Neutral Citation No: [2021] NICA 26	*Ref:* McC11506
	ICOS No: 21/009838
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 29/04/2021 *Ex tempore*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

EMMA WALSH

Appellant:

-and-

OFFICE OF THE INDUSTRIAL TRIBUNAL

-and-

THE GOVERNING BODY OF BELFAST METROPOLITAN COLLEGE

Respondents:

Before McCloskey LJ, Horner J and Rooney J

Representation

Appellant: Self-representing, assisted by a McKenzie Friend
First Respondent: Unrepresented
Second Respondent: Sean Gerard Doherty, of counsel, instructed by J Blair solicitor

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Emma Walsh ("*the appellant*") brought unfair dismissal proceedings in the Industrial Tribunal ("*the tribunal*") against her former employer, the Governing Body of Belfast Metropolitan College ("*the College*"). By its decision transmitted to the parties on 06 January 2020, the tribunal decided unanimously that the appellant's dismissal had been:

> "*… automatically unfair and unfair for the purposes of the statutory test in the Employment Rights (Northern Ireland) Order 1996.*"

In a further, consequential stage of the proceedings the tribunal addressed the issue of remedy. This gave rise to a second written decision transmitted to the parties on 07 August 2020. While by this second decision the tribunal made a series of conclusions, its three main conclusions for the purposes of this summary are:

(a) Neither reinstatement nor re-engagement of the appellant by the College was practicable.

(b) In the alternative, neither reinstatement nor re-engagement would be just having regard to the significant contributory conduct of the appellant.

(c) A further hearing for the purpose of determining financial compensation would be convened.

[2] The appellant reacted by applying to the tribunal to reconsider its decision. By its further decision dated 04 November 2020 the tribunal refused this application.

[3] The appeal which the appellant is attempting to pursue in this court is against the <u>second</u> of the trilogy of tribunal decisions. Thus, the appellant purports to engage the jurisdiction of this court to reflect her dissatisfaction at the tribunal's ruling that neither reinstatement nor re-engagement is considered an appropriate remedy. The involvement of this court arises at a stage when the tribunal proceedings are uncompleted.

Parties and Representation

[4] In her Notice of Appeal the appellant identified the Office of the Industrial Tribunals as the respondent. During the case management phase the court raised the issue of parties, highlighting the decision in *Re Darley* [1997] NI 384. Under section 38(1)(i) of the Judicature (Northern Ireland) Act 1978 this court is empowered to make any order as may be necessary for the due determination of an appeal. Furthermore, pursuant to Order 59 Rule 8 of the Rules the Court of Judicature this court may also direct that a notice of appeal be served on any person. The court subsequently made an order joining the College as second respondent.

[5] In the tribunal proceedings the appellant was represented by one Peter Bunting, a trade union official. In the Court of Appeal representation by a person who is not legally qualified is not possible. However, assistance from a "McKenzie Friend" is an option, subject to an application to the court and the formal approval of the court. Having been apprised of this by the court, the appellant made such an application and the court acceded to it.

The Appeal

[6] The document entitled "Notice of Appeal" is dated 02 February 2021. It rehearses the following grounds (in essence): the tribunal hearing was procedurally unfair in that a witness statement of one Ms Gillespie (a fellow employee/teacher) was admitted in evidence and its author was not available to be cross examined on behalf of the appellant; the tribunal "*… failed in its duty of care towards the appellant*"; an unspecified "*… factual error*" was made "*… in connection with the appellant's line management*"; Ms Gillespie "*… acted in contravention of the wishes of a director of the respondent in respect of her grievances against the appellant*"; and "*… the appellant was continually excluded from meetings and training on an ongoing basis.*" The first ground of appeal is that the tribunal allegedly failed to take all of these matters into account.

[7] The remaining four grounds of appeal are the following:

(a) The tribunal failed to consider "*… whether the belief by the respondent that there was a loss of necessary trust and confidence between employer and employee was irrational*".

(b) In its assessment of contributory conduct the tribunal erred "*… by failing to take into account all relevant facts and by placing undue weight on the respondent's allegations*".

