Employment Law and Human Rights: Recent Developments

a presentation by

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I. Introduction

1. It is five years since the Human Rights Act 1998 ("HRA") came into force. The impact has been limited for a number of reasons:

   (1) EC law has covered much of the field in employment law and, in certain respects, goes further than the ECHR in the substantive rights conferred, and further than the provision by the HRA in the ability of individuals to rely upon such rights;

   (2) Employment law raises issues of social and economic rights, which are mainly not addressed by the ECHR but by the European Social Charter (which has not been incorporated into domestic law);

   (3) Even where ECHR rights are directly involved, the variations in practice between contracting states has meant that the ECHR has afforded states a wide margin of appreciation and has been reluctant to intervene.

2. The substantial majority of employment law matters are litigated in the tribunal. Tribunals have been hesitant to tackle HRA issues; often preferring to determine disputes in other ways rather than having to tackle the issue directly. Furthermore, tribunals have a limited jurisdiction under the HRA. It is not an appropriate tribunal in which to bring proceedings against a public authority for acting incompatibly with an ECHR right (pursuant to s.7 of the HRA) nor can it make a declaration of incompatibility (under s.4 of the HRA).

3. Nevertheless, Tribunals must show respect for ECHR rights in three ways:
(1) It is required to take into account any judgment, decision or opinion of the ECHR or Commission insofar as it is relevant to the proceedings when determining a question which has arisen in connection with an ECHR right (s.2 of the HRA);

(2) It is required “so far as possible” to read and give effect to primary legislation in a way which is compatible with ECHR rights: the interpretative obligation (s.3 of the HRA);¹

(3) It is unlawful for the tribunal, as a public authority, to “act in a way which is incompatible with a Convention right” (s.6(1) and (3) of the HRA).²

4. This paper examines two recent decisions of the Court of Appeal which considered the approach to adopt when a tribunal is confronted with an ECHR issue (at least in respect of a claim for unfair dismissal). The first (X v. Y (2004) ICR 1634) concerns the applicability of article 8 and the second (Copsey v WWB Devon Clays Limited (2005) IRLR 811) the applicability of article 9.

II. X v. Y

5. The facts were (as set out by Mummery LJ at paragraphs 10-16):

(1) X was a highly regarded employee of Y (a private-sector employer). In his employment, he worked closely with young people;

(2) In June 2000, X was appointed to the full-time post of Development Officer. The post was funded by the local Probation Service;

¹ See further at [ ].
² This obligation reinforces the interpretative obligation: see Mummery LJ in X v. Y ibid. at paragraph 58(4).
In mid-2001, Y discovered that six months previously (in January 2001), X had been arrested and taken to a police station in connection with an incident, which occurred when he was off duty and away from the workplace. He was not charged, but received a caution, which was accepted and signed by him, for committing a sex offence with another man in a transport café lavatory, to which the public had, and were permitted to have access. The caution came to light as a result of routine police checks made by the local probation Service;

X had not told Y of the incident or the caution though he knew, by May 2001, that he should have disclosed it as it was relevant to his job;

Y suspended X and, following a disciplinary hearing, he was summarily dismissed on 30th July 2001 on the grounds of gross misconduct;

It was explained to X at the hearing that the issue was not one of his sexuality, but of his having committed a significant criminal offence and then deliberately deciding not to disclose it;

X brought proceedings in the ET claiming that he had been unfairly dismissed and in a manner inconsistent with respect for private life under article 8 and in breach of the prohibition of discrimination in article 14 of the Convention on the grounds of sexual orientation.

The ET found that the dismissal was for a conduct reason and was fair. It dealt with the article 8 and 14 contention as follows:

"X suggests that in dismissing him for this offence this breaches the Human Rights Act. X has to understand that there are no stand alone headings of claim which can be brought under the Human Rights Act in the Employment Tribunal. In any event this court does not have the jurisdiction to make any declaration of incompatibility. In this particular case, we do not have
to go into the minutiae of whether there is, or is not, compliance with the Human Rights Act. Quite simply X’s acknowledgement that he should have told his employers of his involvement in the offence and the caution he received … strikes us as an acknowledgment … that he did wrong in withholding that information. Whatever the rights and wrongs of any breach of privacy he acknowledges that he should have done so and chose not to do so.”

