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Judgment: approved by the Court for handing down | *Delivered:* **08/09/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF APPEAL FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

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BETWEEN:

JULIUS EMBER ANAKAA

Claimant/Appellant;

-and-

FIRSTSOURCE SOLUTIONS LIMITED

Respondent.

_____

Before: Girvan LJ, Coghlin LJ and O'Hara J

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O'HARA J (delivering the judgment of the court)

Introduction

[1] This is an appeal by Mr Anakaa ("the appellant") from a decision of an Industrial Tribunal which dismissed every part of his claim against his former employer, Firstsource Limited ("the respondent"). The appeal raises issues about the following:

- The Tribunal's decision not to grant him permanent anonymity.
- Race discrimination and harassment.
- Disability discrimination.
- Non-payment of pay in lieu of notice, holiday pay and notice pay and bonus.
- No itemised payslips.

[2] In this court (and before the Tribunal) the appellant represented himself. We have considered his original written submission, his oral argument and the further written submission which he was invited to present in response to the skeleton

argument and oral submission on behalf of the respondent represented by Mr T Warnock.

[3] The Tribunal heard the evidence in this case over five days. Apart from the appellant it heard from five witnesses called on behalf of the respondent. It then gave a detailed 50 page decision in the course of which it made findings of fact based on the documentary evidence presented to it and its assessment of the reliability and credibility of the various witnesses. Of course the Tribunal was operating on the civil standard of proof which provides for decisions being made on the balance of probabilities. Contrary to the appellant's understanding, it did not have to be satisfied on any issue beyond a reasonable doubt. We have reminded ourselves that in reaching its conclusions the Tribunal had the advantage of hearing directly from those witnesses and observing their demeanour as it did so, a process which is not repeated in this court. In accordance with the established law, those findings of fact cannot be overturned in this court unless they are clearly wrong. Our focus is on the conclusions which were drawn from those facts and whether in law those conclusions are correct.

[4] We will deal with issues raised by the appellant in the order set out at paragraph [1] above against the background of his very short employment. He was engaged as a customer service operator in a call centre from 31 January until 4 May 2012. In fact he resigned "with immediate effect" on 20 April but was paid up to 4 May.

Permanent anonymity

[5] Tribunals are given limited statutory powers to restrict reporting of their proceedings by the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 ("the 2005 Regulations"). Rule 49 provides that where allegations of sexual misconduct are made the Tribunal shall take certain steps to prevent "any person affected by or making such an allegation" from being identified to the public. That rule does not arise in the present case in which no sexual allegations were made. The only relevant rule therefore is Rule 50 which provides for "restricted reporting orders" in the following terms:

> "(1) A restricted reported order may be made in the following types of proceedings – …
>
> (b) involving a complaint under section 17A or 25(8) of the Disability Discrimination Act in which evidence of a personal nature is likely to be heard by the tribunal or a chairman.
>
> (2) A party may apply for a restricted reporting order (either temporary or full) in writing to the Office of the Tribunals, or orally at a hearing, or the

> tribunal or chairman may make the order on its or his own initiative without any application having been made.
>
> (3) A chairman or tribunal may make a temporary restricted reporting order without holding a hearing or sending a copy of the application to other parties.
>
> (8) Where a tribunal or chairman makes a restricted reporting order –
>
> (a) it or he shall specify in the order the persons who may not be identified;
>
> (b) a full order shall remain in force until both liability and remedy have been determined in the proceedings unless it is revoked earlier …
>
> (10) A Tribunal or Chairman may revoke a restricted reporting order at any time."