(c) "*In light of the evidence, the tribunal's findings on the issue of loss of trust was perverse*".

(d) "*In light of the evidence, the tribunal's finding on the issue of contributory conduct of the appellant was perverse*".

[8] As highlighted above, this appeal materialises at a stage when the tribunal proceedings are uncompleted. The first question which arises is whether, as a matter of law, an appeal lies to this court in these circumstances.

Statutory Framework

[9] To begin with, it is appropriate to consider those provisions of the Employment Rights (NI) Order 1996 governing the issues of complaints to the Industrial Tribunal and remedies. These are contained in Articles 145 – 149, assembled in the Appendix to this judgment.

[10] Provision is made for an appeal from the Industrial Tribunal to the Court of Appeal by Article 22 of The Industrial Tribunals (Northern Ireland) Order 1996 (NI 18) SI 1996/1921 (NI 18). This provides:

"*…**22. - Appeals from industrial tribunals***

> *(1) A party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may, according as rules of court may provide, either-*
>
> *(a) appeal therefrom to the Court of Appeal, [see RsCJ Order 60B] or*
>
> *(b) require the tribunal to state and sign a case for the opinion of the Court of Appeal [.see RsCJ Order. 94 r.2]."*

Chronology

[11] The chronological background is as follows:

EVENT	DATE
Tribunal decision refusing re-instatement and re-engagement	7th August 2020
Appellant makes an application for reconsideration of the tribunal decision	26th August 2020
Application for reconsideration refused	4th November 2020
Next:	
(i) The appellant (in her words) "*… submitted her appeal to the Court of Appeal on 16 November 2020*".	16/11/20
(ii) During the following two months there were documented electronic communications passing between the appellant and the court of appeal administration.	02/12/20 Nov 2020 – Jan 2021
(iii) As early as 03 December 2020 the appellant was informed of certain procedural shortcomings relating to her Notice of Appeal.	
(iv) During this period the appellant's attention was specifically drawn to the relevant provisions of the Rules.	
(v) Furthermore she was provided with the appropriate template for completion.	
(vi) The appellant failed to pay the prescribed fee for	

appeal. An application for remission was then made.

(vii) The appellant served Notice Of Appeal dated 8th January 2021 on the College.	19th January 2021
(viii) The appellant amended the Notice Of Appeal to name "The Office of the Industrial Tribunal NI" as the respondent to the appeal.	2nd February 2021

Time Limits and Rules of Court

[12] The Rules of the Court of Judicature (NI) 1980 ("the Rules"), reflecting Article 22 of the 1996 Order (*supra*), provide for two mechanisms whereby a decision of an Industrial Tribunal can be appealed to this court. The first is specified in Order 60B Rule 1(2), which provides that an appeal must be served on all parties to the proceedings within six weeks of the appellant receiving a copy of the tribunal's decision. The second is Order 94. Order 94 Rule 2(4)(b) provides that an application for leave to appeal to the Court of Appeal under Order 94 must:

> *"… be lodged together with a certified copy of the tribunal's decision in the Central Office within 14 days of the date of the tribunal's decision."*

The appellant purports to be proceeding under Order 94.

[13] The Supreme Court Practice (1999) states at paragraph 59/3/5:

> *"A notice of appeal does not have to be stamped, sealed or in any way authenticated by the Court of Appeal (or any other court) prior to service. There is no such process as `issue of a notice of appeal' in the case of an appeal to the Court of Appeal. It has come to the notice of the court of late that in some areas it is thought by some members of the legal profession that a notice of appeal is not valid unless it has been first sealed or somehow authenticated either by the Civil Appeals Office or by a local court office, and in the absence of such authentication, it is not a valid notice of appeal and service of it can be rejected. That is not so. The order of events is: first, service of the notice of the appeal on the parties required to be served, then second, setting down the appeal in the Civil Appeals Office. There is no need to send the notice of appeal to the Civil Appeals Office prior to service indeed it is pointless to do so. In some cases the appellant's side have put the appeal out of time by sending the notice of appeal to the court before service."*

