Correcting an arbitration award: how far can the arbitrator go?

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This was the main question which arose for determination in H v W *[2019] EWHC 1897 (Fam), in which deputy High Court judge Clare Ambrose carried out a detailed analysis of the scope of s57 of the Arbitration Act 1996, in the context of a financial arbitration under the IFLA scheme*

Under s57(3)(a) of the Arbitration Act 1996 (AA96), the arbitrator may (unless the parties have agreed otherwise):

> "(a) correct the final award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award …".

This important decision highlights the limit (absent agreement by the parties under s57(1)) to an arbitrator's power to revisit a final award once it has been formally delivered.

Procedural background

As events following the delivery of the award were at the heart of this case, the relevant procedural chronology is set out below in some detail.

Both parties acted in person throughout the arbitration. Among the issues which they submitted for determination by their nominated arbitrator was the principle and quantum of spousal maintenance.

A final hearing took place on 31 October 2018 and the arbitrator delivered his final award on 26 November 2018. His conclusion on maintenance was that H should pay spousal maintenance at the rate of £500pcm, with a three-year term.

On 13 December, following a number of informal email exchanges, H made a formal application to the arbitrator under s57 AA96, seeking the correction of what he characterised as a clerical error, namely, that the arbitrator had excluded W's lodger's income when considering her forecast income. The application was supported by detailed calculations.

By his response on 17 December the arbitrator declined to amend the award, holding that the complaint did not fall within the scope of s57. He took the view that he was not being asked to rectify a clerical mistake: H's complaint was more fundamental, namely, that the arbitrator had miscalculated W's income, thereby affecting the overall fairness of the award.

On 24 December H sent the arbitrator a revised formal application (thus just within the 28-day time limit stipulated by s57), again expressed to be under s57 and, as before, supported by detailed calculations.

W made submissions in reply, but requested time to consider making a more detailed response in the event that the arbitrator was minded to make a substantial change to the award.

On 3 February 2019 the arbitrator informed the parties that he had considered H's representations on income but had also reviewed W's income-related expenses. He set out detailed further findings. His conclusion was that the amount of maintenance should be reduced to £300pcm, but that his award stood in all other respects.

On 12 February H made a third formal application under s57, seeking correction to the amended award. He asserted that the recalculation of W's income was "inadmissible" and argued that the award should be revised to provide for a clean break. W also made representations.

The arbitrator responded on 15 February. He rejected the application to amend the award further, ruling that H's request to reconsider had been dealt with, and that his role as arbitrator was now at an end.

Thereupon, on 8 March, H applied to the court for an order setting aside the part of the award dealing with spousal maintenance. He advanced a wide-ranging case alleging serious irregularity causing substantial injustice (s68 AA96), principally in relation to the arbitrator's conduct ➤

of the amendment of the award. He further submitted that the award was vitiated by error of law (s69).

He also argued that the court's power to correct an award under s57(3)(a) was not limited to the correction of a "clerical mistake or error arising from an accidental slip or omission".

"It has long been held that the test of substantial injustice will only be met in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

For her part, on 14 March W issued a notice to show cause. While her primary case had been that the original award should be made an order of the court, at the hearing she sought an order in the terms of the amended award.

Deputy High Court judge Clare Ambrose's conclusions were as follows:

Challenge under s69

a) She dismissed H's challenge under s69 (appeal on point of law), as there was no basis for suggesting that the arbitrator's application of law was obviously wrong or that it raised a legal question of general public importance [55].

Challenge under s68

b) As to the challenge under s68 (serious irregularity), she observed that the grounds of intervention are very circumscribed indeed, and that it has long been held that the test of substantial injustice will only be met in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. It must be shown that what happened is so far removed from what could reasonably be expected of the arbitral process that the court must take action [57].

c) At [59] she stated:

> "It was common ground that the threshold for intervention under s68 is a high one requiring that something really serious has gone wrong. In entering arbitration the parties signed the ARB1FS on the express basis that challenge to court was limited and a variation would only be justified in an exceptional case. The reason why intervention is exceptional is because the parties have chosen to use arbitration in order to bring an end to their dispute in a fair and efficient manner. Parties do not agree for an arbitrator to resolve their disputes in an award in order for this to be a precursor to further rounds of extended submissions on possible errors and then a set of court proceedings before the matter is remitted back to the arbitrator for further submissions and perhaps a further hearing. This must be the last outcome the parties would intend and the court would not allow it unless the high statutory threshold is clearly met."

Analysis of the scope of s57

d) The starting point is that a published arbitration award is final and binding (s58). Once an arbitrator has made a final award, they have discharged their duty (they are *functus officio*) and no longer have power to make decisions in respect of matters decided [61].

e) Section 57 provides a limited exception. However, it does not allow an arbitrator to give effect to second thoughts (see also *Ases Havacilik v Delkor* [2012] EWHC 3518 (Comm) referred to in *DB v DLJ* [2016] EWHC 324). Nor does it allow an arbitrator to improve or revisit their decision or correct a mistaken assessment of the facts or the law. Likewise, if an arbitrator "assesses the evidence wrongly or misappreciates the law" this error does not come within s57 (as per *The Montan* [1985] 1 Lloyd's Reports 189 and *R v Cripps ex p Muldoon* [1984] QB 686) [63].

f) Whether an error comes within s57 is an objective matter. It is not simply a matter of the arbitrator's discretion under what is often termed the slip rule. If an arbitrator admits that there is an error in an award there are usually only three ways to correct it: by the parties' agreement, by a correction if it falls under s57, or by an order of the court under s68(2)(i) for an admitted error [64].