[6] In this case the appellant sought a restricted reporting order, primarily on the basis that he has a teenage daughter who shares his surname, one which is unusual in this jurisdiction. He did not want any reporting of the evidence lest it embarrass her because of the personal nature of some matters which related to him. The Tribunal granted interim reporting orders without objection from the respondent for the duration of the hearing but only until its decision was issued in accordance with Rule 50(8)(b). In taking this course during the proceedings it exercised the discretion given to it by Rule 50. If anything, the Tribunal went too far in the appellant's favour by doing so, for two reasons. The first is that the "evidence of a personal nature" in this case was not particularly sensitive or embarrassing. The second reason is that the orders were made because the Tribunal, to use its own words, "could not rule out the risk of such embarrassment to [the appellant] if the proceedings were to be the subject of publicity/media". This is not the test set out in Rule 50(1)(b). The statutory test is that "evidence of a personal nature is <u>likely</u> to be heard …". It is at least possible, if not probable, that no restricted reporting orders should have been made.

[7] In any event the Tribunal went on to consider whether the reporting restrictions should continue after the decision by way of a permanent anonymity order/register deletion order. Such orders are not provided for at all in the 2005 Regulations but emerge from the development of the duties of Tribunals as public authorities within the meaning of section 6 of the Human Rights Act 1998. Among those duties is to protect the Article 8 ECHR right to privacy of the parties and those associated with the case. In the present case the Tribunal analysed the relevant case law, including cases from the Employment Appeals Tribunal in Britain

and the High Court in this jurisdiction and concluded that if it was appropriate to do so in the circumstances of a particular case it could make such orders in order to protect a party or a person other than a party – in this case the appellant's teenage daughter. We respectfully agree with the Tribunal's careful scrutiny and analysis of the case law.

[8] Specifically we endorse the Tribunal's adoption of the guidance provided by Underhill J in F v G (2012) ICR 246. At paragraph [24] of that judgment the following appears:

> "(a) As a preliminary, consideration needs to be given to whether Rule 49 applies. If it does anonymisation is mandatory.
>
> (b) Subject to that, the best starting point is to consider whether restrictions on reporting and/or anonymisation of record are required in order to protect the rights of a party or other affected person under Article 8, paying full regard to the importance of open justice (see para [23] above): and if so, to consider the extent of the necessary measures. It will be necessary to consider not only what restrictions are proportionate but for how long they need remain in place: permanent protection may or may not be appropriate.
>
> (c) If such protection is indeed required:
>
> (i) If the necessary measures can be taken in the exercise of the powers under Rule 49 or 50, they should be. (Indeed, as regards Rule 49, the stage will already have been passed – see (a) above).
>
> (ii) If however one or other of those rules is of no application – say because there is no allegation of the commission of a sexual offence or a sexual misconduct nor any (in short) disability issue – the necessary measures, whether by way of an RRO or by way of anonymisation, it should be taken in the exercise of the general powers of the Tribunal under (now) Rule 10, in accordance with the

reasoning in X and A v B (the case of a RRO the fact that the order is being made under these wide powers may not make much difference to the actual format of the order since, as pointed out above, the standard format of an order under Rule 50 can still usefully be taken as a template).

(iii) There may be cases which fall within the scope of Rule 50 but for the relief available under that rule is too limited – e.g. if restriction of reporting is required beyond the end of the proceedings. In such a case the Tribunal should, in case any tricky issues arise subsequently, make clear what it is doing under Rule 50 and what extra it is doing under the wider powers recognised in X and A v B.

(d) If there is no entitlement to protection under Convention rights, then of course the issue falls to be dealt with purely under Rules 49 or 50 as the case may be.

(e) Except in cases where Rule 49 applies in accordance with its terms, the question of whether the record of the Tribunal needs to be anonymised need not necessarily be decided once and for all at the start of the proceedings. There is no reason why, in an appropriate case, a judge may not direct interim anonymisation, with a final decision being taken only at the point when the judgment is delivered and when the Tribunal will be best placed to assess all relevant factors.

I acknowledge that this guidance does not address some difficult questions that may arise; but I ought not to attempt to resolve issues which do not fall for a decision on this appeal and have not been argued before me."