The above passage was cited with approval by this court in *Magill v Ulster Independent Clinic* [2010] NICA 33 at [9]. In *Magill*, the court added at [10]:

> "[As] *this passage makes clear it is the service of the notice of appeal which effectively commences the appeal not the purported lodgement of a notice appeal in the court."*

[14] The court in *Magill* then examined the application of the Rules and time limits to litigants in person, at [16]:

> *"Mrs Magill also emphasised that as a personal litigant she was at a disadvantage compared to litigants professionally represented and the submission appeared to suggest that that fact should in some way ease her task in seeking an extension or resisting an order for security. On her own case she did take advice about a potential appeal but irrespective of that fact, a personal litigant cannot have an unfair advantage against represented parties by seeking to rely on inexperience or a lack of proper appreciation of what the law requires. The application of legal principles poses a duty on the court to examine cases objectively without fear or favour to any party, represented or unrepresented. While courts are conscious of the difficulties faced by a personal litigant representing herself and will strive to enable that person to present her case as well as they can,* ***the dictates of objective fairness and justice preclude the court from in any way distorting the rules or the requirements of due process because one party is unrepresented****."*
>
> [emphasis added]

[15] In *Fontan v Teletech UK Limited* [2012] NICA 44 this court again considered the above principles, together with the impact of the delay caused by an application for a review of an Industrial Tribunal decision. At [8] it stated:

> *"In this case the applicant offers the excuse that she did not pursue her appeal because her application for a review was outstanding. We appreciate that the applicant is a personal litigant but it is her responsibility to ensure that she complies with the Rules of the court. It would have been open to her to apply for an extension of time within the six-week period prescribed for an appeal. In her favour is the fact that the respondent has indicated that it would not be prejudiced by the grant of the extension. The applicant has, however, had a hearing on the merits and the points which she wishes to pursue are largely criticisms of the tribunal in its approach to fact-finding. There is no general point of law raised by this appeal."*

[16] At this juncture it is appropriate to consider the principles established by this court in *Davis v Northern Ireland Carriers* [1979] NI 19. They are the following, per Lowry LCJ:

> *"Where a time-limit is imposed by statute it cannot be extended unless that or another statute contains a dispensing power. Where the time is imposed by rules of court which embody a dispensing power, such as that found in Order 64, rule 7, the court must exercise its discretion in each case, and for that purpose the relevant principles are:*
>
> *(1) whether the time is sped: a court will, where the reason is a good one, look more favourably on an application made before the time is up;*
>
> *(2) when the time-limit has expired, the extent to which the party applying is in default;*
>
> *(3) the effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;*
>
> *(4) whether a hearing on the merits has taken place or would be denied by refusing an extension;*
>
> *(5) whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) to be made which could not otherwise be put forward; and*
>
> *(6) whether the point is of general, and not merely particular, significance.*
>
> *To these I add the important principle:*
>
> *(7) that the rules of court are there to be observed."*

[17] In McArdle v Marmion [2013] NIQB 123 Gillen J, reviewed the tests to be applied by the courts when determining whether or not to exercise a discretion to extend time. The following propositions can be distilled from [8] – [9]:

> "(a) The exercise of the discretion to extend time is unfettered;
>
> (b) The discretion can be exercised even where the delay is substantial;

(c) What is at the heart of the exercise is whether it would be equitable to allow the action to proceed, and in fairness and justice, the obligation of a tortfeasor to pay damages should only be removed if the passage of time has significantly diminished his opportunity to defend himself;

(d) The basic question is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in commencement."

