Neutral Citation No. [2013] NICA 32

Ref: **GIR8915**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **24/06/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

BRINKS IRELAND LIMITED

Appellant-Respondent;

-and-

ADRIAN HINES

Respondent-Claimant.

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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GIRVAN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal made pursuant to Article 22 of the Industrial Tribunals (Northern Ireland) Order 1996 and Order 60B Rule 1. The appellant Brinks Ireland Limited ("Brinks") challenges the decision of an industrial tribunal ("the Tribunal") dated 30 November 2012 whereby the Tribunal decided that Adrian Hines ("Mr Hines"), the claimant before the Tribunal and respondent to the appeal, had been unfairly dismissed and was entitled to compensation measured in the sum of £51,281.52 together with costs of £4,000. Mr McKee appeared for Brinks and Mr Mulqueen appeared for Mr Hines. The court is grateful to counsel for their helpful submissions.

Factual background

[2] The Tribunal in paragraphs [5]-[22] of its decision sets out its findings of fact which can be summarised as follows.

(a) Brinks is part of Brinks Incorporated which operates in over 50 countries on six continents around the globe employing over 49,000 employees. The company has over 150 years trading experience. It has a presence in both

parts of Ireland. It employs 50 members of staff in Belfast and approximately 500 people throughout Ireland.

(b) Mr Hines was employed by the respondent in the Belfast area from 19 November 2000. He was initially employed as a cash in transit driver and on 4 November 2005 he became a first line maintenance engineer ("FLM engineer"). His work involved the replenishment of cash in ATM machines and he worked mainly in connection with a contract which Brinks had with the Bank of Ireland.

(c) In January 2011 Brinks became aware that it had lost the Bank of Ireland contract. It was unclear at the time as to whether TUPE applied to the lost contract or whether the loss would result in a redundancy situation in respect of staff. Brinks believed that the employment contracts of three FLM engineers including the claimant Mr Hines would be affected.

(d) Apart from limited correspondence the Tribunal had no evidence as to what if anything transpired between January 2011 and March 2011. On 11 March 2011 Mr John Campbell, the General Manager of Brinks, held meetings with the three FLM engineers whose employment was to be affected. He informed them of the loss of the Bank of Ireland contract to Risk Management Solutions (Global) LLP ("RMS") and the consequent risk of redundancy. Mr Campbell indicated that there would be one FLM position available going forward and this position would be filled following a selection process with set criteria.

(e) At the meeting on 11 March Mr Hines enquired as to whether TUPE applied to the loss of the Bank of Ireland contract. Mr Campbell informed him that enquiries would be made in that regard. On 14 March 2011 Mr Hines was informed by a letter from Mr Jordan, the Human Resources Director of Brinks, that Brinks now believed that it was clearly a TUPE matter and that Brinks had written formally to advise Bank Machine (a subsidiary of RMS) of this. The letter indicated that if Mr Hines chose not to transfer to the new contractor under the transfer of undertakings legislation he would not be entitled to claim any redundancy entitlement from Brinks the reason for that being that it was now known that TUPE applied and Mr Hines's role was not redundant as it would transfer to the new contractor. It was indicated that one FLM engineer's post would still be required and if Mr Hines was interested he could apply for that post. Mr Hines and one other employee competed for the available post and Mr Hines was unsuccessful.

(f) By letter dated 4 April 2011 Mr Hines sought reasons from Mr Campbell as to why it was believed that TUPE applied. No reasons were given in reply save that legal advice was taken and relied upon. At a meeting on 31 March 2011 attended by Mr Hines, Mr Campbell, Mr Jordan and other employees further questions were raised as to the applicability of TUPE and the meeting was informed by one of the affected employees of advice having been received

from the Labour Relations Agency to the effect that TUPE did not apply. However, at a meeting on 14 April 2012 attended by Mr Hines and Mr Campbell, Mr Hines was informed that the company was clear on its position in view of the advice that TUPE did apply.

(g) Brinks steadfastly maintained the view that TUPE applied and was in contact with RMS who remained firmly of the contrary view. RMS by a letter dated 12 April 2011 advised Brinks of their reasons for believing that TUPE did not apply and the fact that no other supplier was even considering TUPE as being applicable. The letter concluded by pointing out that it would be inappropriate for Brinks employees to be contacting RMS directly and RMS requested Brinks not to instruct employees to report to RMS on Friday 15 April 2011.

