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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Brown's (James) Application [2014] NIQB 84

IN THE MATTER OF AN APPLICATION BY JAMES BROWN
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE CIVIL SERVICE APPEAL BOARD

TREACY J

Introduction

[1] This is another application by the applicant James Brown for leave to apply for judicial review consequent upon his dismissal from his position as Civil Engineer in the Department of Regional Development. As previously observed in another application brought by this personal litigant he has single-handedly generated a plethora of judicial review applications arising out of his dismissal – see, for example, [2014] NIQB 23 in particular at paras [4] and [5] thereof.

[2] By this judicial review he seeks, inter alia, an order quashing the decision of The Civil Service Appeal Board (“the CSAB”).

Order 53 Statement

[3] The grounds upon which relief was sought included:

- “(a) The Civil Service Appeal Board has acted unlawfully in not applying logical or rational principles in making its determination;

- (b) The Civil Service Appeal Board has acted unlawfully in failing to provide a fair hearing under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

[4] The material averment in his grounding affidavit, sworn on 10 January 2014, simply refers to and exhibits an email dated 11 October 2013 which is in the following terms:

“Joanne

I attach my statement of case (hardcopy sent by post). Should I chose to be represented by a solicitor or barrister I request the removal of the restriction [not] to act in a professional capacity following the views expressed by the Court of Appeal in England.

See KulKarni [2009] EWCA Civ 789 at paragraph 60 where Lady Justice Smith said:

In my view, the expression ‘not representing the practitioner formally in a legal capacity’ is devoid of meaning. If ‘legal capacity’ were intended to synonymous with ‘professional capacity’ then I could understand that the lawyer who was a friend, spouse, partner or colleague could be said to be acting in a personal capacity as opposed to a professional capacity. Even so, that person would be entitled to do all the things that lawyers do when representing clients. Those functions are set out at the end of paragraph 22. But when it is seen that a legally qualified person either employed or retained by a defence organisation may represent the practitioner, it is meaningless to say that that person is not acting in a ‘legal’ or ‘professional’ capacity. I wholly reject Miss Lee’s attempts to limit the scope of what the lawyer might be permitted to do. I accept Mr Stafford’s submission that, once a lawyer is admitted as a representative, he or she is entitled to use all his or her professional skills in the practitioner’s service.

Regards
James Brown BSc LLB
Chartered Engineer”

[5] By pre-action protocol letter emailed to the proposed respondent on 9 December 2013 he characterises the issues that arise in the proceedings in the following terms:

“By email dated 11 October 2013 the applicant requested the waiver of the restriction on his legal representative not to act in a legal capacity.

The Appeal Board maintains that, ‘should you opt to engage a Barrister or Solicitor to assist with your case, instead of a colleague or Trade Union representative, you should note that the former cannot act in a professional capacity at Appeal Board hearings (see paragraph 5.4.1 in Section 5 Submission and Consideration of Appeal of the HR Policy 2.07 Civil Service Appeal Board).

The applicant contends that when a legal representative attends the Appeal Board hearing the Barrister or Solicitor must represent the applicant, without restriction, and the term ‘cannot act in a professional capacity’, is meaningless (see paragraph 60 of Lady Justice Smith’s decision in Kulkarni V Milton Keynes Hospital NHS Foundation Trust [2009] EWCA Civ 789)

The applicant further contends that there is no justification for limiting the right to legal representation under Article 6 of the ECHR.”

[6] Accordingly, from the Order 53 Statement and the pre-action correspondence, two related grounds of challenge emerge namely that the CSAB procedures are not Art 6 compliant and that it has wrongly prevented the applicant from being represented by a lawyer in a professional capacity.

The CSAB

[7] The CSAB is a second stage appeal mechanism for all civil servants in Northern Ireland. It is entirely independent of the Civil Service but its policy is set by Corporate HR in DFP. Thus, the policy is found in the Civil Service Handbook at Section 2.07.

[8] The CSAB is sponsored by DFP but acts independently in discharging its responsibilities. It is not open to the public in general; it is a right belonging to civil service employees only. Hearings are private. The appeal is a contractual right, not a public law right.

[9] The applicant was dismissed by his employer, the DRD and the reason for the dismissal was a failure to disclose a conflict of interest. He appealed that decision and his appeal was not upheld. This then permitted him a right of appeal to the CSAB.

Procedure before the CSAB

[10] The CSAB is designed to be informal so that appellants may represent themselves. Rule 1.1 states:

“The Appeal Board is a lay body and does not follow legal procedures”.

Rule 2.2 states:

“The Appeal Board, not being a legal forum, will operate in an informal manner”.

Appellants represent themselves or are represented by a colleague, trade union official or a lawyer.

[11] The Board does not re-hear the case. It examines all the papers, considers the submissions of the parties and decides on the fairness of the dismissal.