[18] On behalf of the College, Mr Doherty submitted:

a. The appellant did not comply with Order 94 Rule 2(4)(b) by lodging her application for leave to appeal within 14 days of the tribunal's decision on 7th August 2020;

b. Leave to proceed with this appeal has never been granted;

c. The appellant did not serve a copy of her Notice of Appeal on Belfast Metropolitan College within 6 weeks of the date of the tribunal's decision;

d. The appellant served her amended Notice of Appeal on the Office of The Industrial Tribunal on or about 2nd February 2021. This is considerably outside the 6 week time limit under Order 60B;

e. The appellant was able to lodge an application for reconsideration on 26th August 2021. There is therefore no evidence that she was incapable of timeously applying for leave to appeal within 14 days of the tribunal decision and it is clear that there was nothing preventing the claimant lodging an appeal under Order 60B by serving a Notice Of Appeal within 6 weeks of the date of the decision;

f. There has been an extensive hearing on the merits;

g. The appellant's appeal largely consists of criticisms of the tribunal's fact finding;

h. There is no general point of law raised by the appeal.

[19] The appellant's response to submissions of the College on the issue of time is contained in a detailed schedule entitled "Timeline of Delays in the Process, mainly due to Covid Pandemic and supporting email trail". This documents a series of dates and events during the lifetime of the tribunal proceedings, the timeline in relation to the tribunal's second decision and the ensuing unsuccessful application

for reconsideration and certain other events. This confirms beyond peradventure that on 4 November 2020 the appellant received the tribunal's (third) decision whereby it refused her application for reconsideration. Thereafter, see [11] (i) ff above.

[20] Upon the listing of her appeal the appellant, with the assistance and support of her McKenzie Friend, responded affirmatively when the court enquired, at the outset, whether she was pursuing an application to extend time for appealing. In oral submissions the appellant emphasised that she had acted in good faith and, procedurally, had done everything "by the book" from the initiation of the underlying proceedings. She further suggested that, in contrast, there had been certain procedural defaults on the part of the College and she had been accommodating in this respect. During the period under scrutiny, which began on 07 August 2020, the appellant's stance was evidently one of focusing attention on her application for reconsideration and awaiting the outcome thereof. She said that she had been in contact with the tribunal office during this period and she further mentioned that her McKenzie Friend had been self-isolating in Dublin around this time. She also detailed her interaction with the Court of Appeal office.

Appeals to this Court: General Principles

[21] As this court will be taking into account the content and merits of the appellant's substantive challenge to the impugned decision of the tribunal, we turn our attention to the applicable principles. These are summarised in *Nesbitt v The Pallet Centre* [2019] NICA 67 at [56] – [61]:

> "[56] What is the correct test to be applied in determining this second ground of appeal? The starting point is the statute which makes provision for appeals from Industrial Tribunals to the Court of Appeal. Article 22 of the Industrial Tribunals (NI) Order 1996 (the "*1996 Order*") provides:
>
> "*(1) A party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may, according as rules of court may provide, either –*
>
> *(a) appeal there from the Court of Appeal, or*
>
> *(b) require the tribunal to state and sign a case for the opinion of the Court of Appeal.*
>
> *(2) Rules of court may provide for authorising or requiring the tribunal to state, in the form of a special case for the decision of the Court of Appeal, any question of law arising in the proceedings.*"

[Emphasis added.]

The wording of this provision is uncomplicated. It conveys that in appeals of this species, the question for the Court of Appeal is whether the tribunal, within the confines of the grounds of appeal, erred in law in some material respect or respects.

[57] Of what does the error of law threshold consist? The decision in *Belfast Port Employer's Association v Fair Employment Commission for Northern Ireland* [1994] NIJB 36 concerned an appeal by case stated from a decision of the county court that the appellant had discriminated on the ground of religious belief or political opinion contrary to the Fair Employment (NI) Act 1976. The appeal was brought under Article 61 of the County Courts (NI) Order 1980 which provides in material part:

> "*Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal …*"

The county court judge upheld the employer's appeal against a decision of the Fair Employment Agency that the employer had discriminated against the complainant, ruling that there was no case to answer. The test which the judge formulated was whether the respondent to the appeal, the Fair Employment Commission for Northern Ireland (the "*FEC*"), had discharged the onus of establishing the alleged discrimination. Carswell LJ stated at p 6:

> "*… The judge seems to have apprehended that where evidence has been given on both sides, the complainant must ultimately prove that he was discriminated against on grounds of religion. He does not appear to have appreciated the correct application of the well-established principle that where one finds a person or group treated less favourably in circumstances which are consistent with that treatment being based on religious grounds it is generally right to draw an inference that that was the reason for it.*"

The judge's basic error was his failure to regard the circumstances as *prima facie* proof of discrimination which called for an explanation, compounded by his disregard of the principle that a holding that there is no case to answer should be restricted to exceptional or frivolous cases only.

