

The range of reasonable responses – is Hitt the end of the story?

J Sainsbury plc v. Hitt [2002] EWCA Civ 1588 & [2003] ICR 111 is yet another case which focussed on the range of reasonable responses test. Darren Sylvester¹ assesses the decision and attempts to evaluate the judgment in light of the Employment Act 2002.

Introduction

The Employment Rights Act 1996 (ERA) provides for a general right not to be unfairly dismissed². Section 98 ERA provides that an employee who considers that they have been dismissed unfairly can, if suitably qualified³, complain about the dismissal to an employment tribunal which (amongst other things) will determine whether the employer acted reasonably in the circumstances in taking the decision to dismiss.

Once an employee can show that they have been dismissed the tribunal has to then invoke section 98 of the ERA to examine the fairness of the dismissal. Once the employer can show their reasons for the dismissal⁴ the tribunal will then proceed to examine its fairness in accordance with section 98(4) ERA having regard to the ‘*size and administrative resources of the employer’s undertaking*’⁵ and where such a decision will be determined in accordance with ‘*equity and the substantial merits of the case*’⁶.

The earlier authorities

Previous judgments indicated that applying the fairness test in section 98(4) to particular circumstances did not create precedents which were strictly binding on future courts⁷, neither were tribunals required to rigidly follow guidelines for the purposes of interpreting section 98(4) which has been illustrated in the cases of *Bailey v. BP Oil (Kent Refinery) Ltd*⁸ *UCATT v. Brain*⁹. In the latter case it was held that:

¹ A student on the Bar Vocational Course, Inns of Court School of Law, City University, London. My thanks go to Steve Anderman, Birkett Long Professor of Law & Bob Watt, Senior Lecturer at the University of Essex whose comments on earlier drafts clarified my thinking process. The responsibility for errors remains mine.

² s.94(1) Employment Rights Act 1996.

³ see s.108(1) Employment Rights Act 1996.

⁴ see s.98(1) Employment Rights Act 1996 and the grounds thereof in s.98(2).

⁵ s.98(4)(a) Employment Rights Act 1996.

⁶ s.98(4)(b) Employment Rights Act 1996.

⁷ see *Jowett v. Earl of Bradford (No.2)* [1978] ICR 431. However, the Court of Appeal decision of *Walls Meat v. Khan* [1978] IRLR 499 is now incorporated in s.111(2)(b) of the Employment Rights Act 1996.

⁸ [1980] ICR 642.

⁹ [1981] ICR 542.

*‘... whether someone acted reasonably is always a pure question of fact, so long as the tribunal deciding the issue correctly directs itself on matters which should and should not be taken into account ... it should therefore be very rare for any decision of an [employment] tribunal under this section to give rise to any question of law, and where Parliament has given to the tribunals so wide a discretion appellate courts should be very slow to find that the tribunal has erred in law’.*¹⁰

The facts of Hitt

Mr Hitt was employed by Sainsburys plc as a baker from 29th April 1991. He was suspended on full pay pending an investigation in early September 1999 for allegedly stealing a box of razor blades from his place of work. A box of razor blades were indeed found in his locker; he said another employee had placed them there and denied any misconduct.

On 16th September 1999 a Disciplinary Hearing took place whereby Mr Hitt argued the above contention; the hearing was adjourned for two weeks to enable the store manager to investigate the matter further, including an investigation in to locker keys. The Disciplinary Hearing recommenced on 30th September 1999 and Mr Hitt was dismissed for gross misconduct. Mr Hitt appealed and attended an Appeal Hearing on 24th November 1999 before the District Manager for the South-West Region who upheld the decision of the Disciplinary Hearing and concluded that Mr Hitt had taken the razor blades.

Mr Hitt then commenced a claim for unfair dismissal alleging that his employers had failed to carry out a reasonable procedure when the loss of the items were discovered and that there were no reasonable grounds for Sainsburys to disbelieve him.

The Burchell Test

At the stage when the tribunal addresses reasonableness they must ascertain whether the employer had in fact acted reasonably in forming their view of the facts. At this juncture the employer does not actually have to prove that the employee was guilty of the alleged misconduct as it is sufficient for the employer to show that they had reasonable grounds for their belief that the employee had committed misconduct of some kind.

It was held by the Employment Appeal Tribunal (EAT) in *British Home Stores Ltd v. Burchell*¹¹ that:

‘... First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage which he formed the belief on those

¹⁰ Per Donaldson J at 550.

¹¹ [1980] ICR 303 which was cited and approved by the Court of Appeal in *W. Wedell & Co Ltd v. Tepper* [1980] ICR 286.

grounds, at any rate at the final stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case’.

The Employment Tribunal’s decision

Although the tribunal concurred on the primary facts as they appeared, they were clearly confused as to the state of the law, especially with the decisions of *British Home Stores Limited v. Burchell*¹² and the later decision of the EAT in *HSBC Bank plc (formerly Midland Bank plc) v. Madden*.¹³ The reasoning of the majority (the Chairman being in the minority) was that the investigation by Sainsburys of Mr Hitt was flawed and was inadequate in that the claim by Mr Hitt that somebody else had put the razor blades in his locker was not properly investigated.¹⁴

It is clear that the employment tribunal had its mind set on Sainsburys having to prove the guilt vis-à-vis the misconduct of Mr Hitt as opposed to allowing Sainsburys to demonstrate that they had reasonable grounds to assert his guilt. Furthermore, as the majority of the employment tribunal failed to apply the *Burchell test*¹⁵ and substituted themselves (as a tribunal) for the employer, forming an opinion of what they would have done had they been the employer patently reveals that the reasoning of the employment tribunal can only be described as reasoning which is without any foundation and therefore had to be appealed on an issue of law.

