The contractual doctrine of mistake – is a mistake always a mistake?

Nexus v RMT & Unite the Union [2022] EWCA Civ 1408

By Alex Leonhardt
3PB

1. In ***Nexus v RMT & Unite the Union [2022] EWCA Civ 1408***, the Court of Appeal considered the application of the contractual doctrine of mistake – both common mistake and unilateral mistake – in the context of a collective bargaining agreement.
2. Contrary to the judgment at first instance in the High Court, the remedy of rectification was not available to an agreement made pursuant to a collective bargaining agreement that was not itself legally binding. Such a remedy could only properly be sought against the individual employees whose contracts of employment had incorporated that agreement.
3. In the course of its judgment, the Court also made a clear determination that the Employment Tribunal had jurisdiction to take into account the doctrine of mistake as part of the defence to a claim, notwithstanding its lack of jurisdiction in respect of rectifying a document as a remedy.

Background

4. In previous proceedings, various employees (supported by the RMT) of Nexus brought a claim in the Employment Tribunal for unlawful deduction of wages. Their claim was that a collective agreement by which a “productivity bonus” was applied to pay, should also apply to the calculation of uplifts paid for certain shift patterns. Nexus had argued that the bonus should not increase basic salary for the purposes of these calculations.
5. The ET and EAT found in favour of the employees. An appeal by Nexus to the Court of Appeal in respect of the ET’s jurisdiction to interpret contracts of employment, as the ET and EAT had done, was unsuccessful (it was the case heard alongside ***Agarwal v Cardiff University*** on the issue).

6. In the present proceedings, Nexus brought a claim seeking the remedy of rectification of the relevant agreement, such that it should (in essence) explicitly read so that the bonus was not taken into account for the purposes of shift uplift calculations. The claim was brought on the basis that both parties were operating under a common mistake in contracting in the terms they did, or alternatively that Nexus was operating under that mistake and the RMT and Unite the Union knew or ought to have known of that mistake.

7. This hearing concerned applications brought by the unions on preliminary matters:

   a. On the substantive legal question of whether the court has the power to rectify a collective bargaining agreement that is not in itself binding in law; and

   b. On the procedural questions of whether the claim was an abuse of process, or else if Nexus were subject to an estoppel based upon the principle of *res judicata*, as they had not advanced the argument on mistake during the first set of proceedings.

8. While the former may appear to be of more particular interest to employment practitioners, in the course of the latter the Court of Appeal made clear the jurisdiction of the ET in respect of the doctrine of mistake – a doctrine which would seem to apply infrequently to contracts of employment.

Rectification of Non-Binding Agreements

9. It was common ground that the collective agreement itself was not a legally enforceable contract, not containing any express provision to this effect as required by Section 179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992. It was agreed, however, that the agreement had the effect of varying the contractual terms of those employees in respect of whom the relevant unions were recognised.

10. Also obvious, however, was that it was only the collective agreement that could be rectified directly by any remedy in this claim, as it was the unions and not the individual employees who were the parties.

11. At first instance in the High Court, Stuart Isaacs QC had considered that it was not necessary for a document to be legally binding in nature to benefit from the remedy of rectification. He drew on obiter dicta from ***Marley v Rawlings [2014] UKSC 2***, which concerned rectification of a will, but also upon the equitable nature of the remedy: that it is a remedy that seeks to act on the conscience of a party who seeks to take advantage of a mistake. There was no reason why, according to the judge, such a remedy should be constrained to mistakes in respect of legally binding documents and not apply to other documents which have consequences for the parties. He also drew on Canadian authorities directly on the point of rectification of collective agreements.

12. Lord Underhill, giving the judgment of the Court of Appeal, disagreed. The unenforceable nature of the collective agreement was “an insuperable barrier” to rectification, and the equitable nature of the remedy did not extend its reach beyond the natural remit of the court – the *legal rights* of the parties concerned. The Canadian cases were of little assistance since, in Canada, collective agreements have legal effect.

13. The result of this is that the claim was wrongly pleaded as seeking rectification of the collective agreement, rather than the individual contracts of employees, and therefore also brought against the incorrect parties – the Defendants should be individual employees, rather than the trade unions.

14. Lord Underhill accepted that this presented practical difficulties in undertaking the litigation, and might be considered an unnecessary formality when the unions were likely to continue to have conduct of any case brought against individual employees.

15. While claims against individual employees based upon mistake, in respect of a negotiation that was undertaken collectively, might seem to present evidential difficulties, Lord Underhill indicated that the actions and intentions of the union negotiators are what are were relevant.

Abuse of Process & Estoppel

16. The Court of Appeal undertook a lengthy examination of the principles and authorities relevant to abuse of process and *Res Judicata*, one aspect of which are highlighted below.

17. While Nexus could not seek the remedy of rectification via the ET in the initial claim, the ET not having such jurisdiction, the issue could nonetheless be raised as a defence to the unlawful deductions claim. Such an approach follows the grain of the decision of ***Agarwal***, that an ET “has jurisdiction to resolve any issue necessary to determine” whether wages were payable.

18. What follows from this is that it is not necessary (although it may be desirable) for such an issue to be resolved by the County Court before an ET case for unlawful deduction can properly be determined.

19. Indeed, the failure to raise such an issue is likely to prevent such a subsequent claim being properly brought (at least against the parties to the ET claim): the Court of Appeal considered that the issue both could and should have been raised in the previous

proceedings in this litigation, notwithstanding that the ability of the ET to consider the doctrine of mistake had previously been (at the least) somewhat obscure.

Conclusions

20. The circumstances giving rise to this case are unlikely to repeat themselves with enormous frequency, and no doubt was something of a “test case” in respect of the rectification of collective agreements.

21. Perhaps of more use than the decision in respect of the rectification of non-binding collective agreements are the comments of Lord Underhill at Paragraphs 28 and 32 on the practicalities of bringing such a claim against a pool of employees, where the relevant contractual provisions were negotiated collectively.

22. Practitioners in employment law will, unfortunately, be all too aware of the potential for written contracts to depart from what the intention of the parties must have been at the point of agreement. Such a state of affairs is inevitable where contracts are drafted and re-drafted, against a background of a complex and changing statutory framework, often by non-professionals.

23. The clear guidance from the Court of Appeal in this case, in respect of the ability of parties to rely upon the doctrine of mistake as a defence to a claim in the Employment Tribunal may well be of significant use – particularly when used alongside other (perhaps more frequently used) arguments.

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Alex Leonhardt

Barrister
3PB

020 7853 8055
alex.leonhardt@3pb.co.uk

3pb.co.uk