



Neutral Citation Number: [2012] EWCA Civ 1046

Case No: A2/2011/1556

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE EAT (3 JUDGES)
UKEAT/0015/11/LA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2012

Before :

**LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil
Division**

LORD JUSTICE MOORE-BICK

and

LORD JUSTICE SULLIVAN

Between :

**WELSH NATIONAL OPERA LTD
- and -
JOHNSTON**

Appellant

Respondent

Mr Simon Cheetham (instructed by **Eversheds LLP**) for the **Appellant**
Mr Nicholas Smith (instructed by **MLM Cartwright Solicitors**) for the **Respondent**

Hearing date : 31 May 2012

Approved Judgment

Lord Justice Maurice Kay :

1. Murray Johnston is a gifted musician. From 1974 until he was dismissed in September 2008 he was principal oboeist in the orchestra of Welsh National Opera (WNO). The reason for his dismissal related to his capability. He commenced proceedings in the Employment Tribunal (ET) alleging unfair dismissal. Following a four day hearing in October 2010, the ET concluded that the dismissal had been substantively and procedurally fair. Mr Johnston appealed to the Employment Appeal Tribunal (EAT). His appeal was allowed following a hearing on 20 May 2011 and the EAT remitted the case to the ET, differently constituted, for rehearing. WNO now appeals to this Court seeking to restore the decision of the ET on the ground that it was free from legal error.
2. WNO is an opera company of high repute. Between 1992 and 2001 its music director was Carlo Rizzi. He returned for a second period between 2004 and 2007 and again as a guest conductor after that. For present purposes, it is unnecessary to go into the details but it is clear that there were difficulties in the relationship between Mr Rizzi and Mr Johnston. They began to appear in 1994 but it was only after Mr Rizzi rejoined WNO in 2004 that they took the form of criticism of Mr Johnston's performance. In due course, the criticisms centred upon three aspects of Mr Johnston's playing, namely intonation, emission of sound and blending of sound. The first two are concerned with the relationship between the musician and his instrument. The third is concerned with the relationship between the sound produced by a particular musician and the sounds produced by the rest of the orchestra. There is a procedure whereby poor performance can be assessed in "audition". On 23 October 2006 Mr Johnston attended an audition at which he satisfied the assessors (including Mr Rizzi) in relation to intonation and emission of sound. The audition was carried out with a piano accompaniment. Thereafter, criticism was substantially confined to the blending of sound which was said to be capable of assessment only in an ensemble situation. The audition procedure was considered by WNO to be inapplicable to this type of perceived shortcoming. The issue did not go away and there was a volume of evidence about criticisms and communications through 2007 and into 2008. By July 2008 the relationship between the parties was deteriorating further and Mr Johnston instructed his solicitors. Through his solicitors, Mr Johnston was raising a formal grievance about his treatment suggesting that he had been undermined as principal oboeist, the response to which was that WNO was considering disciplinary action against him. The historic details are set out in the judgment of the ET and are further summarised in the judgment of the EAT. A blow by blow account is not necessary for present purposes. Suffice it to say that following a disciplinary hearing on 22 September 2008, Mr Johnston was dismissed, subject to a right of appeal and on 11 November 2008 his internal appeal was dismissed.
3. The issue at the heart of this case relates to the procedure adopted by WNO in relation to the unresolved issue of blending of sound and ensemble playing. Essentially, WNO took the view that shortcomings of that kind were unsuitable for assessment through the audition process because such an assessment could only be carried out in full ensemble conditions. It therefore dealt with the issue not under the "poor artistic performance" procedure which it had agreed with the Musicians' Union in 2003 but through a disciplinary procedure which was not in all respects the disciplinary

procedure set out in the Welsh National Opera Company Handbook 2007 but was adapted from it. As the ET stated in paragraph 13 of its judgment:

“It was not [WNO’s] case that the disciplinary procedure applied but it was [their] case that, since the WNO/MU agreement did not provide for the factual situation existing, [they] followed a procedure which was akin to the disciplinary procedure. [They] did not embark on the stages of the quasi disciplinary procedure, such as oral warning, written warning and final written warning, because they were conscious of the additional level of stress which this may place upon [Mr Johnston].”

