UK Supreme Court Exempts Arbitrator Selection Criteria From Anti-Discrimination Legislation

Jivraj v Hashwani: Judgment of the UK Supreme Court

1. The facts

Mr Hashwani and Mr Jivraj are members of the Ismaili community, part of the Shia branch of Islam. In 1981 they established a joint venture to invest in real estate. Their agreement provided that, if any dispute arose, it would be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the president of the HH Aga Khan National Council for the United Kingdom. One term in the arbitration agreement provided that "all arbitrators shall be respected members of the Ismaili community and holders of high office within the community".

In 1998, Mr Hashwani and Mr Jivraj decided to terminate their venture and they appointed three members of the Ismaili community to act as a conciliation panel to assist them. Certain matters remained unresolved.

In July 2008, Mr Hashwani put forward a claim for US$1,412,494 plus compound interest, and gave notice to Mr Jivraj of his appointment of Sir Anthony Colman, a retired High Court Judge who was not of the Ismaili faith, as one of the arbitrators. Mr Jivraj started proceedings seeking a declaration that the appointment of Sir Anthony Colman was invalid. Mr Hashwani applied to the Court for an order that Sir Anthony Colman should be appointed by the Court as sole arbitrator.

2. The issues

Mr Hashwani contended that the term in the arbitration agreement, that the arbitrators must be members of the Ismaili community, had become void in 2003 by virtue of the Employment Equality (Religion or Belief) Regulations 2003 (the **"Regulations"**) (and, by extension, would be unlawful pursuant to the relevant provisions of the 2010 Equality Act which had replaced the Regulations).

The key issues for determination were therefore: (i) whether a term in an arbitration agreement which provided that all arbitrators must be members of the Ismaili community related to "employment" as defined in, and was discriminatory under, the Regulations; (ii) if so, whether, in the circumstances of the case, the term fell within the "genuine occupational requirement" exception in the Regulations; and (iii) whether if such a term in an arbitration agreement was void, this made the whole arbitration agreement void.

3. The earlier decisions

David Steel J at first instance found that the nature of the relationship between arbitrators and the parties appointing them was not one of employment within the meaning of the Regulations. Therefore, the legislation did not apply and the requirement that the arbitrators should be members of the Ismaili community was valid. Even if arbitrators were "employees" for the purposes of the legislation, David Steel J was prepared to find that the requirement that the arbitrators be members of the Ismaili community was a genuine occupational requirement.

The Court of Appeal, in a decision which caused concern and debate within the international arbitration community, reversed the first instance decision. Finding that the definition of employment in the Regulations included "a contract personally to do any work", the Court of Appeal concluded that it extended to the terms on which arbitrators acted in arbitration matters and that therefore the appointor was an "employer" within the meaning of the Regulations. It therefore held that the restriction of eligibility for appointment as an arbitrator to members of the Ismaili community constituted unlawful discrimination on religious grounds. The Court of Appeal further held that being a member of the Ismaili community was not a "genuine occupational requirement" for the job.

Finally, the Court of Appeal concluded that the incorporation of the requirement that the arbitrators be Ismaili was so fundamental to the arbitration agreement that if that part of the agreement was unlawful, the whole agreement to arbitrate fell away. It was not possible simply to remove the characteristics requirements in relation to the arbitrators without fundamentally changing the nature of the parties' agreement to arbitrate.

4. The Supreme Court Judgment

The Supreme Court unanimously restored the first instance decision, finding that arbitrators are exempt from the requirements of anti-discrimination legislation as the relationship between them and the appointing parties is not one of employment.

The Court focused on the case law from the European Court of Justice which had considered the definition of "worker" for the purposes of the EC Treaty, and the European Union legislation deriving from the Treaty. The definition was best set forth in the case of *Allenby v Accrington and Rossendale College* (Case C-256/01) where the Court of Justice had drawn together principles previously laid down in other cases concerning workers and summarised the position as follows *"there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration … it is clear from that definition that the authors of the Treaty did not intend that the term "worker" within the meaning of Article 141(1)EC should include independent providers of services who are not in a relationship of subordination with the person who receives the services".*

The importance of the "relationship of subordination" became clear in the context of the wording of the Regulations, since the Regulations provided that "employment" meant employment under a contract of service or of apprenticeship or a contract personally to do any work. In the view of Lord Clarke, who gave the leading judgment, the Court of Appeal had failed to appreciate the significance of the phrase *"employment under … a contract personally to do any work"* which, in his view, required a careful analysis of the nature of the contract. Lord Clarke explained that *"although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract".* He continued *"it is in my opinion plain that the arbitrator's role is not one of employment under a contract personally to do work. [The arbitrator] is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services…The Arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the parties and interest of the parties and not to act in, or so as to further, the particular interests of either party."*

Both the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) had been given permission to intervene in the Supreme Court hearing because their respective rules of arbitration provide that, in cases where parties of different nationalities are in dispute, the Chairman or sole arbitrator should be of a different nationality than the parties. This provision would fall foul of the Equality Act 2010 were it to be held that arbitrators were employees within the meaning of that legislation. Given the Court of Appeal's conclusion that such provisions could not be severed from the overall agreement to arbitrate without fundamentally changing the nature of the parties' agreement, the case raised the possibility that agreements to arbitrate pursuant to those rules would, if governed by English law, be invalidated.

On the question of the "genuine occupational requirement" exemption in the Regulations, Lord Clarke referred to the principle of party autonomy in the Arbitration Act 1996, pursuant to which the parties are free to agree on how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. A majority of the Supreme Court held that even if arbitrators were employees, the "genuine occupational requirement" exception would apply on the facts of this case, such that it would be, not only a genuine, but also a legitimate and justified requirement, to stipulate that an arbitrator be Ismaili.

Counsel for Mr Hashwani had argued that the application of the relevant "genuine occupational requirement" exception should be interpreted very narrowly and as a matter of necessity. The Supreme Court was not persuaded that the test was one of necessity. The question was whether, in all the circumstances, the provision that all the arbitrators should be respected members of the Ismali community was legitimate and justified, and the majority found that it was.

In the light of the Court's conclusions on the first two issues, it was unnecessary to consider the severability point.

5. Conclusions

This judgment, which strongly affirms the principle of party autonomy in arbitration, and the legitimacy of contracting parties' desire to select tribunals having particular characteristics (such as neutral nationality), is a commercially sensible response to the issues raised.

The Supreme Court's careful analysis of the nature of the relationship between arbitrators and parties is a helpful one, which recognises the essential difference between the subordinate nature of an employment relationship and the quasi-judicial activities of an arbitrator who is truly self-employed, although entitled to remuneration for the provision of his services.

From the perspective of users of London arbitration as a preferred method for resolution of their disputes, the strong line taken by the UK Supreme Court is of considerable comfort, as it indicates that an issue of this type should not be raised in future, even where the basis of selection between potential arbitral candidates is not based on religious belief but on other parameters. The decision supports and gives certainty to parties that their autonomy in the selection of arbitrators will be upheld in English law.

Contact

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