Employer discretions and Braganza: three years on

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Following the Supreme Court's decision in Braganza on contractual discretions in 2015, it was unclear whether the case would be confined to its fairly unusual facts or whether it would have wider implications. Since then, various cases have pointed the way to it potentially having a wide-ranging impact as to how the exercise of employer discretions can be challenged, although the full extent of its implications remains unclear.

Braganza revisited

Prior to the *Braganza* decision, the law on the exercise of employer discretions was relatively settled. There was a fairly extensive list of cases with which most employment lawyers will be familiar (*Clark, Keen, Horkulak etc*) which, in very broad terms, held that where an employer has a discretion (for example, in relation to whether and how much to award as a purely discretionary bonus), the court would imply a term that it must not be exercised in a way that is irrational or perverse. *Keen* itself set something of a high-water mark in the previous bonus/discretion cases, in view of the statements by the Court of Appeal that the employer 'has a very wide discretion' and that the burden on the employee of establishing that a bonus payment was irrational is 'a very high one'. What that line of case law focused on, however, was largely the *outcome* of the decision-making process.

Braganza effectively opened up a new basis on which a discretionary decision could be challenged. Mr Braganza was a chief engineer on one of BP's oil tankers. While the ship was at sea, he disappeared and was never seen again. It was presumed that he had drowned. His employment contract entitled his widow to certain death-in-service benefits but also provided that if, 'in the opinion of the company or its insurers', the death resulted from his own wilful act, no benefits would be payable.

BP established an investigation to determine the cause of his death. That inquiry concluded that he had committed suicide and that therefore no benefits were payable. This decision was challenged by his widow in a breach of contract action as an unlawful exercise of the employer's discretion. When the case reached the Supreme Court, the majority confirmed that the exercise of the employer's discretion had to be examined under both limbs of the public law *Wednesbury* test, namely (i) the decision-making process itself (ie whether relevant matters were not taken into account and/or irrelevant matters were taken into account); and (ii) the rationality of the decision itself, ie, even if the decision-making process was sound, whether the decision arrived at was so unreasonable that no reasonable person could ever come to that decision.

Prior to *Braganza*, the focus of challenges to discretionary decisions had always been on the basis of the rationality of the outcome of the decision but *Braganza* indicated that the process by which such a decision had been arrived at was equally capable of being used as a basis for challenge.

Applying Braganza to the decision-making process

Since *Braganza*, various cases have shown the extent to which it can be relied on to challenge the legitimacy of the decision-making process itself, rather than simply the outcome. *Hills* concerned a discretionary decision by the employer as to how much available commission under a commission plan should be allocated to the company's UK office. The Court of Appeal upheld the county court's decision that the allocation of 48% of the commission to the UK, rather than two-thirds, was an unlawful exercise of the employer's discretion. The Court of Appeal noted that the absence of any evidence as to the way

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in which the decision had been taken was problematic for the employer, and the judge at first instance could not decide that the employer's decision had been taken rationally unless he knew what had been taken into account by it.

In *Simpkin* the High Court was dealing with a preliminary issue in relation to the decision by an employer not to exercise its discretion under a bonus plan and various long-term incentive plans to deem a departing executive to be a good leaver. The schemes provided that if the executive left before the benefits vested (which was the case) his entitlement to benefits lapsed, unless the employer exercised its discretion to treat him as a good leaver. The executive alleged that the company had, in breach of its *Braganza* duty, exercised its discretion on the basis of allegations against him relating to his performance and conduct which had not been investigated or tested, nor which had been put to him and that the allegations were not supported by evidence of sufficient weight. At a preliminary hearing, Fosket J ordered a trial of a preliminary issue as to whether the employer's decision had been in breach of its *Braganza* duty and whether he should have been treated as a good leaver.

Watson is another good example of how the *Braganza* duty can be used to challenge the reasonableness of the decision-making process itself. The case concerned a claim for specific performance of a share option agreement, which provided that the option could only be exercised with the consent of a majority of the company's board. When the claimants sought to exercise their option, the defendant company vetoed the exercise.

The High Court held that, in exercising its discretion, the *Braganza* duty applied and the company had not complied with that duty. The directors had given virtually no considered exercise of the discretion at all. Only one director had spoken about the matter and the others had simply concurred. The decision by the board had been taken in a rushed manner in a difficult atmosphere and had been dealt with as the last item on the agenda at a board meeting. There was unsatisfactory evidence of prior consultation. The directors had effectively understood that they had an unconditional right of veto rather than having to consider whether the claimants had made a real or significant contribution to the growth of the business. There had been no real discussion and no consideration had been given to one plainly relevant factor. The claimants were therefore entitled to an order for specific performance of the option agreement.

