



16 May 2018

PRESS SUMMARY

R (on the application of Gallaher Group Ltd and others) (Respondents) v The Competition and Markets Authority (Appellant) [2018] UKSC 25
On appeal from [2016] EWCA Civ 719

JUSTICES: Lord Mance (Deputy President), Lord Sumption, Lord Carnwath, Lord Hodge, Lord Briggs

BACKGROUND TO THE APPEAL

The Competition and Markets Authority (“CMA”) is the successor in title to the Office of Fair Trading (“OFT”). In April 2008 the OFT identified 13 parties, including the respondents, as having infringed the Competition Act 1998. In early June 2008 both respondents, along with four other parties, entered into Early Resolution Agreements (“ERAs”) with the OFT. The ERAs involved the parties admitting infringement and co-operating with the OFT in exchange for substantial reductions in the anticipated penalties. A party to an ERA could also appeal against that final decision, notwithstanding the admissions in the ERA, but in that case was liable to have his penalty increased by the Competition Appeal Tribunal (“CAT”). The Early Resolution process was neither subject to statutory rules nor, at the material time, described in any published document. An internal OFT document nonetheless emphasised “Fairness, transparency and consistency” as “integral to an effective settlement process.” An OFT “speaking note” for use in discussions with parties also included a commitment to “equal treatment principles.”

TM Retail (“TMR”) was one of the parties which had entered into an ERA. In 2008 the OFT responded to a query from TMR with an assurance that, if it did not appeal, it would get the benefit of any successful appeal made by any of the other parties to the decision.

In April 2010 the OFT issued its final decision which made findings of infringement against parties under investigation, including the respondents. Six of those parties appealed to the CAT. Neither the respondents nor TMR appealed, but instead chose to pay the reduced penalties imposed in the ERAs. The CAT allowed the appeals of all six appellants. TMR then wrote to the OFT, citing the 2008 assurance and inviting the OFT to withdraw the decision against it. The OFT reached a settlement agreement with TMR whereby the penalty which had been imposed on TMR was repaid with a contribution to interest.

The respondents invited the OFT to withdraw the decisions against them, arguing that they should also be given the benefit of the assurances given to TMR. The OFT refused. The respondents ultimately brought judicial review claims. These failed in the High Court but succeeded in the Court of Appeal, which held that the OFT’s failure to repay the penalties to the respondents was, in the absence of some objective justification for the difference in treatment compared to TMR, a breach of a public law duty to treat all those under investigation equally. The CMA appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Carnwath gives the lead judgment, with which the other Justices agree. Lord Sumption and Lord Briggs give concurring judgments.

REASONS FOR THE JUDGMENT

Domestic administrative law does not recognise a distinct principle of equal treatment. Consistency is a generally desirable objective, but not an absolute rule [24]. In this case the OFT was applying a single

set of legal and policy criteria to a limited group of parties within a single area of business activity, and its commitment to equal treatment had been expressed in terms to those parties. To that extent, they had a legitimate expectation of equal treatment; but that tells one nothing about the legal consequences of such an expectation [29-30].

Although procedural unfairness or impropriety is a well-established ground of judicial review, substantive unfairness as such is not. References to “conspicuous unfairness” or “abuse of power” in the case law add nothing to the ordinary principles of judicial review by which this case must be judged [31-42].

Even accepting that there was a breach of a legitimate expectation in the failure to replicate the assurances given to TMR in 2008, that would not in itself provide a basis for financial remedy in relation to the events of 2012, nor the reversal of financial penalties which had by then been lawfully imposed on, and accepted by, the respondents. It makes no difference to the result whether one applies a test of “objective justification” or one of “rationality” [43].

All those who entered ERAs knew of the possibility that other parties would appeal successfully. That was a risk the respondents took knowingly. TMR did not. TMR sought and obtained an assurance on which it claimed to have relied. In 2012 the OFT could reasonably take the view that, if the assurance were not honoured, TMR would have had a strong case for permission to appeal to the CAT out of time, whereas the respondents did not. If objective justification were needed for OFT taking a different approach to TMR, that was sufficient. [44-45].

Lord Sumption adds that the assurance given to TMR was a mistake because it was inconsistent with the OFT’s policy of non-discrimination, the terms of the ERA under discussion, and the purpose of the Early Resolution procedure [51-52]. That, however, cannot affect the position of the respondents, each of whom had entered into a distinct ERA which was intended finally to resolve the issues which were the subject of the CAT appeals, subject only to their right to either (i) terminate the ERA before the final OFT decision or (ii) appeal to the CAT after that decision. They invoked neither option, thus accepting the risk that they would not benefit from any other party’s successful appeal but ensuring that they would retain the benefit of the discounted sanction if the appeals failed. Finality and certainty required that they should live with the consequences [53]. The assurance to TMR was in no sense given at their expense. They had no right to such an assurance. The OFT’s mistake was that they gave the assurance to TMR, not that they failed to give it to the respondents. It was not irrational for the OFT in 2012 to repay the penalty to TMR after the appeal while not repaying the respondents, because having failed to appeal in reliance on the assurance, TMR would otherwise have been entitled to obtain leave to appeal out of time. Since they were in materially the same position as the six successful appellants, their appeal would have succeeded. Therefore, while the decision was discriminatory, the discrimination was objectively justified. Unlike TMR, the respondents had no basis for a late appeal to the CAT [54-56].

Lord Briggs adds that, where a public authority has the option to avoid replicating an earlier mistake but at some cost to equal treatment, the choice is one for the authority rather than the court, subject to the usual constraints of lawfulness and rationality. The OFT’s conduct did not transgress those boundaries. The circumstances amount to a powerful objective justification for the unequal treatment: (i) the assurance to TMR was a mistake, (ii) its withdrawal in 2012 likely would have left TMR even better off than if the assurance were honoured, and (iii) the respondents had neither received nor relied upon any similar assurance. On any view the OFT made a rational choice between unpalatable alternatives, with which the court should not interfere [62-63].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>