[9] We also agree with the Tribunal's reliance on what McCloskey J said in Re A Police Officer's Application for Leave for Apply for Judicial Review (2012) NIQB 3 at paragraph [15]:

> "In my opinion, the advent of Convention rights in domestic law during the past decade, through the vehicle of the Human Rights Act 1998, has served to place a sharper focus on issues relating to hearings in camera, hearings in chambers, protection of the identities of litigants and witnesses and the promulgation of judgments. I consider that if the Court adopts as its starting point the principle of open justice and, having done so, then explores rigorously – without resort to burden or standard of proof – the question of whether sufficient justification for any encroachment on this principle has been demonstrated and, if so, in what manner and to what extent, the Court is unlikely to fall into error. Adherence to this approach has the additional merit of minimising the risk of misuse of the Court's process."

[10] We further agree entirely with the Tribunal's conclusion that in the present case the evidence did not justify such an order being made. The interest of the public in knowing what is alleged in Tribunals and what decisions Tribunals reach is a substantial one. It should only be restricted when such a course is necessary and proportionate. The appellant's case did not require any anonymisation or restriction on the judgment either to protect his daughter or to protect any other person.

Race discrimination and harassment

[11] The appellant alleged that he was treated less favourably on the ground of his race in a number of respects. The starting point for this is that he is a British national who is black and of Nigerian origin. He contended that he had been discriminated against in relation to his failure to pass his initial classroom assessments. That claim is undermined by the fact that despite his failure, he was not held back and he was allowed to progress to join a team under a team leader Ms McAteer. It was specifically on the intervention of Ms McAteer that he remained working with her team with appropriate support and coaching. This is a finding of particular significance by the Tribunal because it was Ms McAteer who he then alleged of having harassed him on the ground of his race.

[12] The appellant alleged that Ms McAteer had left a banana on his desk, a fact which she initially denied but then admitted when (she said) she recalled the context in which she had done so i.e. as part of a Health and Well-being Week. To support this allegation of harassment the appellant also contended that apart from this

maltreatment of him, she had sworn at another black employee, Mr Musonza. The Tribunal accepted, despite her denial, that Ms McAteer had sworn at Mr Musonza. In reaching this conclusion it is clear that the Tribunal considered very carefully the evidence which was given by Mr Musonza who was called on behalf of the respondent. The Tribunal noted how uncomfortable he was in giving that evidence, it interpreted his evidence as amounting to an acceptance that he had been sworn at but it noted that he himself said that it was a one-off exchange in the heat of the moment which he and Ms McAteer had discussed a few days later in order to put behind them.

[13] While they acknowledged that the appellant may have felt insulted by a banana being left on his desk, in whatever context, we accept that the Tribunal was entitled to conclude for the reasons which it gave that this was not racial harassment and that the exchange between Mr Musonza and Ms McAteer was not such as to add any weight to that argument. There are some unsatisfactory aspects of this part of the evidence but the decision by the Tribunal that the appellant was not discriminated against or harassed on the ground of his race is one which cannot be disturbed.

Disability discrimination

[14] We find this element of the appeal much more straightforward. The Disability Discrimination Act 1995 ("the 1995 Act") is engaged if a person has a disability, meaning a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities – see section 1 of the Act. In our opinion this part of the appellant's claim is bound to fail because, as the Tribunal concluded comprehensively:

(i) While the appellant claimed that he suffered from depression (which can constitute a disability within the meaning of section 1), the medical evidence did not come close to establishing that he did in fact suffer from depression during his employment.

(ii) Even insofar as there was any evidence before the Tribunal of stress or anxiety, the appellant chose not to tell the respondent that he had any relevant medical history in his pre-employment questionnaire.

(iii) The appellant did not take any time off work due to ill-health until he provided a sick line asserting that he was too unwell to attend a disciplinary hearing after he had been suspended from work.

(iv) Even if the appellant had suffered from depression (which the Tribunal found as a fact that he did not), an employer cannot be guilty of disability discrimination by failing to make reasonable adjustments for a person with a disability if the employer is unaware of the

disability and therefore unaware of the need to try to make some accommodation.