[58] One of the reformulated questions which the Court of Appeal had to determine was:

> "*Whether on the facts which I found my conclusion that the employers did not discriminate against the complainants on the ground of religion was one which a tribunal properly directing itself could reasonably have reached.*"

The Court of Appeal determined this question by the application of the well-known principles in *Edwards v Bairstow* [1956] AC 14. Lord Radcliffe stated at page 36:

> "*When the case comes before the* [appellate] *court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in*

> *themselves, and only to take their colour from the combination of circumstances in which they are found to occur."*

The formulation of Viscount Simonds, at page 29, was the following:

> *"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."*

Carswell LJ also cited with approval the approach of Philips J in *Watling – v – William Baird Contractors* [1976] 11 ITR (at pages 71 – 72) equating the same test with a finding that the tribunal's conclusion was "*plainly wrong*" or, in the legal sense, perverse.

[59] The *Edwards v Bairstow* principles have been applied by the Northern Ireland Court of Appeal in a variety of contexts. These include an appeal by case stated from a decision of the Lands Tribunal (*Wilson v The Commissioner of Evaluation* [2009] NICA 30, at [34] and [38]), an appeal against a decision of an industrial tribunal in an unfair dismissal case (*Connelly v Western Health and Social Care Trust* [2017] NICA 61 at [17] – [19]) and a similar appeal in a constructive dismissal case (*Telford v New Look Retailers Limited* [2011] NICA 26 at [8] –

[10]). The correct approach for this court was stated unequivocally in *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]:

> *"This is an appeal from an industrial tribunal with a statutory jurisdiction. On appeal, this court does not conduct a rehearing and, unless the factual findings made by the tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court."*

[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:

> *"Before we turn to the evidence we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.*
>
> *……………..*

4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.

5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless –

(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (Fire Brigades Union v Fraser [1998] IRLR 697 at 699, per Lord Sutherland); or

(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

> This approach is of long standing, being traceable to decisions of this court such as *McConnell v Police Authority for Northern Ireland* [1997] NI 253.
>
> [61] Thus in appeals to this court in which the *Edwards v Bairstow* principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established principle noted in the recent judgment of this court in *Kerr v Jamison* [2019] NICA 48 at [35]:
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>> *"Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility …….. the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently ….."*
>
> Next the judgment refers to *Heaney v McAvoy* [2018] NICA 4 at [17] – [19], as applied in another recent decision of this court, *Herron v Bank of Scotland* [2018] NICA 11 at [24], concluding at [37]:
>
>> *"To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."*

[22] In *Nesbitt*, this court also addressed the principles regarding procedural fairness, at [47] – [48]:

> *"[47] It is instructive to reflect on the principles formulated by Bingham LJ in R v Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344 at [60]:*
>
> *"While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:*

1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.

2. As memorably pointed out by Megarry J in John v Rees [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.

3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.

4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

5. This is a field in which appearances are generally thought to matter.

6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the acting chief constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."

Bingham LJ added at [65]:

> *"I think it important that decision-makers and judges should fix their gaze on the fairness of the procedure adopted rather than on the observance of rigid rules."*

The main relevance of this code of principles in this appeal is that the Appellant was given no notice of the Tribunal's procedural intentions following the six days of hearing and, hence, had no opportunity to make representations on the issue of engagement of an independent expert by the Tribunal or, indeed, retaining her own expert witness.

