



Article by Rachel Crasnow. First published in the Solicitors Journal.

The Supreme Court has ruled unanimously that the choice of arbitrator on the basis of their religious beliefs or nationality is lawful. The ruling was handed down in *Jivraj v Hashwani* and overturns a unanimous Court of Appeal decision which found that arbitrators were employees and therefore those who engaged them were bound by the full body of employment equality law. The landmark ruling has significant implications for both the legal arbitration world as well as for employment and equality lawyers more generally.

Case background

Back in 1981, Mr Jivraj and Mr Hashwani had entered into a Joint Venture Agreement, in which they agreed a clause which stipulated that, in the event of arbitration, the arbitrators should be respected members of the Ismaili (Muslim) community.

In 2008, long after the relationship had dissolved between the parties and most of the issues relating to the termination had been resolved, Mr Hashwani sought to appoint an arbitrator who was not a member of the Ismaili community to deal with a remaining issue in dispute. He argued that the stipulation for the arbitrator to be an Ismaili fell foul of the Human Rights Act, public policy and the now repealed Employment Equality (Religion or Belief) Regulations 2003 ("the Regulations") - now within the Equality Act 2010 ("the Act").

The High Court (David Steel J) held that the appointment of arbitrators fell outside the scope of the Regulations as they were not 'employed' or, if they were employees, that the requirement for them to be from the Ismaili community fell within the 'genuine occupational requirement' exception, which it was proportionate to apply.

Mr Hashwani appealed against this decision and the Court of Appeal ruled that arbitrators were, in fact, employees to the parties who instructed them to mediate a settlement on their behalf. The judgment concluded that the self-employed tradesman or professional who provided a service to a customer or client was, in

fact, an employee. Those who engaged the services were therefore bound by equality employment legislation.

The Supreme Court ruling

The Supreme Court however overturned this ruling. Mr Jivraj argued that the extension of employment discrimination law in this manner went far beyond what either domestic or European law had ever conceived or permitted.

The appeal was allowed on the ground that an arbitrator is not a person employed under a contract personally to do work within the meaning of the Regulations, which do not therefore apply. The Court found that an arbitrator did not fall within the definition of a worker laid down by the case law of the ECJ, and in particular *Allonby*¹ and *Lawrie-Blum*².

Rather, an arbitrator was an independent provider of services who was not in a relationship of subordination with the recipient of the services, nor under the direction of that recipient, not least because an arbitrator was a quasi-judicial adjudicator whose duty was not to act in the particular interests of either party.

The majority of the Court also found that, if the arbitrator had been an employee, it would have been a 'genuine occupational requirement for the job' for the purposes of the exception in regulation 7(3) of the Regulations. A stipulation that an arbitrator be of a particular religion or belief could be relevant to the manner in which disputes are resolved. Here, the Ismaili community had demonstrated an ethos, based on religion, for dispute resolution contained within that community.

Implications

In reaffirming the *Allonby* approach to employment definitions in an equality context, the path is now clearer domestically as to the distinction to be applied by the courts between the employed and the self-employed. Although the Court did not decide emphatically that a self-employed plumber, for example, could never be an employee, the application of the *Allonby* criteria now make better sense of the domestic case-law, including *Percy v Board of National Mission of the Church of Scotland*³.

In addition, the Court has now clearly stated that the domestic cases⁴ which had

¹*Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328

²*Lawrie-Blum v Land Baden-Wurttemberg* (Case C-66/85) [1987] ICR 483

³[2005] UKHL 73, [2006] 2 AC 28

⁴ See eg *Quinnen v Hovells* [1984] ICR 525, *Mirror Group Newspapers Ltd v*

dealt with the question of whether the dominant purpose of the contract is the execution of personal work or labour, were not consistent with the ECJ (now CJEU) approach. Those cases, said the Court, did not focus on the fact that the “employment” must be employment under a contract of employment, a contract of apprenticeship or a contract personally to do work and that they must be read in the light of the ECJ decisions. This clarity will be very welcome to employment lawyers struggling to make sense of these rather puzzling, and inconsistent, previous decisions.

The Supreme Court discussed the distinction between the role which arbitrators and judges and referred to the important case of *O’Brien v MOJ* [2010] 4 All ER 62 which is going to the CJEU in Luxembourg in September 2011. Mr O’Brien is represented by Rachel Crasnow and Robin Allen QC of Cloisters.

The case also demonstrates how the commercial world increasingly finds itself head to head with equality, discrimination and human rights law. Hill Dickinson’s decision to bring together in-demand commercial silk Rhodri Davies QC of One Essex Court with the equality and human rights’ expertise of Cloisters’ Schona Jolly was clearly a smart move. The interplay between these two very different fields is likely to become increasingly apparent in the future.

Gunning [1986] 1 WLR 546, especially per Oliver LJ at 551H and Balcombe LJ at 556H; *Kelly v Northern Ireland Housing Executive* [1999] 1 AC 428 and *Percy* [2006] 2 AC 28 per Lord Hope at para 113, where he referred to two other cases in the Court of Appeal, namely *Patterson v Legal Services Commission* [2004] ICR 312 and *Mingeley v Pennock (trading as Amber Cars)* [2004] ICR 727; *Tanna v Post Office* [1981] ICR 374 and *Hugh-Jones v St John’s College, Cambridge* [1979] ICR 848.