Has the test for whether or not an appeal should be allowed in respect of a case management decision, as laid down in O'Cathail v Transport for London, been impliedly overruled by R (Osborn) v Parole Board? No, says the EAT in Chowdhury v Marsh Farm Futures UKEAT/0473/18/DA

By Sarah Clarke
3PB Barristers

Employment Tribunal judges have a wide discretion when making case management decisions, with it being rare for a challenge to such a decision being successful. The Court of Appeal in O'Cathail v Transport for London [2013] IRLR 310 have made it clear that tribunal decisions can only be questioned for error of law. The specific issue in that case was whether or not it was an error of law for a Tribunal to refuse a postponement application in circumstances in which a litigant in person had a fit note saying they were not fit to attend the hearing. The application was refused and the trial went ahead in his absence. The Court of Appeal upheld this decision, holding that:

> *44. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome…*
> *45. Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.*

Thus in respect of case management decisions, the role of the appellate court was to review the decision of the first instance tribunal and to consider whether there had been an error of law or if the decision was perverse.

However following the Supreme Court case of R (Osborn) v Parole Board [2014] AC 1115, doubt has been cast as to the correctness of this approach. The question in that case was whether, in proceedings before the Parole Board, procedural fairness required a prisoner to have an oral hearing. The Supreme Court held that, when addressing the issue as to whether or not there had been a fair trial:

The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. In the case of the appellant Osborn, Langstaff J [2010] EWHC 580 at [38] refused the application for judicial review on the ground that "the reasons given for refusal [to hold an oral hearing] are not irrational, unlawful nor wholly unreasonable". In the case of the appellant Reilly, the Court of Appeal in Northern Ireland stated [2012] NI 38, para 42: "Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board." These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on Wednesbury grounds: see Associated Provincial Picture Houses Ltd v Wednesbury Coprn [1948] 1 KB 223 . That is not correct. The court must determine for itself whether a fair procedure was followed: Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781, para 6, per Lord Hope of Craighead. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.

In other words, the correct approach was not simply to review the original decision and consider whether there had been an error of law; rather the appellate court should undertake their own exercise to determine whether there had been a fair trial.

This approach has been applied in the employment sphere in Galo v Bombardier Aerospace UK [2016] IRLR 703 and Shui v Manchester University [2018] ICR 77. In Shui, (which was another case involving the issue as to whether the refusal to grant an adjournment when the unrepresented claimant was unwell), HHJ Eady QC described the role of the EAT in fairness appeals as follows:

Moreover, when faced with an appeal raising fair hearing issues arising from the underlying proceedings, I bear in mind (per the Supreme Court in R (Osborn) v Parole Board [2014] AC 1115, followed by the Northern Ireland Court of Appeal in Galo v Bombardier Aerospace UK [2016] IRLR 703) that determination of questions of fairness will be for the appellate tribunal. I see that as fulfilling a similar role to that undertaken by appellate tribunals in (for example)

bias appeals, when they must stand in the shoes of the objective informed observer and determine whether it can properly be said that there was a possibility of bias. Similarly, when determining questions of fair hearing, the appellate body must objectively view that which took place below and decide for itself whether or not a fair process was followed.

Whilst that case was an appeal against two case management decisions, namely whether to grant a postponement and whether to have 'allowed' the respondent to limit cross-examination (and thus on the face of it subject to the test as enunciated in O'Cathail), HHJ Eady said as follows:

"Although the appeal has thus focused on two particular moments within the hearing, it is right that I see these points in context: was the hearing fair for the claimant when viewed overall? It is this question that elevates the issue raised on this appeal from a simple matter of case management to the more fundamental question, whether the claimant was denied a fair hearing."

By reframing the issue as one of overall fairness, HHJ Eady took the view that the Osborn approach was the proper one, leading to the test to be applied being the much more stringent one. This decision clearly opens the door for claimants to argue that, at least in postponement appeals, the correct approach is that as set out in Osborn.

However in another EAT decision some 7 months following Shui, the EAT refused to endorse the Osborn approach in respect of case management decisions. In Leeks v Norfolk and Norwich University Hospitals NHS Foundation Trust [2018] ICR 1257 the question for the EAT was whether to allow the appeal in respect of a decision to refuse to postpone a preliminary hearing (at which all of the claims were dismissed in the claimant's absence, due to ill-health). HHJ Hand found that granting or refusing an adjournment and the concomitant decision as to whether to continue with proceedings in the absence of a party was a case management decision which fell to be scrutinised on the same principles as any other appeal, namely an examination of the decision to identify whether or not there had been an error of law. Thus leading to apparently conflicting decisions at the EAT level.

These issues were all engaged in Sarah Clarke's recent case of Chowdhury v Marsh Farm Futures, heard by HHJ Barklem on 14 January 2020. She acted for the respondent, who had successfully defended claims of unfair dismissal and detriment on the ground of whistleblowing, following an 8 day trial in Watford Employment Tribunal in February 2018. The claimant represented himself and raised issues with his health during the trial. He did not however apply for a postponement. One of the grounds of appeal was whether or not he

had been denied his right to a fair trial on the basis that his health was evidently such that he could not properly present his case, and that in such circumstances, the tribunal ought to have postponed the matter of their own volition. One of the questions was what test the EAT should apply when considering this ground of appeal.

HHJ Barklem found that the cases of O'Cathail and Osborn were dealing with different situations and as such, were not inconsistent with one another and further that Shui was dealing with a wider question. He went on to look at all of the factors of the case and came to the conclusion that the trial had not been unfair, thus seemingly applying the Osborn test.

However there is clearly a considerable overlap between many case management decisions and the question as to whether or not there was a fair trial, the most obvious example being in relation to a refusal to postpone a hearing in circumstances in which a party faces the matter proceeding in their absence. That clearly could lead to the hearing being unfair. Similarly the refusal to admit late witness statements or evidence, or a decision to limit cross-examination, could all have an impact on the fairness or otherwise of a trial. What then is the correct approach to take in such circumstances? On the case law as it stands, it would appear that either approach could be advocated. In Shui, HHJ Eady applied the more stringent Osborn approach by finding that the question in that case had been 'elevated' to one of fairness. However the decision being appealed was clearly a case management decision, and applying O'Cathail and Leeks, the proper approach was arguably that of whether there had been an error of law. Whilst in the vast majority of cases, the outcome is likely to be the same regardless as to which approach is adopted, one can envisage circumstances in which that would not be true, and until the matter is definitely resolved by the Court of Appeal, it seems likely that more cases will emerge in which there is a dispute as to the correct approach, with claimants no doubt seeking to shoe horn case management decisions into questions as to fairness overall.

Sarah Clarke
Barrister
3PB Barrister
0330 332 2633
sarah.clarke@3pb.co.uk
3pb.co.uk