> *[48] In every case where, on appeal, it is contended that the decision making process of the court, tribunal or authority concerned is vitiated by procedural impropriety or unfairness the question for the appellate court is whether the avoidance of the vitiating factor/s concerned could have resulted in a different outcome. In this case the Tribunal failed to address the mandatory statutory question of whether to instruct an independent expert witness in a context involving a substantial dispute concerning the roles, demands and responsibilities of the Appellant's four chosen comparator employees, none of whom gave direct evidence. The Respondent's evidence bearing on these issues had elements of the second hand and hearsay, together with the subjective. Furthermore, the Appellant was unrepresented and no expert witness testified on her behalf. In these circumstances we consider that the error of law which the court has diagnosed cannot be dismissed as trivial or technical. It was, rather, a matter of substance. Its avoidance could have given rise to an outcome favourable to the Appellant in respect of her equal pay claim. Beyond this assessment it is inappropriate for this appellate court to venture. The Appellant's hearing was, further, unfair in consequence, in the sense explained in [47]. The first ground of appeal succeeds accordingly."*

Extension of Time: Conclusions

[23] The factual and legal framework against which the exercise of applying the *Davis* principles falls to be undertaken is set forth above. It is in all material respects uncontroversial. While the court has considered all of its ingredients there are four of these in particular:

(i) The impugned decision of the tribunal was promulgated on 07 August 2020.

(ii) The purported appeal to this court being governed by Order 60B of the Rules, the time limit of six weeks for appealing began to run immediately and expired on 18 September 2021.

(iii) Service of the Notice of Appeal on the other party (or parties) is the critical act required by the Rules: see Rule 1(2). This is the only event which will stop the clock ticking.

(iv) The Notice of Appeal was served on the College on 08 January 2021.

Thus the period of six weeks expired on 18 September 2020 and service of the Notice of Appeal was not effected until 111 days (16 weeks) later.

[24] As the time limit which had to be observed in the present case is a product of rules of court rather than statute it is capable of being extended, in accordance with Order 3, Rule 5. This gives rise to consideration of the *Davis* principles, which the court applies in the following way:

(i) As noted above, the application to this court to extend time materialised at a stage when the relevant time limit had expired.

(ii) The extent of the appellant's default, some 16 weeks, is on any showing substantial. This is particularly significant in a context where the underlying proceedings are uncompleted and are stagnated by the appellant's recourse to this court.

(iii) In the appellant's favour the other party, the College, can point to no particular prejudice in the event of the court extending time and, in principle, compensation in costs would appear possible.

(iv) There will be no denial of a hearing on the merits if this court declines to extend time. The appellant has already had at first instance two comprehensive hearings on the merits, convened for differing purposes at first instance.

[25] It is at this juncture that the principles rehearsed at [21] above must be considered. A summary of the grounds contained in the appellant's Notice of Appeal is provided in [6] above. In brief compass this court considers that: there is no discernible procedural unfairness in the admission of a witness statement in tribunal proceedings, given *inter alia* the tribunal's inability to compel a witness's attendance; furthermore there is no indication that the manner of receipt of the evidence of the witness concerned was not weighed by the tribunal in determining the measure of weight to be attributed to it; the "*duty of care*" ground is opaque and raises no question of law; the asserted "*factual error*" is un-particularised and, as formulated; this ground also raises no question of law; and the next two grounds relate to aspects of the underlying facts alleged by the appellant, in a context where she has succeeded in her substantive complaint. Furthermore, these two grounds raise no question of law.

[26] There are four remaining grounds. Two of these consist of bare assertion, while the remaining two fall manifestly short of even approaching the self-evidently elevated threshold of perversity. In this context it is appropriate to observe that in the opinion of this court care, diligence, attention to detail, balance, accurate self-direction and clarity are the hallmark of the tribunal decision under challenge. In summary the appellant's grounds of appeal identify no point of law, much less one of substance, arising out of the tribunal's decision.

[27] Accordingly, if this appeal had been in time it is inconceivable that it would have succeeded on its merits.

[28] To conclude, the application of the *Davis* principles points inexorably to the conclusion that the appellant's quest to extend time must be rejected.

[29] This court would exhort the appellant to adopt a fresh and forward looking stance. She has secured a notable success on the merits against the other party. She must now focus her attentions on assembling the evidence necessary to facilitate the tribunal's task of measuring the compensation to which she is entitled, thereby completing this protracted litigation.