4. The ET concluded that, by so doing, WNO was “acting within a reasonable range of responses”. The EAT disagreed, holding that the judgment of the ET was “flawed by the misconstruction of the poor artistic performance procedure and its application to the facts of this case” (paragraph 53). Ultimately, the case turns on the scope of the agreement between WNO and the Musicians’ Union, (the WNO/MU Agreement).

The WNO/MU Agreement

5. This collective agreement was made and implemented specifically for the orchestra of WNO in August 2003. The relevant provisions are in the following terms:

“1.17 Poor artistic performance

1.17.1 The contract of a Musician may be terminated on the grounds of poor artistic performance by the Company giving 13 weeks’ notice after the following procedure has been followed:

- The Musician shall be given at least 4 weeks’ notice that he/she is required to attend an audition.
- The Musician shall be entitled to ask for and receive a written statement of the reason for the audition.
- The Musician shall be entitled to have a personal representative sitting with the audition panel. The representative may be a member of the orchestra, a Union official or any other person, who shall sit as a member of the panel.
- The music for the audition shall be taken from the orchestra’s current repertoire except that a prepared solo piece may also be required.
- The Company must inform the Musician within 7 days of the result of the audition.

- The Musician shall be entitled to a second audition, of which he or she must receive at least two weeks notice in writing.
- The panel for the second audition shall consist of two members appointed by the Company, two members appointed by the Union and one Independent member mutually acceptable to the Company and the Union.
- Notice of termination of contract may not be given by the Company unless and until the Musician has been judged by the panel to have failed both auditions.

1.18 **Disciplinary procedure**

1.18.1 Purpose and scope

This procedure is designed to help and encourage all employees to achieve and maintain standards of conduct, attendance and job performance. It is the duty of Departmental Directors, Managers and Section Leaders, to set and maintain these standards. For orchestra players this procedure is used for all issues other than poor artistic performance for which the procedure in 1.17, above, is used.”

The WNO Company Handbook 2007

6. The Handbook is incorporated into the contracts of employment of all employees of WNO, not just musicians. It includes a disciplinary procedure. It is similar to disciplinary procedures in many employment contexts. It provides for both informal meetings and a formal disciplinary procedure. Under the heading “Informal Meetings”, there are two sub-headings, namely “Poor Performance” and “Poor Conduct”. Immediately below the sub-heading “Poor Performance”, the following appears:

“[This section does not apply to Musicians, who should refer to the WNO/MU House Agreement].”

7. Where the informal meeting procedure does apply to poor performance, the Handbook goes on to say that, in the event that improvement is not achieved, the aim will be to “tell the employee that if the standard is not met the Formal Disciplinary Procedure will be initiated”.
8. The Formal Disciplinary Procedure has sub-headings which include “Indiscipline/Poor Performance”. It provides that “in the event of employee indiscipline and/or recurrence of poor performance or unacceptable conduct”, a typical disciplinary procedure shall ensue, with meetings, verbal warnings, written warnings, and so on. Under the heading “Formal Disciplinary Procedure”, there is no repetition of the rubric of non-applicability to musicians.

The case for WNO

9. In simple terms, the case for WNO is that the decision of the ET contained no legal error and there was no basis for the EAT to interfere with it. The ET considered that the audition procedure set out under the heading *Poor artistic performance* in the WNO/MU Agreement could have no application to concerns about ensemble playing. It continued:

“[WNO] could not use the disciplinary part of the WNO/MU Agreement, because [Mr Johnston] was a performer. This then left [WNO] in a limbo position ... it could not be the case that [WNO] could be expected to do nothing, simply because the WNO/MU Agreement was silent on the set of facts which it perceived to exist. [WNO] acted within a range of reasonable response in deciding that they had to take some action.

84. What [WNO] appears to have done is to create something of a hybrid procedure, using a procedure akin to their disciplinary procedure, but avoiding steps such as an oral warning, written warning and final written warning, as a precursor to dismissal. This was because they stated that to do so, would place additional stress upon [Mr Johnston].

...

86. We conclude that [WNO] was acting within a reasonable range of response, either to use the disciplinary procedure, or to create a hybrid procedure, to fill the vacuum left by the inadequate provisions of the WNO/MU Agreement. Therefore, whether the disciplinary procedure or any hybrid procedure was used, it was inside the range of reasonable response for [WNO] to require [Mr Johnston] to attend what was called a disciplinary hearing.”