[12] Both the appellant and the Department make written submissions for consideration by the panel. These are done sequentially with the appellant having a final right of reply – see Rule 5.3. Sometimes a hearing does not take place and the Board considers the appeal on the papers (“a paper Board”).

[13] Rule 5.4.1 states:

“Should you opt to engage a solicitor or barrister to assist with your case, instead of a colleague or Trade Union representative, you should note that the former cannot act in a professional capacity at the Appeal Board hearings and should be advised of this as early as possible in the process. This is because the Board operates informally and is not a legal forum or a court of law”.

[14] Where an oral hearing does take place no witnesses are called. It takes the form of submissions to the Board. Either the appellant or his representative makes his case to the panel. The Department is not legally represented at the hearing. The respondent submitted that the purpose of Rule 5.4.1 is to ensure that all legal issues are dealt with in the paper submission and not at the oral hearing. Appellants can, and do, obtain legal advice in the making of their written submissions. Thus, if there

are legal issues in the case, the Departmental Presenting Officer can obtain his or her own legal advice and reply to them.

[15] The Court was informed through Mr Sands' skeleton argument that on occasions where appellants are legally represented before the CSAB at the oral hearing, the written submission has already been prepared by the lawyer on behalf of the appellant, and the Board would expect all legal issues to be fully articulated at that stage.

[16] The Court was further informed that the Board is not aware that the appellant has engaged a lawyer for his hearing. The appellant's submission has been received but it would appear that he has not engaged a lawyer for what is, arguably, the most important part of the process.

Discussion

Art 6

[17] I agree with the respondent that Art6 does not apply to proceedings before the CSAB. The Court of Appeal has already decided that the applicant is not entitled to the protection of Art 6 for the internal disciplinary proceedings - see [2013] NICA 17. In respect of his complaint of unfair dismissal he is entitled to a fair and public hearing before an Industrial Tribunal which is Convention compliant.

[18] The CSAB hearing is simply another stage of the internal disciplinary proceedings to which Art 6 does not apply for the same reasons given by the Court of Appeal upholding the refusal of leave in the earlier case.

[19] The applicant relies on para 60 of the judgment in KulKarni in which the Court said:

“In my view, the expression ‘not representing the practitioner formally in a legal capacity’ is devoid of meaning”.

[20] But KulKarni was not a judicial review. In that case the relief sought was founded on the claimant's contractual rights. The claimant issued proceedings seeking a declaration that the Trust was acting unlawfully and in breach of contract. At first instance the Court granted an ex-parte injunction preventing the Trust from proceeding with the hearing without allowing the claimant legal representation. The Court's conclusion that the claimant was entitled to legal representation was based on its interpretation of the precise contractual term in the claimant's contract of employment – see paras 57 -61. It was not on the basis of any public law rights.

Whether a Public Law Decision

[21] In R v Civil Service Appeal Board ex parte Bruce [1988] ICR 649 it was held by the English Divisional Court that the English CSAB was amenable to judicial review. However, at that time there was no right for Civil Servants to bring an application for unfair dismissal to the Employment Tribunal. Instead, the CSAB performed that public function. In Bruce the Court declined to grant the applicant any relief as he was exercising his right to make an application to the Industrial Tribunal.

[22] The proceedings before the CSAB are the final stage in the internal disciplinary proceedings. The right not to be unfairly dismissed does not become a public law right merely by virtue of the fact that the employer is a public body – see R v East Berkshire Health Authority ex parte Walsh [1985] QB 152. Different considerations may apply where the terms of employment are underpinned by statute in which case employees may have rights both in public and private law. But a distinction has to be made between an infringement of statutory provisions which give rise to public law rights and those, as in this case, that arose solely from the breach of the contract of employment.

[23] The present case only involves private law contractual rights and accordingly the impugned decision is not amenable to judicial review.

Merits

[24] The CSAB has not denied the applicant the right to legal representation to which he is plainly entitled under Rule 5.4.1. In the light of KulKarni once a lawyer is admitted as a representative he is entitled to use his professional skills in the service of his client. Rule 5.4.1 states that if a solicitor or barrister is engaged they “cannot act in a professional capacity”. I cannot see how a lawyer engaged on behalf of the applicant to represent him before the CSAB could do anything other than act in a professional capacity. What is required in the discharge of the lawyer’s professional duties will necessarily be constrained by the scope of the hearing. Insofar as the prohibition is intended to limit the lawyer in the proper discharge of his professional duties this would, if implemented, be neither lawful nor permissible. The respondent makes the case that the purpose of the rule is to ensure that both sides have equality of arms and that the proceedings are conducted more informally than in a Court setting. Even if that is correct, the impugned prohibition is not a lawful means of achieving such laudable objectives.

Conclusion

[25] Accordingly, for the above reasons, the application must be dismissed.