements were an addition to, and often greater than, the legal minimum crewing levels imposed by the relevant Air Navigation Order. She observed that neither the WSA or ECCM had previously been altered without bilateral agreement.

In the light of what she termed a "powerful argument", her Ladyship determined that the provisions of the WSA and ECCM which set out crew complements were not apt for incorporation into individual contracts of employment. She did so by considering the effect they would have if individually enforceable by cabin crew. BA argued that if individual cabin crew could enforce crewing levels by injunction whenever it was obliged to fly an aircraft with fewer crew members than provided for in the collective agreement, the result would be anarchy. If one member of crew was individually contractually entitled to refuse to fly without the collectively agreed number of crew, he could prevent a flight departing by insisting upon his contract and, if necessary, by obtaining an injunction to prevent a breach of contract. However the other members of crew may well have agreed to vary their contractual rights to enable the flight to depart. In such a case there would be tension between the individually enforceable rights of different crew members on the same flight. In this situation a flight would be prevented from departing. Given

the "disastrous commercial effects" of individual enforcement, the Court concluded that this could not have been intended by the parties.

Smith LJ recognised the findings of fact made by Sir Christopher Holland on the modest impact of a reduction in crew complements on the working conditions of individual crew members. When "set against" the disastrous consequences for BA which would flow from the crew complements being enforceable by individual crew members, it was unthinkable that crew complements should give rise to individual contractual rights. The crew complements were therefore not apt for incorporation into individual contracts of employment. Instead they were intended to be an undertaking towards cabin crew collectively, partly to protect jobs and partly to protect crews from excessive work and binding in honour only.

Reasonable Changes

The Judge had in the court below, accepted as an alternative argument that BA had the power to make unilateral variations to terms and conditions of employment for most of the claimants due to an express term included in contracts since 1994. BA reserved the right "to make reasonable changes to any of your terms of employment from time to time" by way of a general or specific notice. The Judge upheld this clause relying on *Wandsworth LBC v Da Silva* [1998] IRLR 193, but the claimants appealed arguing that *Wandsworth* did not apply and *Bateman v Asda Stores* [2010] IRLR 370 was incorrectly decided. The Court of Appeal declined to address the issue and dismissed the appeal on this issue and so the first instance decision and *Bateman* still stand.

Previous case law

The Court of Appeal's decision requires consideration in the light of previous case law. The test of whether a term of a document purporting to be incorporated into an individual's contract of employment is apt for incorporation was set out in *Alexander v Standard Telephones* [1991] IRLR 286, but the judgment did not go so far as to say what "apt" means in this situation. Subsequently, guidance from the Court of Appeal in *Keeley v Fosroc International* [2006] IRLR 961 was that a court should consider the importance of a provision to a bargain when determining whether it should be incorporated into an individual's contract of employment. Those which amounted to contractual undertakings can be apt for incorporation, in contrast to those which are declarations of aspiration or policy. It is apparent from Smith LJ's conclusions in *Malone* that although she considered the crew complements to be part of a policy of collectively protecting jobs and crews from excessive work, this was not the basis on which the crew complements were found to be inapt for incorporation.

In two subsequent cases the courts have drawn distinctions between a procedure contained in a collective agreement which operates at a personal level, which is apt for incorporation and a collective procedure or mechanism in a collective agreement which is not apt to be incorporated into an individual's contract of employment. In *National Coal Board v National Union of Mineworkers* [1986] ICR 736 although a conciliation procedure set out in a collective agreement was not apt for incorporation, the High Court recognised that terms of collective agreements fixing rates of pay, hours of work or dismissal procedures *would* be apt for incorporation.

The latter is demonstrated by the decision of the Court of Appeal in *Kaur v MG Rover* [2005] IRLR 40 where the Court of Appeal held that collective agreements which stated that there would be no compulsory redundancies were not apt for incorporation, not only because this was an aspiration, but because avoiding compulsory redundancies depended on the co-operation of the workforce as a whole and therefore could not have been intended to be incorporated into individual contracts of employment. This is similar to *Malone* where the collective undertaking about crew complements could not practicably be a term of individual contracts of employment. Where *Malone* differs to the decision in *Kaur* is that although crew complements provisions contained in the collective agreements used the language of individual application they were still not apt for incorporation because the essential nature of the right could only have been intended to be enforced collectively, not individually. Collectively, a union can decide what manning levels it thinks are appropriate and speak with one voice to the employer. However, different employees may well have different views as to how many colleagues should be on their team. It would cause anarchy if each employee could contractually enforce his or her different point of view. With regard to manning levels, employees can only sensibly speak with one collective voice and not with multiple differing individual voices.

The significance of the decision

Malone differs from previous case law because incorporation did not fail because the crew complements are aspirational nor because, as in cases concerning incorporation of redundancy procedures such as *Kaur*, a lack of everyday relevance of the crew complements to the individual crew members mitigated against incorporation. The crew complements are of direct relevance to members of crew every time they work on a flight and were mostly set out in mandatory language.

In *Malone* the impact of individually enforceable crew complements would be to give individual crew members control over other crew members as well as over BA. The Court of Appeal's decision is one which recognises that provisions of collective agreements can only be apt for incorporation into individual contracts of employment if they do not allow the employee the right to disrupt the workforce and the employer's business and create anarchy. That cannot have been intended by the parties to the contract.

Comment

Malone is in line with previous authority which determine aptness for incorporation by considering whether provisions of a collective agreement were objectively intended to be enforced by an individual employee. It goes further by indicating that incorporation must make business common sense else it cannot be said to have been objectively intended by the parties to be incorporated. Parties to a contract cannot intend it to result in anarchy. This line of thinking is drawn from principles of contractual construction summarised by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich* [1998] 1 WLR 896. A provision that is collective in nature or which contains general policy is usually inapt for incorporation. However, even a provision of individual application which appears to grant an individual entitlement will not be apt for incorporation if the result of doing so would flout business common sense. A provision such as this which tries to maintain a certain staffing level (and thus prevent redundancies) is apt for collective enforcement by the union, which has the option of calling for industrial action if manning levels are threatened by an employer. NLJ

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