Neutral Citation No. [2005] NIQB 28 | *Ref:* WEAC5242

Judgment: approved by the Court for handing down | *Delivered:* **11/04/2005**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY HASSAN IBRAHAM FOR JUDICIAL REVIEW

_____

WEATHERUP J

The application for Judicial Review.

[1] This is an application by an employee for Judicial Review of two decisions of an Industrial Tribunal, the first being dated 5 August 2004 dismissing the applicant's complaint against his former employer, and the second being a review by the Industrial Tribunal on 20 September 2004, which review was also dismissed. In essence the applicant objects to the manner in which the Industrial Tribunal permitted the employer to make a case at the hearing, without any prior notice to the applicant, based on alleged cash payments to the applicant, the effect of which was found to taint the contract of employment with illegality and deprive the Industrial Tribunal of jurisdiction to deal with the applicant's complaint. Mr McKee BL appeared for the applicant and Mr McMillan BL appeared for the respondent.

The application to the Industrial Tribunl.

[2] The applicant made an application to an Industrial Tribunal on 14 July 2003 claiming against Tullymore House Hotel Limited, where the applicant had been employed as head chef from 9 March 2003 to 29 June 2003. It was the applicant's case that he had been employed from 9 March 2003 at £4.50 per hour for 48 hours per week plus 12 hours overtime at the same rate, which would have amounted to an income of £14,000 per annum. At the end of April 2003 the applicant's employer produced a written contract of employment which provided that the applicant would receive an income of £11,000 per annum with a bonus of £3,000 on 31 December 2003 provided the

applicant was still employed at that date. This written contract was agreed and it was further agreed that the applicant would continue to work overtime but would take time off in lieu of overtime payments, with the dates of such time off being agreed from time to time. The applicant continued working for the employer on that basis but in the event there was no agreement on the dates that the applicant would have time off in lieu of overtime payments. The applicant's employment was terminated on 29 June 2003. The applicant complained of breach of contract and claimed for payment in lieu of untaken leave and for loss of bonus entitlement. By notice of appearance the employer agreed that the applicant had been dismissed and stated the reason as being the applicant's failure to carry out duties assigned to him, that is the smooth running of the kitchen on a day to day basis. Further it was stated that the entitlement to the bonus of £3,000 was conditional on the applicant remaining in employment on 31 December 2003.

[3] At the hearing before the Industrial Tribunal evidence was given about the rate of payment to the applicant from time to time. The Tribunal's findings indicate that the initial arrangement had been that the applicant would work a weekly working pattern of 48 hours basis per week at a salary of £4.50 per hour gross plus 12 hours overtime at the same hourly rate. The result was a net weekly payment of some £215 and wages slips were available. The employment contract of 21 April 2003 provided for a salary of £11,000 gross per annum for a fixed term contract expiring on 31 December 2003 with a bonus of £3,000 only payable if the applicant was still in employment on 31 December 2003. The wages slips for the period after 21 April 2003 indicated a net weekly payment of some £175.

[4] The Chairman of the Industrial Tribunal set out on affidavit the procedure at the hearing. The case commenced in the afternoon of the first day with the applicant representing himself and the employer represented by Counsel. There was a short discussion between the parties and the Chairman as to the nature of the case being made and the order of evidence and the applicant gave his evidence. The applicant was questioned by the Tribunal in relation to the details of the payments made to the applicant. On the morning of the second day the applicant was cross-examined by Counsel and towards the conclusion of that cross-examination Counsel put it to the applicant that the explanation for the reduced weekly payment in April 2003 was that the applicant had asked for £75 of his weekly wage to be payable in cash. This was denied by the applicant. It was further suggested to the applicant that a reason for the arrangement was the need to keep the applicant's earning down to a level where he or members of his family could obtain state benefits. This was also denied by the applicant. There were then three witnesses called on behalf of the employer who gave evidence that the applicant was paid £75 cash per week over and above the wages appearing on the payslips and that this cash had been taken from a poker machine on the employers premises and there was no documentary record of the payments.

[5] The Tribunal accepted the evidence of the employer's witnesses and noted that the evidence was not directly controverted by the applicant. It was stated that the purpose of the arrangement was to allow the applicant to gain advantage in relation to the state benefits available to him and his family and that in the Tribunal's view the arrangement constituted a fraud on the Revenue. The Tribunal's decision was that it had to draw the conclusion that there was potential illegality of contract. The Tribunal stated the test as to whether or not any such illegality precluded an applicant's entitlement to relief as being dependant upon certain factors. First, there must be prima facie illegality, second, the Tribunal must establish that the applicant had knowledge of the illegality and third there must be a sufficient degree of active participation in the illegality. The Tribunal was satisfied that the three conditions were present and concluded that the contract was tainted by illegality. Accordingly it was the unamamous decision of the Tribunal that, on the grounds of illegality of contract, there was no jurisdiction to deal with the applicant's claim for breach of contract and the complaint was dismissed.