7. On appeal, the Employment Appeal Tribunal considered whether on the facts there was any potential breach of article 8 or 14. It held that article 8 did not apply as the conduct in question was not private.

8. X further appealed to the Court of Appeal. It was his case that the ET misdirected itself in law in concluding that the HRA was irrelevant to determining the issues before it. He submitted that the combined impact of sections 3 and 6 of the HRA was that it was not open to the ET to find that his dismissal was fair and reasonable under the ERA without first determining whether the dismissal engaged a Convention right and if so whether any interference was justified.

9. In response, Y contended that it was never relevant for the ET to address issues under the HRA when determining a claim for unfair dismissal against a private sector employer under the ERA. Y was not a public authority within the meaning of s.6 of the HRA and therefore it was not unlawful for it to act in a manner which was incompatible with a Convention right.

10. Mummery LJ (giving the lead judgment) held that there was both a “short” and a “longer” answer to X’s case. The short answer was that expressed by the ET and the EAT, namely on the facts that the incident did not occur in the context of X’s private life and therefore did not engage article 8.

11. The longer answer is of more interest. It provided guidance on the scope of the s.3 HRA interpretative obligation in private sector employment cases and on the tribunal’s obligation under s.6 of the HRA as a public authority. The following steps should be considered (see paragraph 64):
Do the circumstances of the dismissal fall within the ambit of one or more of the Convention articles? If they do not, the Convention right is not engaged and need not be considered;

Does the state have a positive obligation to secure the enjoyment of the relevant Convention right between private persons? If not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

If it does, is the interference with the Convention right justified? If it is, go to (5) below;

If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it;

If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving to them under s.3 of the HRA so as to be compatible with the Convention right. Section 3 of the HRA applied to all primary and subordinate legislation and it drew no distinction between legislation governing public bodies and legislation governing private individuals. The obligation arising from s.6 of the HRA reinforced the interpretative obligation.
III. Interpretation of X v. Y

12. Whilst the focus is on article 8 in X v. Y, it is clear that the Court of Appeal’s guidance applies more generally in relation to Convention rights.

13. Mummery LJ considered that it is only when an ECHR right encompassed a positive obligation to secure the enjoyment of that right that an employee could rely upon that right against a private employer. He did however express dismay about the possibility that the law could be differently applied as between public and private employers on the basis that there “would be no sensible grounds for treating public and private sector employees differently in respect of unfair dismissal”. He also considered that any difference in application could not have been intended. On the other hand, Dyson LJ believed that the interpretative obligation applied to the same degree in legislation applying between private parties as it did between individuals and the state (see paragraphs 65 and 66). He was concerned that otherwise the same statutory provision “would require different interpretations depending upon whether the defendant was a public authority or a private individual”. Thus, according to Dyson LJ, even if there were no positive duties on the state to secure a particular right, the interpretative obligation would still apply.

14. Pay v. Lancashire [2004] IRLR 129 concerned the applicability of articles 8 and 10. In contrast to X v. Y, the employer was a public sector employer (the Probation Service). A probation officer was dismissed for merchandising bondage, domination and sadomasochism products and performing in hedonist and fetish clubs. These activities were deemed by his employer to be incompatible with his role and responsibilities, especially his work with sex offenders. The employee claimed unfair dismissal and a breach of articles 8 and 10 (using the interpretative obligation). The ET held that the dismissal was fair and involved no breach of articles 8 or 10. The EAT agreed. It held that the words, “having regard to the applicant’s Convention
"rights" should be inserted into s.98(4) of the ERA where the respondent is a private-sector employer.

IV. Copsey v. WWB Devon Clays

15. The facts were (as set out by Mummery LJ at paragraphs 10-16) that C had refused to agree to a contractual variation in his working hours that would involve him in a shift which included Sundays. His refusal was based on his desire to observe Sunday as a day of rest in line with his Christian religious beliefs. The proposed change in his working hours was a consequence of significant increases in production in the employer’s business. C had been offered, and declined, alternative job opportunities within the company.

16. C claimed unfair dismissal and a breach of article 9 of the ECHR.

17. The ET found that C was dismissed because he had refused to accept a contractual variation in his working hours (a change to a 7 day shift pattern) and not in any way connected with his religious beliefs.