The EAT judgment

10. Essentially, the EAT considered that the ET had fallen into legal error by finding that, as a matter of construction, ensemble playing was not included in paragraph 1.17.1 of the WNO/MU Agreement. The EAT stated (at paragraph 42):

“There is nothing in the language to exclude it; it is excluded only by [WNO’s] case that it is too difficult, but that is not a matter of textual construction, and the difficulty of application is an unsure – and in our judgment an unsafe – basis on which to reach the conclusion that it was never the intention of the parties that the agreement was not to cover all aspects of poor artistic performance. It does not say anything to the contrary.”

The EAT could see no basis on which paragraph 1.17.1 could be construed as not embracing all aspects of artistic performance (paragraph 43). It considered that this was implicit in the final bullet point in paragraph 1.17.1:

“Notice of termination of contract may not be given ... unless and until the Musician has been judged by the Panel to have failed both auditions.”

11. In these circumstances, it did not consider it appropriate to construe the word “audition” in the narrow sense suggested by WNO. As a matter of construction, the EAT concluded that an allegation of below standard ensemble playing was simply another aspect of “poor artistic performance” which attracted the paragraph 1.17.1 procedure, modified as required by the circumstances.

Discussion

12. It is absolutely clear that the disciplinary procedure set out in the Handbook does not apply to poor performance by musicians. The words in parentheses “this section does not apply to Musicians, who should refer to the WNO/MU House Agreement”, are unequivocal. That, in turn, is consistent with paragraph 1.18.1 of the WNO/MU Agreement which, in prescribing a disciplinary procedure, goes on to state “for orchestra players this procedure is used for all issues other than poor artistic performance for which the procedure in 1.17, above, is used”. (Emphasis added)
13. The fundamental question is whether, as the ET found, paragraph 1.17.1 of the WNO/MU Agreement, as a matter of construction, excludes from its procedure, below standard ensemble playing. In my judgment, it does not. The purpose of paragraph 1.17.1 was to protect a musician from too subjective an assessment of his performance. Its objective elements are emphasised by the fact that it provides for two separate audition panels. The musician is entitled to have a personal representative sitting with the first audition panel. The panel for the second audition consists of two members appointed by WNO, two members appointed by the MU and one independent member acceptable to both WNO and the MU. In relation to matters such as intonation and emission of sound, one would expect that the assessment might best be carried out with the musician playing solo or with piano accompaniment. However, paragraph 1.17.1 does not confine the audition or assessment to such circumstances. I do not think that it would have been appropriate for the procedure to be too prescriptive. What is important is to arrange a suitable audition for the particular perceived problem. In one of their letters, Mr Johnston’s solicitors suggested that there ought to be a discussion as to “who should participate in the audition on an ensemble basis”, adding:

“We would need to agree who would be on the audition panel and, in particular, which instruments should be played by way of accompaniment to adequately assess Mr Johnston’s ensemble playing.”

14. It seems to me that this was a realistic proposal in the circumstances. Concerns about ensemble playing require the musician to be assessed in ensemble, either in audition conditions or, perhaps, in rehearsal and/or performance, with the panel concentrating on the musician in question. This may call for a modification of the paragraph 1.17.1

procedure to meet the circumstances of the case, but it would retain the protection against subjectivity which, as I see it, the musicians were granted by the poor performance procedure. I am quite sure that it accords with the intentions of the parties, objectively determined, having regard to the text of the WNO/MU Agreement. In effect, the parties to that agreement had decided that a fair procedure in relation to below standard artistic performance required that objective element.

15. I respectfully agree with the EAT that it was a legal error for the ET to exclude concerns about ensemble playing from paragraph 1.17.1. To subject Mr Johnston to the Handbook disciplinary procedure, minus the requirements of oral, written and final warnings, was procedurally unfair, even if the concern was to save him from additional stress (something which, we are told, was not put to Mr Johnston in cross-examination). Contrary to what the ET held, it was not a reasonable response to the problem that had arisen.

Conclusion

16. It follows from what I have said that, in my judgment, the EAT was correct to identify a legal error in the judgment of the ET. I would dismiss WNO's appeal and remit the case to the ET. Because I consider that a finding of procedural unfairness is inevitable, I would remit solely for a remedies hearing. The case now having been the subject of three contested hearings at considerable expense, I hope that the parties will give active consideration to the possibility of a negotiated settlement, if necessary through mediation.

Lord Justice Moore-Bick:

17. I agree.

Lord Justice Sullivan:

18. I also agree.