Substitution and the decision of the Employment Appeal Tribunal

The ‘range of reasonable responses’ test was formulated Browne-Wilkinson J (as he then was) on behalf of the EAT in *Iceland Frozen Foods v. Jones*¹⁶. Its main provision is that in judging the reasonableness of an employer’s conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer, but must be aware that there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another might quite reasonably take another.

The EAT¹⁷ whilst taking a conscious note of the employment tribunal’s erroneous decision, stating expressly that it was flawed¹⁸ tried to circumvent ruling that the employment tribunal misdirected itself by posing the question of whether an error of law ‘*might have made a difference to the outcome of the hearing in the employment tribunal*’¹⁹. While there clearly can only be one answer to the question posed, it was surprising to note that the EAT, while being aware of the fact that members of that appeal tribunal may have reached a different decision as regards to the adequacy of the investigation of the case, could not say categorically that the decision of the

¹² Op.cit

¹³ [2000] ICR 1283.

¹⁴ see paragraph 15 of the judgment.

¹⁵ As laid down by Arnold J, EAT.

¹⁶ [1983] ICR 17.

¹⁷ comprising Judge J. R. Reid QC, Mr D. A. C. Lambert and Miss D. Whittingham.

¹⁸ para 9 of the judgment given on behalf of the EAT by Judge Reid QC.

¹⁹ Ibid.

majority in the employment tribunal in respect of the adequacy of the investigation was perverse.

Instead, the analysis provided was that

'... the employment tribunal came to a conclusion by a wrong route to which the majority would have come if the right route had been followed ... the error of law merely led the tribunal to address the correct issue of law at the wrong stage. It did not affect the outcome. In those circumstances the appeal will be dismissed'.²⁰

The Court of Appeal's approach and Madden

Judgment was given by Mummery LJ who also gave the decision in *Madden*²¹. It was apparent that neither tribunal had considered the Court of Appeal's decision in the later cases of *Foley v. Post Office* and *HSBC Bank plc (formerly Midland Bank plc) v. Madden*²² where it was said that the range of reasonable responses test needed to be applied to all aspects of the question.

For the avoidance of any future doubt, Mummery LJ stated the following:

'The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason'.²³

Mummery LJ concluded that Sainsburys investigations were reasonable and they were duly entitled to arrive at the decision that Mr Hitt's contention was implausible. It was further expressed that:

'The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out'.²⁴

Accordingly, as the only conclusion which a reasonable and properly directed tribunal could arrive at was that the investigation carried out by Sainsburys was fair and reasonable in all the circumstances of the case – it followed that Mr Hitt was reasonably dismissed for gross misconduct and the appeal was allowed²⁵.

²⁰ para 27 of the judgment.

²¹ Op.cit.

²² Op.cit.

²³ para 30 of the judgment.

²⁴ Para 31 of the judgment.

²⁵ Jonathan Parker LJ and Ward LJ concurring with the judgment of Mummery LJ at paragraphs 38 and 39 respectively.

The Employment Act 2002

The Employment Act received Royal Assent on the 8th July 2002 and contains a new statutory dispute resolution procedure²⁶ which applies to unfair dismissal law as well as the areas of equal pay, deductions from pay, sex, race and disability discrimination.

So far as unfair dismissal is concerned, the Act does not alter the House of Lords' decision in *Polkey v. A E Dayton Services*²⁷ as the 'utterly futile' test has been retained for cases that fall outside the statutory scheme²⁸; however, for cases within the statutory parameters, the Act specifies that where an employer fails to comply with procedures a dismissal will be automatically unfair²⁹.

Conclusion

The effect of *Hitt* is to hold that tribunals should not find a dismissal unfair merely because the employer failed to adhere to certain prerequisites of a fair investigation. A foreseeable problem is of course whether this decision could sit comfortably alongside the equity and fair procedure argument as ratiocinated in *Polkey*³⁰.

Whether *Hitt* is the end of the story depends entirely on how the new statutory procedures under the Employment Act operate in practice: if the procedures will be at all interwoven with the range of reasonable responses test, or if they will be a distinct and separate entity.

It cannot be articulated in certain terms as to what effect the new statutory proposals will have on the *Hitt* decision; however, it is submitted, that for the short term at least tribunals have received a reaffirmation as to what the range of reasonable responses test exactly encompasses together with being given further guidance on the interpretation and application of the *Madden* test³¹.

As for the long term, it may be argued that the *Hitt* decision is the end of the story for the range of reasonable responses test as further cases which arrive before the courts are likely to either be 'automatically unfair' cases or the type where the 'futility rule' is invoked. On these bases it is my contention that a rumble of a coach and horses can definitely be detected in the distance.

²⁶ see s.29 of the Employment Act 2002.

²⁷ [1988] ICR 142.

²⁸ Contained within s.34(2)(2) of the Employment Act 2002. See also *Sillifant v. Powell Duffryn Timber Ltd* [1983] IRLR 91.

²⁹ for automatically unfair dismissals see sections 99,100,101,102, 103,104 and 105 of the Employment Rights Act 1996.

³⁰ Op.cit.

³¹ Op.cit.