[6] The applicant sought a review of the decision under Rule 13(1)(d) of Schedule 1 to the Industrial Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2004 which provides that a Tribunal shall have power to review any decision on the ground that –

> "(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing."

[7] At the review hearing the applicant and the employer were each represented by Counsel. The new evidence was adduced by the oral testimony of the applicant and included various documents relating to Social Security and the Inland Revenue. The import of the Social Security documents was that the applicant did not make any claim for benefits nor did anyone else claim on his behalf during the relevant period. The import of the Inland Revenue document was that the applicant had sought confirmation of wages and tax paid from the Inland Revenue enquiry office and a note had been made about the impact of cash payments on a Tribunal hearing. On the oral evidence of the applicant denying the cash payments the Tribunal did not find a reason to alter its previous finding of fact based on the employer's evidence. On the issue of the Revenue document the Tribunal stated that the document had not altered its view in respect of the fraud on the Revenue. On the state benefits documents the Tribunal noted that state benefits might take one of a number of forms and might potentially be the subject of a claim from a number of different parties including if possible persons related to the applicant. The Tribunal found that the documents were not of sufficient

weight to cause it to alter its view in respect of the additional purpose behind the arrangement. In the result the application for review was dismissed.

The applicant's grounds for Judicial Review.

[8] The applicant's grounds for judicial review may be summarised as follows –

> (1) By allowing evidence of illegality to be introduced at the hearing without prior notice the Tribunal failed to ensure that the hearing was conducted justly;
>
> (2) Having allowed evidence of illegality without notice, fairness required that the Tribunal ought to have adjourned the hearing to enable the applicant to prepare a proper response;
>
> (3) As the grounds for review of Tribunal decisions are limited the opportunity for review did not remedy the failings of the original hearing.

Contracts tainted by Illegality.

[9] In Laurie v Holloway [1994] ICR 32 the Employment Appeal Tribunal dealt with a situation where the issue of illegality of contract had been raised by the Tribunal rather than the parties. Knox J referred to three relevant principles of illegality of contract. First, where illegality is apparent on the face of the contract or the contract is one which cannot be preformed without illegality on the part of either or both the parties to the contract, the contract is illegal and void ab initio and neither party can rely on it. Second, where the contract is on its face lawful it will nevertheless be regarded as illegal and void if both parties intended it should be used as a vehicle for perpetrating a fraud on the Revenue. Third, if there is a contract which is on its face lawful and one party alone is guilty of illegal purposes, the other party being innocent of knowledge of illegality, then the innocent party can enforce the contract despite the element of illegality and notwithstanding the fact that the other party responsible for the illegality cannot enforce it.

The right to know and to respond.

[10] In Laurie v Holloway it was held that where a Tribunal was minded to rely on a point that had not been taken by the parties, natural justice required that the Tribunal should alert the parties to that possibility. As the parties had not been sufficiently alerted the case was remitted to a differently constituted Tribunal. The EAT referred to Mahon v Air New Zealand Limited [1984] AC

808 and to the rules of natural justice and to the rule that any person represented in an enquiry who will be adversely affected by the decision to make a finding should not be left in the dark as to the risk of the finding being made and thus deprived of an opportunity to adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding even though it could not be predicted it would inevitably have had that result. The rule applied to the situation where the Tribunal proposed to rely on a ground not disclosed to the parties and a decision had been made without any party having an opportunity to make representations on that ground. This is an aspect of the general principle of procedural fairness that a party to proceedings has a right to know and to respond, that is, that each party should be sufficiently well informed of matters relied on by the opposing party in advancing their case or by the tribunal in reaching its decision and that each party should have a reasonable opportunity to respond to that information.

[11] Rule 11(1) of the Schedule to the 2004 Regulations provides that -

> "A Tribunal shall, so far as it appears to it appropriate, seek to avoid formality in its proceedings and shall not be bound by any statutory provision or rule of law relating to the admissibility of evidence in proceedings before the courts of law. The Tribunal shall make such enquiries of persons appearing before it and witnesses as it considers appropriate and shall otherwise conduct the hearing in such a manner as it considers most appropriate for the clarification of the issues before it and generally to the just handling of the proceedings."

The requirement for "just handling" of proceedings is a statement of the requirement for procedural fairness, which includes the right to know and to respond. This includes the right to disclosure of sufficient information within a reasonable time to enable adequate inquiry to be undertaken and a considered response to be made. How that is achieved depends on the circumstances from case to case.