g) While there may sometimes be a fine distinction between an accidental slip or omission (correctable under s57) and an error or gap in the reasoning or a mistaken assessment of the facts (outside s57), the arbitrator's powers under s57 should not be construed broadly for this purpose [65]:

> "Section 1 of the 1996 Act makes clear that its provisions are founded on the object of achieving a fair resolution without undue delay or expense. This is also the parties' intended priority in agreeing to the FLAS scheme. Section 57 is not intended to allow parties 'another bite of the cherry' and it should not be construed broadly so as to permit costly and time-consuming attempts to re-open the arguments or the evidence. Section 57 does not allow for the introduction of fresh evidence for the purpose of identifying or correcting errors."

h) Where an arbitrator is entitled to correct an error under s57 they are then entitled to make changes to other parts of the award in order to reflect the correction. The corrections may be made after the expiry of the 28-day period prescribed by s57 and they can make them without having to go back to allow further representations, since this is merely the necessary consequence of the error [69].

i) At [71] the judge noted that:

> "The arbitrator was placed in a difficult position. He was dealing with two litigants in person in circumstances where an award had been made and ordinarily his work would be complete. The informality of the exchanges suited the parties but it may have led them to believe that submissions could continue as if there had been no award. The arbitrator decided to allow an application under s57 to address what he perceived as a shortcoming in his original award that should be corrected. He took the view that both income and needs needed recalculation such that the overall correction should not be as large as H requested. It was understandable that he wanted to improve his decision so as to correct it. *However, attempts by parties or a tribunal to perfect, correct or improve an award (except for the narrow powers under s57) are not allowed under the 1996 Act where finality is valued more than meticulous accuracy*." [emphasis added]

Conclusion on s68: the merits

j) The deputy judge held, first, that the arbitrator's corrections fell outside the scope of s57; the arbitrator had been right in deciding on 17 December that H's request went beyond the scope of s57; in his 3 February decision he expressly acknowledged that he had been asked "to look at matters afresh"; he had reopened his reasoning and reconsidered his method of assessment [72].

k) Going on to consider the merits of H's complaints under s68 AA96, the judge rejected them in their entirety, as no substantial injustice had resulted (to either party). At [73] she stated:

> "However, even if the errors were not within s57, the application to challenge the amended award on grounds of the arbitrator exceeding his powers under s68 fails for want of substantial injustice. This would apply equally to the complaints of W (who preferred the original award with no corrections) and also H (who was unhappy with the recalculation of needs). The arbitrator decided that a correction was required to give better allowance for income and costs due to lodgers. The parties had agreed that he should decide their financial dispute. Justice does not require me to undo his decision or send it back to him for reconsideration. To the contrary, his decision reflects a fair and careful assessment of the parties' needs. I note that the 1996 Act also makes provision for an arbitrator to admit an error falling outside s57 such that the parties can either agree for the award to be corrected or one party can apply to court for remission under s68(2)(i) of the 1996 Act. This is intended for extreme cases but shows that a court may give effect to an arbitrator's admission of an error."

"The judge also rejected both parties' further challenge under s68, not least because neither party could show that there would have been a significantly different outcome had further submissions been made."

l) The judge also rejected both parties' further challenge under s68, based on the contention that the arbitrator should have invited further submissions before making his 3 February decision, not least because neither party could show that there would have been a significantly different outcome had further submissions been made. She stated that while a further round of submissions might possibly have prevented one ground of complaint, it would have increased costs and delay, and "could have spawned further unnecessary and unmeritorious attempts to re-open the decision or seek further corrections" [75].

m) The judge accordingly granted W's application to show cause and made an order in terms of the amended award. She ordered H to pay W's costs.

Comment

One has sympathy with any arbitrator who conducts an arbitration in which both parties are acting in person. It is clear, moreover, that the arbitrator in *H v W* was striving to find a just and pragmatic solution to the issues which arose following the delivery of his formal award. It is suggested that the judge was undoubtedly correct in rejecting the parties' challenges under ss68 and 69 AA96.

The case is a reminder, however, that, notwithstanding the procedural flexibility and relative informality which are among the main benefits of family arbitration,

family arbitral proceedings are nevertheless subject to the constraints imposed by the statutory framework of the 1996 Act. In particular, it provides a useful delineation of the boundary between permissible and impermissible post-award "correction" within the meaning of s57 AA96.

The judgment does not record whether the award was circulated to the parties in draft form prior to its formal delivery, so as to give them the opportunity to draw to the arbitrator's attention any typographical, factual or arithmetical errors. Further, while circulation in draft form is not intended to allow the opportunity for further submissions on matters on which the arbitrator has already adjudicated (and it is advisable to point this out to the parties), if the arbitrator has overlooked an evidential issue or failed to give reasons for a particular conclusion, or the award contains an ambiguity, it is suggested that it is preferable that this be dealt with informally prior to finalisation of the award. This practice is likely to reduce the prospect of a formal post-award application to correct under s57, whether to "correct" or to clarify to remove an ambiguity (the second limb of s57(3)(a) AA96, with which the judge in *H v W* did not have to deal), or of some other challenge under the Act.

Note also that in the unlikely event that the arbitrator omits to deal with a claim contained in the arbitration (such as, for instance, costs or interest), application for an additional award in respect of such a claim may be made as of right under s57(3)(b), unless the parties have agreed to exclude this right.

More generally, the decision is a reminder (see also *BC v BG* [2019] EWFC 7) that a challenge under s68 is likely to succeed only in an extreme case, "where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

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