Malone & ors v British Airways plc

The Court of Appeal in *Malone & ors v British Airways plc* (3 November) decided that collectively agreed provisions which stipulate minimum manning levels are not incorporated into the appellants' individual contracts of employment. The decision considers the test for determining whether a collectively agreed provision is 'apt' to become a term in an individual employment contract. Anna Thomas and Andrew Burns report

Anna Thomas and Andrew Burns: Devereux Chambers

The facts

Hard hit by the global recession, British Airways held talks with unions, including Unite, from February 2009 to agree ways to cut costs. BA sought a significant reduction in cabin crew costs. A key proposal was to reduce crewing levels on board some flights. The crewing levels were set out in collective agreements made between BA and the trade unions, which provided that 'all services will be planned to the current industrially agreed complements for each aircraft type'.

The collective agreements were expressly incorporated into the appellants' individual contracts of employment 'so far as the same are applicable to your particular employment'. The collective agreements were regarded by both sides as being negotiable rather than consultative. Talks with the trade unions were set back following a dispute between two branches of Unite. By October 2009 BA decided to take unilateral action. Crew complements would be reduced from mid-November. There was to be no reduction in service standards. Strike action and a speedy trial followed (*British Airways v Unite*).

Legal principles

Collective agreements are not generally legally binding between the trade union and employer (s.179 TULRA 1992). Provisions within the agreements may, however, become incorporated into individual contracts – and capable of individual enforcement – by reference or implication. To be so incorporated, the relevant provision must be 'apt' to be a term of the employment contract.

The word – and concept – of 'aptness' for incorporation derives from the judgment of Hobhouse J in *Alexander v Standard*, a case about whether provisions in a collective agreement relating to selection procedures for redundancy were incorporated into individual contracts of employment. He set out the classic test at 292:

> *'The relevant contract is that between the individual employee and his employer. It is the contractual intention of those two parties which must be ascertained ... Where a document is expressly incorporated by general words it is still necessary to consider in conjunction with the words of incorporation, whether any part of that document is "apt" to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract.*
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> *Where it is not a case of express incorporation but a matter of inferring contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision of whether or not the inference should be drawn.'*

Subsequent authorities cite the dicta of Hobhouse J in *Alexander* and accept the centrality of 'aptness' in determining whether a particular term should be incorporated in an individual's contract, whether the document in which the term is found is expressly incorporated or not.

Relevant factors have been identified; for example, in *Keeley v Fosroc International Ltd*, the importance of the provision to the overall bargain between employer and employee. Findings have been made that provisions in collective agreements that are aspirational or reflect agreed policy are not appropriate for incorporation; nor are provisions that set out a collective procedure or 'machinery' for the resolution of industrial disputes (*National Coal Board v NUM*). By contrast, provisions in collective agreements fixing pay or hours are of their nature 'apt' to become enforceable terms of an individual's contract (*Kaur v Rover Group Ltd)*.

In *Malone* the disputed provisions in the collective agreements fell somewhere between pay and hours of work (apt for incorporation) and policy and procedure (not so apt). No test for aptness has been articulated in the authorities. In *Malone*, BA argued that the word 'aptness' was shorthand for the ultimate test that needs to be applied to determine whether the parties intended to give an undertaking to the individual employee. BA suggested two basic criteria for aptness:

- was the character of the provision in question essentially personal rather than collective?
- was the content of the provision in question objectively intended to create a legal right enforceable by the individual, applying ordinary contractual principles?

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Factors in favour

Giving the leading judgment, Smith LJ noted some factors in favour of finding that the provision stipulating minimum crewing levels were capable of individual enforcement: crewing levels impacted on working conditions; there was a finding that the changes to manning levels resulted in increased stress and exhaustion on occasions; crew members were paid a cash supplement if required to fly one crew member short during a 'period of disruption'; and there was plainly some sort of undertaking by BA to procure the agreed crewing levels.

Factors against

Smith LJ also considered: the effect on the business if a cabin crew was able to refuse to work if BA decided or was obliged to fly an aircraft without the agreed crewing level ('the chaos argument'); the conflicting contractual rights of a 'refusenick' where other employees might waive the right and agree to fly with fewer crew; the crewing levels agreed by BA exceeded the minimum requirement determined by the relevant regulator under an Air Navigation Order; and that BA had a complete discretion to determine service standards provided on flights.

The chaos argument

Smith LJ said the chaos argument was determinative in deciding whether the agreed minimum manning level was an undertaking to each employee. The logistical and commercial effect of holding that the provision was individually enforceable would be disastrous. Therefore, applying the rule of contractual construction by which a term of uncertain meaning is to be construed by asking what, objectively, the parties must be taken to have intended the provision to mean, Smith LJ was driven to one conclusion: the parties did not mean this term to be individually enforceable. The parties cannot have intended that chaos would follow. The commitment in the provision on minimum crewing must have been to cabin crew collectively, not to individuals.

Comment

By accepting the chaos argument made on behalf of BA, the Court of Appeal appears to have relied on a rule of construction applicable to terms of uncertain meaning developed in a commercial context in two House of Lords decisions: *The Antaios* and *Wickman Machine Tools Ltd v Schuler*. It is interesting to note that the House of Lords decisions have recently been approved in *Kookmin Bank v Rainy Sky,* in which Sir Simon Tuckey said: 'If there are two possible constructions, the court is entitled to reject the one which is unreasonable.'

This follows from *Wickman,* in which Lord Reid said: 'The more unreasonable the result, the more unlikely it is that the parties can have intended it'; and *The Antaios*, in which Lord Diplock said: 'if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense it must yield to business commonsense.'

The chaos argument did not impress Smith LJ in the course of the hearing; she said that she considered it 'rather theoretical'. However, application of the construction rule set out above to the fact that individual crew members *could* refuse to fly with impunity if the term was incorporated compelled the court to refuse the appeal. The provision was unworkable as an individually enforceable contractual term and must have been intended to have been a collective undertaking binding in honour only. Post-contractual conduct of crew members who complied with the new rules was not relevant.

Overall, the approach taken by Smith LJ supports the test for aptness proposed on behalf of BA: (1) was the character of the provision essentially personal? and (2) was the content of the provision objectively intended to create a legal right enforceable by the individual? There was a wide measure of agreement between the parties as to the correct legal approach in the course of the hearing and no dissent from this analysis.

Conclusion

Although the collective agreements and crewing level provision in *Malone* were unusual, the two proposed essential criteria for aptness may have wider application and, it is suggested, provide a 'two-stage test' to assist advisers and courts considering questions of incorporation in the future.

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Cases referred to:

- *Malone & ors v British Airways plc* [2010] EWCA Civ 1225
- *British Airways v Unite* [2010] IRLR 423 and [2010] EWCA Civ 669
- *Alexander v Standard* [1991] IRLR 286
- *Keeley v Fosroc International Ltd* [2006] IRLR 961
- *National Coal Board v NUM* [1986] ICR 736
- *Kaur v Rover Group Ltd* [2005] IRLR 40
- *The Antaios* [1984] AC 191
- *Wickman Machine Tools Ltd v Schuler* [1974] AC 235
- *Kookmin Bank v Rainy Sky* [2010] EWCA Civ 582