(h) Notwithstanding this advice and contrary to the express indication given by RMS Mr Hines was advised to report to RMS on 18 April. He had not been given an indication of the position adopted by RMS. He was surprised, embarrassed and humiliated when told by RMS on the morning of 18 April 2011 to leave the premises.

(i) There followed correspondence and contact between the parties and between Mr Hines and RMS. RMS did not depart from its firmly held view regarding TUPE.

(j) Mr Hines registered with employment agencies and secured alternative employment in early November 2011 working on a part-time basis and on a lower wage as a classroom assistant with autistic children. He lodged a claim with the Industrial Tribunal on 8 July 2011 citing Brinks and RMS as co-respondents.

(k) In due course in the course of the proceedings in the Industrial Tribunal it was accepted that RMS's position in relation to TUPE was correct and that Brinks had been in error in proceeding on the basis that TUPE was applicable.

[3] The Tribunal concluded that the claimant was dismissed in the mistaken belief that TUPE did apply. This was not a potentially fair reason for dismissal within the meaning of article 130(2) of the 1996 Order and it did not amount to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held within the meaning of article 130(1)(b). Brinks could not be entitled to rely on its mistake or that of its legal advisors to dismiss the employee. The Tribunal found that the claimant was unfairly dismissed. Since no procedure whatsoever had been followed in connection with the dismissal of Mr Hines the Tribunal was satisfied that as an alternative the claimant's dismissal was automatically unfair.

[4] Mr Hines claimed an uplift in his compensatory award in accordance with article 17(3) of the Employment (Northern Ireland) Order 2003. That provision provides:

> "(3) If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal that –
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> (a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,
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> (b) the statutory procedure was not completed before the proceedings were begun, and
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> (c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,
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> it shall, subject to paragraph 4, increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50%.
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> (4) The duty under paragraph … (3) … to make an increase of 10% does not apply if there are exceptional circumstances which would be a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances."

The Tribunal expressed its decision in relation to this aspect of the case as follows:

> "(42) The claimant claims an uplift of his compensatory award in accordance with the Employment Rights (Northern Ireland) Order Dispute Resolute Regulations (Northern Ireland) 2004. In circumstances where the Tribunal has found that the dismissal was unfair and no procedures were followed the Tribunal awards the maximum uplift of 50%."

The parties' submissions

[5] Mr McKee in his written skeleton argument focused his attack on the Tribunal's decision on three grounds. Firstly, he argued that the Tribunal had failed to properly address the question whether Mr Hines had been dismissed and, if so, when. He argued that there had not been a dismissal within the definition of dismissal in article 127 of the Employment Rights (Northern Ireland) Order 1996. In his oral submissions Mr McKee accepted that this was a case of termination of Mr Hines contract of employment by reason of a repudiatory breach on the part of Brinks. Work was withdrawn from the respondent and he was sent away to work for RMS which was not, as it turned out, a transferee for the purposes of TUPE. Mr Hines had accepted the repudiation. This had occurred on 18 April 2011 not on 15 April 2011. The Tribunal was in error in finding a dismissal having occurred on 15 April. This analysis, if correct, resulted in Mr McKee's submission in a constructive dismissal which does not lay the basis for any statutory uplift in compensation. The uplift provision in article 17(3) of the 2003 Order arises where there is a failure to follow the relevant statutory procedure. The relevant statutory procedure contained in Schedule 1 Part I Chapter 1 arises where the employer is contemplating a dismissal or contemplating taking disciplinary action against an employee. A constructive dismissal situation arises by operation of law as a result of the conduct of the employer and does not arise out of a contemplation by the employer of dismissing. Mr McKee further argued that the Tribunal's approach to the assessment of compensation was wrong. In assessing compensation the Tribunal might only award what is just and equitable. Relying on the principles stated in Software 2000 Limited v Andrews [2007] IRLR 568 counsel argued that the Tribunal should have assessed the chance that the claimant would have been dismissed by reason of redundancy. It should have considered how long a consultation period would have taken, this normally being between 14 days and one month. This was a case in which it was clear that the Tribunal should have concluded that this was a potential redundancy situation. The Tribunal had failed to direct itself correctly and had failed to consider the appropriate issues in the context of compensation. It engaged in speculation in the absence of evidence.

