

Burchell & judicial jostling

Stephen Levinson reflects on the uncertain future of the test for fair dismissals

IN BRIEF

- ▶ *Burchell* & the band of reasonable decisions test.
- ▶ Should a full panel replace the prevailing approach of making most unfair dismissal cases the province of judges sitting alone?

Mischievous and disingenuous are not adjectives usually applied to decisions of the Supreme Court. In their comments on what constitutes a fair dismissal made in the case of *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] All ER (D) 82 (Mar) however, these words will be applied by some with a certain amount of justification.

What was the case about?

A female head teacher of a primary school had a close (non-sexual) relationship with a man who was convicted of making indecent images of children. Having taken advice she did not disclose the relationship or conviction to the school. The governors, however, later became aware of the relationship, suspended the head teacher and then dismissed her for the non-disclosure. A claim for unfair dismissal failed as did appeals to the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court all holding that a dismissal was within the band of reasonable responses an employer could reach.

What is special about all that?

On the facts as stated, absolutely nothing. It looks like a routine application of well-worn standards and in particular of what has been long-considered the trite principle that what has to be decided is whether the employer acted reasonably, not whether the court would have reached the same decision.

What is of interest were the oblique criticisms made of the principles first set out in *British Home Stores v Burchell* [1980] ICR 303 as to what was required from employers handling a dismissal for misconduct. In his judgment when this case came to the Court of Appeal *Burchell* was described by Elias LJ as 'the classic formulation of the employer's obligation in misconduct cases'. He said that the test was colloquially known as the band of reasonable responses test and that the same principles apply when determining whether the misconduct justifies the sanction

of dismissal. In contrast both Lord Wilson and Lady Hale made comments that inferred doubt as to whether this was the correct approach when deciding if an employer had acted reasonably under s 98(4) of the Employment Rights Act 1996 (ERA 1996).

The requirements in *Burchell* are that the employer should have a genuine belief the misconduct occurred, that it had reasonable grounds for that belief and that it had carried out a reasonable investigation to establish that belief. Section 98(4) of ERA 1996 says that a court has to establish whether an employer acted reasonably or unreasonably and that this should be decided in accordance with equity and the substantial merits of the case.

Lord Wilson said that it was 'apparent' that the *Burchell* requirements were not directed at s 98(4) but at the previous sub-sections, namely at determining the reason for dismissal and whether it came within a permissible category. He instanced cases where the alleged misconduct was not admitted and said that while the *Burchell* requirements would be applicable to resolving that dispute they were not well suited to determining the reasonableness of the decision to dismiss. Having described the requirements of *Burchell* as not fitting well the requirements of s 98(4) the learned judge then made the conflicting remark that the band of reasonable responses test was 'entirely consonant' with the obligations of s 98(4). Appreciating that he was challenging long established principles Lord Wilson also added that no harm seemed to have been done by what he called 'the extravagant' view of the reach of the judgment in *Burchell*. Clearly this judge believes in having his cake and eating it. Lord Wilson also reminded himself that none of this was part of the argued case and then proceeded to apply the *Burchell* test to reasonableness and rejected the appeal.

Lady Hale, before doing exactly the same, regretted that two questions of public importance had not been argued.

- ▶ First whether it was possible for a dismissal based on conduct to be fair if it was not in breach of the employee's contract. This is taken to refer to the fact that the head's contract contained no express requirement to inform the governors of her relationship not any implied term of trust and confidence.
- ▶ Second she said she had heard no arguments whether *Burchell* principles were correctly applicable to s 98(4).



Lady Hale then made clear she was not considering either point in this case, and recognised that *Burchell* had been applied in thousands of cases and that Parliament had not sought to amend the law having had opportunities to do so.

What is intended by all of this?

It is apparent that neither of these speculative forays was necessary to determine the case. What also appears obvious is that the two judges wished it had been possible to challenge *Burchell*. Although Lady Hale said there were arguments on either side it seems clear she was, as another commentator has put it, throwing down the gauntlet and inviting a challenge. She and Lord Wilson would prefer to use a different test giving judges greater say. This is why the charges of mischief and disingenuousness apply because there can be no doubt that both judges are well aware of the debate they will engender and of the fundamental shift in power that removing the band of reasonable decisions test may make.