[15] The appellant was suspended from work on 2 April 2012. He was given a suspension letter on that date and on 4 April he was sent a letter with various pieces of information asking him to attend a disciplinary hearing on 6 April. He did not do so – instead he provided a sick line from his general practitioner dated 6 April which referred to "hypertension, work-related stress". Neither of those conditions is a disability within the meaning of section 1 of the 1995 Act. The respondent then rescheduled the disciplinary hearing for 23 April but because of the sick line and a statement from the general practitioner it offered the appellant a number of options. These included conducting the meeting at his home or in a location convenient to him, conducting the meeting via telephone, the appellant providing a written statement or the appellant assigning a representative to answer questions on his behalf. This range of options constituted an entirely reasonable response to the information which had been provided about his health by the appellant. His response however was to send a letter dated 20 April 2012 resigning with immediate effect "due to health reasons, loss of confidence in the employer and unsatisfactory working conditions". He also raised a grievance by a letter of the same date, 20 April.

[16] Efforts were made in the following weeks to engage the appellant in some meaningful way in the grievance procedure. He declined to become involved but stated that he believed that his grievance should be addressed by the respondent notwithstanding the fact that he was no longer an employee. The grievance was assigned for investigation to Mr Breene, Operations Manager who set out in a detailed letter dated 13 June 2012 why he did not uphold the various grievances.

[17] The case advanced by the appellant on disability discrimination was rejected in its entirety by the Tribunal. For the reasons set out above we conclude that that finding was inevitable and unavoidable.

Non-payment of pay in lieu of notice, holiday pay and notice pay and bonus

[18] Notwithstanding the fact that the appellant resigned "with immediate effect" on 20 April 2012, he was paid in full by the respondent until 4 May. The Tribunal examined his claim in relation to the money which he received upon the termination of his employment and was satisfied that there was no basis for him contending that he had received anything less than his statutory or contractual entitlement. No information has been put before this court by the appellant to undermine that finding. The Tribunal rejected these claims in their entirety. We see no reason to interfere with that decision.

No itemised payslips

[19] Article 40 of the Employment Rights (NI) Order 1996 ("the 1996 Order") provides as follow:

> "(1) An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement."

It is then provided at Articles 43 and 44 of the 1996 Order that where an employee does not receive an itemised pay statement, the employee may refer that fact to a tribunal for determination and the tribunal may then make a declaration that there has been such a failure. There is no provision in the legislation for compensation in this context.

[20] The appellant's contention was that at no point during his employment did he receive an itemised pay statement. The employer accepted that the appellant was not given a written itemised pay statement but contended that in keeping with what it suggested was modern industrial practice employees were given on-line accessible payslips. They were accessible because according to Mr David Cairns, a witness who impressed the Tribunal, he trained the appellant and other new employees in how they could access their payslips on-line by means of a specific password system. Employees who forgot their passwords then had an option to obtain a new password which would last for 24 hours – at the same time they would receive an e-mail informing how to create a new password. The Tribunal was satisfied that this system was the same for all employees in the appellant's position though it appeared that for some reason he had some difficulty in accessing his payslip despite the training given by Mr Cairns.

[21] The court had some unease about whether the respondent had complied with the strict provisions of Article 40 of the 1996 Order i.e. the requirement to give a written itemised pay statement. However, in his submission Mr Warnock drew our attention to section 46(1) of the Interpretation (NI) Act 1954 which provides:

> "'Writing', 'written' or any term of like import shall include words typewritten, printed, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in a visible form."

[22] We accept that in the context of current standards of information technology the requirement to provide a written itemised pay statement is complied with if words are reproduced in a visible form on a computer screen. To that however we would add this caveat – if an employer is aware that an employee is having difficulty of any sort in actually accessing a payslip in this way, the employer is

obliged to find an alternative method of providing information in accordance with the statutory requirement. Notwithstanding this caveat we agree that the Tribunal was correct in law to dismiss this aspect of the appellant's claim.

Conclusion

[23] In all the circumstances and for the reasons set out above we conclude that the appeal against the decision of the Industrial Tribunal must be dismissed.