Vaccines, dismissals and human rights: *Masiero & others v Barchester Healthcare PLC* [2024] EAT 112

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***Masiero & others v Barchester Healthcare PLC* [2024] EAT 112**

Introduction

1. Think back to early 2021. We were in the depths of the longest, darkest Covid-19 lockdown, but with a small light at the end of the tunnel. The vaccine rollout had begun, bringing with it the prospect of an end to the restrictions on our lives, extensive debate about whether vaccination could and should be mandatory, and a flurry of associated litigation.

2. The Respondent in this case is the second largest provider of care home services in the UK **[25]**. Hit hard by the effects of the Covid pandemic, in early 2021 it introduced a policy that all staff had to be vaccinated against Covid-19 ('the Policy'). (N.B. This was 6 months *before* the government policy which mandated vaccines in care homes in November 2021, which was then revoked in March 2022) **[29-33]**.

3. The Claimants were employees who had been dismissed in May/June 2021 as they refused to be vaccinated. They were identified as 'sample cases' from a wider group of claimants who had all been dismissed under similar circumstances **[22]**.

4. All the claims were dismissed. The Tribunal found that the reason for the Policy was *"to reduce the risk of spread of Covid infection in its homes and, therefore, death and serious illness amongst primarily its residents, but also its staff and any visitors"*. This was a *"genuine and substantial [reason] which could justify dismissal of care home workers as a potentially fair reason"* for the purpose of s98(2) Employment Rights Act 1996 ('ERA') **[39]**. When considering the substantive fairness of the dismissals, the ET took into account human rights arguments made by the Claimants (see further below) but considered any interference to be a proportionate means of achieving a legitimate aim, i.e. to minimise the risk of death and serious illness amongst residents and staff **[40-45]**. In the case of one of

the claimants, the Tribunal also found that procedural failings by the Respondent were not sufficient to render the dismissal unfair **[46-47]**.

EAT Decision

5. The EAT dismissed the Claimants' appeals on all grounds, holding that the Tribunal had properly applied s98 ERA and had properly concluded that their dismissals were compatible with the European Convention on Human Rights ('ECHR') and Human Rights Act 1998 ('HRA').

6. On the reason for dismissal, the EAT held that it was correct to characterise the dismissal as fair for some other substantial reason (SOSR). The EAT held that, in cases where an employee is dismissed for failing to accept a change in terms and conditions, the correct test is whether those changes were for a 'sound business reason' (*Catamaran Cruisers Ltd v Williams* [1994] IRLR 386). The Tribunal must consider the employer's reasons for imposing the change and satisfy itself that they are not arbitrary. Contrary to the Claimant's contention, there is no requirement for a Tribunal to consider whether an employee has acted reasonably in refusing to accept new terms and conditions (in fact, there may be cases where an employee has acted reasonably in refusing, but the employer will still act reasonably in imposing new terms) **[49-57]**.

7. Furthermore, the EAT rejected the Claimants' argument that the Tribunal failed to carry out a particular balancing exercise endorsed in *Scott & Co Andrew Richardson* (EAT/0074/04). The EAT reaffirmed that there is no 'checklist' in considering whether dismissal for the employer's reason is fair in all the circumstances for the purposes of s98(4). What matters is that the Tribunal takes into account all relevant factors. In this case, the EAT considered the Tribunal to have done this in *'impressively conscientious detail'*. It did so both by reference to human rights arguments and wider considerations of fairness **[58-65]**.

8. In relation to the human rights arguments, while the Respondent is a private entity, as the Tribunal is a public authority, it must apply employment law in a way that is compatible with ECHR rights, pursuant to s3 HRA. The main rights in play were the Claimants' rights to respect for their private life (Article 8 ECHR) (which it was accepted were engaged) balanced against the right to life (Article 2 ECHR) of the care home residents. The Claimants also sought (unsuccessfully) to argue that Article 5 ECHR (the right to liberty and security) was engaged (see further below).

9. The EAT considered in detail the cases of *Vavřička and ors v The Czech Republic* (Applications no. 47621/13 and 5 ors, judgment of Grand Chamber, 8 April 2021) and *R (Peters) v Secretary of State for Health and Social Care* [2021] EWHC 3182. Both were cases about compulsory vaccinations (the former for children attending pre-school, and the latter the UK regulations which mandated care workers to be vaccinated against Covid-19). In both it was held that the claimants' Article 8 rights were interfered with, but this interference was justified **[6-21]**. These cases served as useful guidance in similar circumstances and were properly part of the Tribunal's overall reasoning **[80-81]**.

10. On Article 2 ECHR (the right to life), the EAT rejected the Claimants' argument that this was only engaged where someone is intentionally deprived of the right to life **[66]**. This right was engaged because of the significant numbers of deaths from Covid-19 in the Respondent's residents and was relevant in considering the balance of any interference with the claimants' Article 8 rights. It was open to the Tribunal to find that even a small reduction in the risk to life of residents was capable of outweighing the claimants' Article 8 rights **[66-77]**.

11. In relation to Article 5 ECHR (the right to liberty and security), there was no merit in the Claimants' argument that the Respondents' policy denied them giving free and informed consent to the vaccine. While recognising that the policy would have put the Claimants under some pressure, the Tribunal was also clear that the Respondent had gone to great lengths to make clear that vaccination was a choice. The EAT agreed; the Claimants chose not to have the vaccine. This argument was also rejected in *Peters* – individuals retained autonomy as to whether or not to have the vaccine, even where regulations/policies impose a consequence on this decision **[43, 78-79]**.

12. Finally, in relation to one of the Claimants who argued that there were procedural failings, the Tribunal was entitled to find that these were not sufficient to render the process unfair **[82]**.

Comment

13. While the circumstances in this case were fairly novel (and hopefully behind us!), this case serves as a useful illustration of a number of points.

14. **Dismissal for failing to accept new terms and conditions (SOSR):** First, a dismissal for failing to accept new terms and conditions may still be fair even if there are good reasons for an employee to refuse. Reasonable business requirements to change terms and conditions and reasonable reasons for refusal are not mutually exclusive.

15. **Fairness of dismissal (s98(4) ERA):** Second, in unfair dismissal cases while it is tempting to cite a checklist of factors from your choice of EAT decision to demonstrate that a dismissal is fair or unfair, the Tribunal will not fall into error if they do not follow it. What matters is that the Tribunal considers all relevant factors **[62]**.

16. **The 'range of reasonable responses' test can take into account human rights arguments:** Finally, where human rights are engaged, these will be part of the relevant factors to be considered. In the context of dismissals, the correct approach is as follows (from *X v Y* [2004] ICR 1634) **[36, 69]**:

    (a) Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the ECHR? If they do not, the Convention is not engaged and need not be considered;

    (b) Does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer;

    (c) If it does, is the interference with the employee's Convention right by dismissal justified?

    (d) If it is not, was there a permissible reason for the dismissal under the ERA that does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it;

    (e) If there was, is the dismissal fair, tested by the provisions of S.98 ERA, reading and giving effect to them under S.3 HRA so as to be compatible with the Convention right?

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