18. The EAT upheld the ET’s decision. C had not been dismissed for his religious beliefs. In any event, C’s employer was a private sector employer and was not subject to any prohibition on acting incompatibly with the Convention right. Further, on the facts, article 9 was not breached. Insofar as there was any interference with work requirement and the manifestation of religious beliefs, C had a choice in that he was free to resign to observe his beliefs.
19. The Court of Appeal dismissed C’s appeal. C contended:

(1) Article 9 was engaged; his dismissal was connected with the manifestation of his religion;

(2) The assessment of reasonableness of the dismissal under s.98(4) should have been made by reference to article 9 (as required, pursuant to s.3 of the HRA);

(3) Whilst the employers were private sector employers, the tribunal (as a public authority) was under a duty not to act incompatibly with article 9 (which involved applying s.3 HRA interpretation to the test under s.98 of the ERA);

(4) Article 9 required religious views and observances to be reasonably accommodated having regard to the nature and resources of the employer, the flexibility of the workforce and the attitude of the employer.

20. The reasoning of each member of the Court of Appeal was different (although all three accepted that article 9 could be relied upon by C in this context notwithstanding the fact that his employer was a private sector employer).

21. Mummery LJ held that there was a connection between C’s dismissal and his religious beliefs. The real issue was whether that link was “sufficiently material to bring the circumstances of the dismissal within the ambit of Article 9”. He concluded that, in the absence of authority, he “would have thought that it was”. However, he found that there was a clear line of decisions of the Commission\(^3\) to the effect that Article 9 is not engaged where an employee asserts Article 9 rights against his employer in relation to his hours working. If there is a conflict, the employee is free to resign.
Mummery relied upon those decisions notwithstanding his trenchant criticisms (see paragraph 35).

22. On the other hand, Rix LJ was not of the view that there was a line of consistent decisions. He held that where an employer sought to change the working hours and terms of the contract of employment so as to interfere materially with the employee’s right to manifest his religion, article 9(1) was engaged. There would be no interference if there was reasonable accommodation with the employee. If a reasonable solution was offered but not accepted, it could not be said that there was interference or alternatively it could be said that it was justified under article 9(2). On the facts, given that the employer had acted reasonably, the claim for unfair dismissal failed, whether viewed solely in terms of fairness or by reference to article 9.

23. Neuberger LJ did not consider that Article 9 took matters any further. He considered that dismissal due to C’s refusal to work on Sundays on religious grounds was potentially unfair. Whether it was required a balancing exercise under the ERA. On the facts, the ET had carried a proper balancing exercised and concluded properly that the dismissal was fair.

V. Analysis

24. Two matters require consideration. First, this was a private-sector employer case. There seemed be an assumption that article 9 was engaged. By analogy with the reasoning in X v. Y, on the basis that article 9 imposes positive obligation on the State to ensure that individual’s rights to manifest his religion are respected, the same approach would be called for (see paragraph 11 above).

That conclusion leads to the second matter, the extent of the obligation imposed upon employers to take religious rights into account. The Commission’s decisions have limited the scope of Article 9 in that, essentially they have held that the employer is entitled to keep the workplace secular. The Court of Appeal rejected that approach (Rix and Neuberger LJ explicitly) in favour of an approach which requires the court to scrutinise every employment dispute in which Article 9 is invoked for a “reasonable accommodation” provision by the employer (i.e. a balancing exercise between the employer’s business interests and the employee’s right to observe his religion).

However, there are two main objections to that approach. The first is a practical one; there would be uncertainty at the point of recruitment and contract negotiation, delay in litigation as the parties to the contract seek to discover the steps taken by the employer to accommodate the employee’s religious beliefs. At the extreme, that could lead to a reluctance on the part of employers to engage an individual who looks as if he or she may raise a religion objection at a later stage.

Second, it is difficult to see the legal underpinning for the primacy of “religion rights” over the ordinary rules of contract.

VI Conclusion

Whilst the impact of these decisions of the Court of Appeal is still unclear, they are likely to signal a greater awareness of ECHR issues in employment disputes. The delicate balance which must be drawn between the public law aspects of the HRA on the hand and the private law aspects of the ERA and other employment legislation is likely to be subject to further analysis and debate.

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