In *Patural* a trader challenged the employer's discretionary decision to award him a lower bonus than two of his colleagues. His claim was dismissed by the High Court on various grounds. His case was not assisted by *Braganza* because his pleadings had not included any allegation of a *Wednesbury* error in the employer's decision-making process. Nonetheless, the High Court implicitly seemed to acknowledge that in principle both limbs of the *Braganza* test would have been analysed, had it been pleaded.

What type of decisions can Braganza be applied to?

One of the as yet unclear issues arising from *Braganza* in an employment context is what type of decisions will be subject to the *Braganza* duty. There are certain types of decisions where an employer either has a discretion to determine whether a certain factual state exists or not (as in *Braganza* itself) or whether, based on a given factual scenario, an individual should be treated in a certain way (as in *Simpkin* where the employer had a discretion to deem the departing executive to be a good leaver).

There are also certain types of decisions where the employer may have a discretion as to a range of options about how an employee should be treated. Some examples include decisions as to whether to award a discretionary bonus and how much any such bonus should be, pay review decisions, decisions on relocation of employees or whether to pay an employee enhanced sick pay etc. It is very likely that the *Braganza* duty would apply to such decisions.

What is less clear is whether *Braganza* can be applied where an employer is simply deciding whether or not to exercise an express contractual power. Some cases after *Braganza* have shown little trouble in applying *Braganza* to the exercise of such powers. So, for example, in *Faieta*, it was accepted (without much discussion as to why) that the *Braganza* duty applied to an employer's decision to place an employee on 15 months' garden leave.

However, in a non-employment context, other High Court judges have been reluctant to apply the *Braganza* duty to situations where a contract gives a party an absolute contractual right to act in a particular way or not. For example, in *Shurbanova*, Waksman J held that the *Braganza* duty did

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not apply to a contractual power for a forex trader to revoke a transaction with a customer. He said that the *Braganza* duty 'is concerned with a determination of a substantive matter, or a judgment about or evaluation of some state of affairs which one party makes as the decision-maker, but which affects the interests of both' and that the duty did not apply to a simple contractual power to revoke a transaction. These cases are hard to square with each other – it could easily be said that a power to place an employee on garden leave is effectively an absolute binary power under the contract that is analogous to a contractual power to revoke a commercial transaction.

And what of other key decision-making powers under employment or other contracts? Could *Braganza* apply to an employer's decision to terminate employment? Instinctively applying the duty to such a decision would largely undermine the many cases that have established that the implied duty of mutual trust and confidence does not apply to the termination decision (*Eastwood, Johnson etc*) as to do otherwise would open the decision to terminate and the related decision-making process up to scrutiny outside of the context of an unfair dismissal claim. It has, however, been suggested by some commentators that *Braganza* could apply to decisions to terminate in non-employment situations, such as the forced removal of partners from an LLP, which could give grounds for an LLP member effectively to challenge the reasons for such a decision and force the LLP to conduct and justify a fair decision-making process.

If it is correct that *Braganza* cannot apply to a contractual decision to terminate employment, and *Braganza* does not apply to binary contractual powers, it seems hard logically to conclude that *Braganza* should apply to a contractual power to remove an LLP member.

The cases since *Braganza* have shown that it may potentially be a powerful tool in the hands of employees for challenging not only the outcome of an exercise of discretion but also, or alternatively, the way in which such a decision has been reached. Nonetheless, the range of types of decisions to which it may apply remains unclear and yet to be decided in case law.

KEY:

Braganza	*Braganza v BP Shipping Ltd* [2015] IRLR 487
Clark	*Clark v Nomura International plc* [2000] IRLR 766
Keen	*Keen v Commerzbank AG* [2007] ICR 623
Horkulak	*Horkulak v Cantor Fitzgerald International* [2005] ICR 402
Wednesbury	*Associated Provincial Picture House Ltd v Wednesbury Corpn* [1948] 1 KB 223
Hills	*Hills v Niksun Inc* [2016] IRLR 715
Simpkin	*Simpkin v Berkeley Group Holdings plc* [2016] EWHC 1619
Watson	*Watson v Watchfinder* [2017] EWHC 1275
Patural	*Patural v DB Services (UK) Ltd* [2015] EWHC 3659
Faieta	*Faieta v ICAP Management Services Ltd* [2017] EWHC 2995
Shurbanova	*Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133
Eastwood	*Eastwood v Magnox Electric plc* [2004] IRLR 733
Johnson	*Johnson v Unisys Ltd* [2001] IRLR 279