[12] In Hotson v Wisbech Conservative Club [1984] IRLR 422 the employee worked in the bar of a club where there was a shortfall in the cash takings and the employee was dismissed. The notice of appearance suggested that the reason for dismissal was inefficiency but at the hearing the employer also proceeded on the additional basis of dishonesty. The Tribunal held that the employee had been fairly dismissed on the grounds of suspected dishonesty. The EAT allowed the appeal and remitted the case for a re-hearing. Waite J stated at para 19 -

> "We are very well aware that the proceedings before the Industrial Tribunal are informal – and long may they remain so. That was the Parliamentary intention. But, when one's dishonesty is introduced into a case, the relevant allegation has to be put with sufficient formality and at an early enough stage to provide a full opportunity for answer. One of the hazards of the Tribunal system, and part of the price necessarily paid for informality, is that misadventures are bound to occur from time to time, as a result of which that necessary formality of expression and that opportunity of answering are denied."

[13] The EAT concluded that such a misadventure had occurred. The employee had been denied the opportunity of dealing with the allegation fully and of being sufficiently prepared to state her answer at the hearing. The EAT went on to consider whether the misadventure was sufficiently grave to put in doubt the validity of the conclusion of the Tribunal or whether it should be regarded as unimportant enough to allow their conclusion to stand. In that respect the EAT had no doubt that it was a very important matter and that it was inevitable that the appeal should be allowed to the extent of ordering a re-hearing.

[14] In the present case the applicant believed that the issue of cash payments had not been raised until the employer's witnesses gave evidence but I am satisfied that it was a matter put to the applicant by Counsel in cross-examination. Nevertheless the issue was not raised until the conclusion of the cross-examination of the applicant. The applicant described his reaction in this way -

> "I was taken completely by surprise in this matter. I was shocked and taken aback. This was a very serious allegation. I was being accused of instigating a fraud on the Inland Revenue. I was being accused of criminal conduct…….
> I absolutely deny the allegations that were being made. However, I had no opportunity to deal with these properly. I did not have the chance to consider the detail of the allegation. I could not think in the Tribunal of all the questions I should have asked or expose what I considered to be the lies of the respondent's witnesses. I felt that I had just been ambushed and I could not think properly in that environment under the pressure of a hearing."

[15] There may well be reasons why parties would be reluctant to disclose arrangements that may impact upon the legality of an employment contract. However where fraudulent conduct is alleged the party affected must have a reasonable opportunity to respond, and that which is reasonable will reflect the gravity of the allegation. The issue is whether in the circumstances of the present case the applicant had a reasonable opportunity to respond. For the following reasons I am satisfied that the applicant did not have a reasonable opportunity to respond.

[16] In the first place the allegation is of a most serious character involving dishonesty. It is an allegation that should not be made lightly, and clearly was not so made in the present case. It is an allegation that must be thoroughly investigated by the Tribunal, and that would require the party concerned to be afforded a reasonable opportunity to examine the particulars of the allegation and prepare a response. Whether that reasonable opportunity would require that the hearing be adjourned depends on the circumstances of the case.

[17] Secondly, the allegation of dishonesty surfaced at the conclusion of the cross-examination of the applicant. This presented the applicant with a new case to meet as he had until that time faced an employer's case based on his failure to carry out his duties. Had the applicant been legally represented the response would undoubtedly have been to seek an adjournment to examine the allegations and consider the response. It is not inevitable that an adjournment would be granted in such circumstances but probable that the interests of fairness would require such an outcome. In R(Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604 at paragraph [30] Lord Steyn stated that "In our system of law surprise is regarded as the enemy of justice."

[18] Thirdly, the applicant was representing himself and he was opposed by Counsel. No doubt his appearance before a Tribunal in such circumstances was an intimidating situation for the applicant despite the informality of Tribunals and the obvious care of the Chairman in seeking to accommodate the applicant. Furthermore the applicant is, as the Chairman noted, not a native English speaker, although his command and comprehension of English were described as very good, and there was nothing to indicate that he did not understand what was being alleged. However the applicant's circumstances could not have been helpful to his ability to respond.

[19] Fourthly, any Tribunal should be wary of concluding that when such allegations are made without prior notice that an adjournment would be to no avail to the employee. The Chairman stated on affidavit that there was unlikely to be any documentary evidence in relation to the alleged illegality nor could the applicant be expected to produce any oral evidence on the issue. The right to respond to such a serious allegation must involve

sufficient time to consider and prepare that response. There may be cases where a Tribunal could be satisfied that a reasonable opportunity to respond could be afforded without the adjournment of the hearing but a Tribunal should hesitate before concluding that it is in a position to determine in advance the outcome of any prepared response.

[20] If a party elects to withhold disclosure of such information until the cross-examination of the opponent then that party takes the risk that the proceedings may be adjourned.

[21] This is a further case where a misadventure has occurred. It is a misadventure that was sufficiently grave to put in doubt the validity of the conclusion at which the Industrial Tribunal ultimately arrived. The process of review had a narrow remit that was not sufficient to address the original problem. The decision of the Industrial Tribunal will be quashed. The matter should be reheard by a differently constituted Tribunal.