[6] Mr Mulqueen countered Mr McKee's argument contending that it had been accepted before the Tribunal that Mr Hines had been dismissed and the Tribunal had been correct to proceed on the basis that this was a straightforward case of actual dismissal which brought into play the right to a statutory uplift as a result of the failure to follow the statutory procedures. Mr Mulqueen submitted that it was clear from Software 2000 Limited that if the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed it was for the employer to adduce any relevant evidence on which it sought to rely. In fact no evidence had been tendered by Brinks at the hearing to support the suggestion that Mr Hines would or might have been dismissed. It was not for the Tribunal to have to embark on an independent investigation of the facts to see whether a fair dismissal might have been justified if a different approach had been adopted. At no stage did Brinks raise as a legal issue

the necessity of the Tribunal having to consider that Mr Hines would have been dismissed by way of redundancy. The Tribunal's decision to apply a 50% uplift to the compensatory figure could not be categorised as perverse or irrational. This was a case in which no proper procedures had been followed leading to the dismissal.

Conclusions

[7] Although Brinks' original case was that it had not dismissed Mr Hines, by the time of the hearing before the Tribunal Brinks accepted that Mr Hines' contract of employment had been terminated. The Tribunal proceeded on the basis that it was common case that there had been a dismissal on 15 April. However, the parties took no steps to explain to the Tribunal how the dismissal had been effected. Dismissal may be a consequence of an express and deliberate termination of a contract of employment or it may be a consequence of a repudiation of the contract by the employer entitling the employee to treat the contract as at an end. A constructive dismissal is as much a dismissal as an express wrongful sacking of an employee. In the present instance the precise date of the determination of the contract may be significant. It is the appellant's case that the dismissal, which it was conceding, arose as a result of a constructive dismissal flowing from the withdrawal of work and pay from Mr Hines occurred on 18 April when RMS refused to take on Mr Hines and Brinks refused to take him back. Mr Hines' case is that his contract was terminated on 15 April when he was told to go and work for RMS. The distinction between an actual express dismissal and a constructive dismissal is important because if the dismissal was a constructive dismissal as Mr Mulqueen accepted the resultant dismissal arose by operation of law and the employer could not be said to have contemplated dismissal for the purposes of Step One of the statutory procedure. This would have consequences on the question of whether a statutory uplift on the award of compensation would be appropriate.

[8] The Tribunal, having received no assistance from the parties on these issues, proceeded on the basis that the conceded dismissal fell to be treated as an actual express dismissal without any further analysis of the nature of the dismissal. This is an issue which must, accordingly, be remitted to the Tribunal for further consideration in the light of such further submissions or evidence as the Tribunal considers appropriate to reach a conclusion on the issue. If the Tribunal, having considered the matter further, is satisfied that a statutory uplift is appropriate it should spell out clearly its reasons for so deciding and for its decision on which percentage uplift should be applied.

[9] We conclude that in the light of the evidence before the Tribunal there was no reliable evidential material on which the Tribunal could properly apply a Polkey reduction to the compensation payable for the unfair dismissal. As was pointed out in Software 2000 Limited v Andrews [2007] IRLR 568 if an employer seeks to contend that the employee would or might have ceased to be employed in any event if a fair procedure had been followed or alternatively would not have continued in employment indefinitely it is for the employer to adduce relevant evidence on which

it wishes to rely. Where the nature of the evidence which the employer adduces or on which it seeks to rely is unreliable the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can be made. The Tribunal in the present case concluded that there was no evidence that alternative employment was considered or offered to Mr Hines. It considered that it was entirely possible that suitable alternative employment could have been identified in what was quite a large organisation if consideration had been properly given to the question. In other words it was by no means clearly established that Mr Hines would have been made redundant in any event if the employer had acted as a proper employer should have done. Accordingly the Tribunal was right to decide not to apply a Polkey reduction to the award of compensation.

[10] In the result we remit the matter to the Tribunal for the reasons given.