Dissenting voices

Many commentators, academics and employee representatives dislike the band of reasonable responses test that *Burchell* supports because it is considered to give too much scope to employers. According to Professor Hugh Collins it means that the court has to accept there is no fixed



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standard of reasonableness and that it broadens the scope for disciplinary action. Professors Deakin and Morris make a similar point that 'there remains a strong case for reviewing the band of reasonableness given that it is essentially a judicial addition to the statutory formula and arguably one which has done much to limit the effectiveness of the statutory protection provided to employees, no matter how hallowed it has become with the passage of time'.

The editors of *Smith & Wood's Employment Law* are equally critical. They call the band 'an ingenious sleight-of-hand that appears to allow tribunals to impose an objective standard while not substituting their own judgement for that of the employer....it calls for a tribunal to imagine a universe of employers, then imagine a subset of reasonable employers and then decide if the decision before it was one that even the least reasonable of the latter subset might make'.

Judges too have joined in this criticism. In 1999 the Employment Appeal Tribunal President, Morrison J, said in *Haddon v Van den Berg Foods Limited* [1999] IRLR 672 that the range of reasonable responses was wrong and was an 'unhelpful mantra'. This was because the test made it too difficult for an employee to succeed and it became in effect a test of perversity. The problem was that 'the moment that one talks of a 'range' or 'band' of reasonable responses one

is conjuring up the possibility of extreme views at either end of the band or range'.

Lady Hale also cited the views of Sedley LJ in *Orr v Milton Keynes Council* [2011] ICR 704 where he described the meaning of s 98(4) as 'both problematical and contentious' and he thought Morrison P's views 'cogently reasoned'. It did not take very long, however, for the Court of Appeal to slap down that approach firmly in *Foley v The Post Office* [2001] 1 All ER 550, [2000] IRLR 827, a year after *Haddon* was decided. Since then the band has played on. All of this background can be taken to have been well known to Lady Hale and Lord Wilson. In stirring the pot they have given tacit encouragement to an attack on the current law and it will not be any surprise when creative legal minds bring before them the opportunity to overrule *Burchell* or at least exclude its application from s 98 (4).

A practitioner's view

Back in May 2000 Michael Rubenstein criticised the courts in his *Highlights to the Industrial Relations Law Journal* for failing to rescue unfair dismissal law from continual uncertainty. Understandable as that view is (and it will be endorsed by many) it is unlikely that whichever view of *Burchell* is taken uncertainty will be removed. The real question is what outcome will prove to be the least uncertain. Consider what is required by s 98(4). It is a

within or without the reasonable band of responses. The objection that Morrison P raised that there will always be some extremes to any band is countered by the fact that as the band is supposed to consist only of reasonable decisions it is logically not possible for the poles at either end to be extreme. If the concept of a band was abandoned what will replace it? The individual views of the tribunal of what is and is not reasonable on the part of the employer? There would be no certainty gained from that approach and whether or not it would provide more protection for employees will depend on the attitudes of the particular tribunal. Even today some tribunal jurisdictions are notorious in their inclination towards one side or the other. Another solution suggested by Professor Collins is the creation of a proportionality test for fairness requiring greater consideration of both the objective of the employer and the necessity for the decision. Given the probable movement away from European legal standards that will follow departure from the EU this is unlikely to appeal to legislators.

Whatever the outcome it needs to be recognised that policy views of the extent to which courts and tribunals should be able to interfere with business decisions will determine whether any change in the law, judicial or legislative is made.

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decision based on equity and the substantial merits whether the decision to dismiss was reasonable or not. To answer this at present and to guide the perplexed, the courts and tribunals have added a number of standards to be observed by the reasonable employer. These include the fact that the investigation has to be appropriate to the nature of the alleged misconduct; that any appeal should usually be heard by those previously uninvolved; the need for clear rules; the reasonableness of an instruction; the consistency of the application of those rules; whether the decision is based on the facts or simply a policy and whether there has been undue delay. Such standards are well known to HR professionals and advisers. They do provide some certainty and guidance about what is likely to be

A final thought

The prevailing approach of making most unfair dismissal cases the province of judges sitting alone means that the experience brought to bear on the issues of fairness has become remarkably narrow and indeed idiosyncratic. No one surely believes that a set of chambers is a typical workplace. Law firms are not renowned for excellence in working practices. If more influence is to be placed on the views of individual tribunals it will be necessary for a new cadre of experienced lay members to be introduced and for all unfair dismissal cases to be heard by a full panel.

NLJ

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