[2004] NIQB 50 | *Ref:* **WEAC5022**

Judgment: approved by the Court for handing down | *Delivered:* **07/09/2004**

(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 DONAL McQUILLAN FOR JUDICIAL REVIEW

WEATHERUP J

The application.

[1] This is an application for Judicial Review of a decision made by Newry and Mourne District Council, as employer of the applicant, to pay to the applicant half pay, rather than full pay, during the suspension of the applicant from his employment. Half pay was paid in accordance with the provisions of "Disciplinary Procedure for Manual Employees", being a part of the terms of conditions of the employment of the applicant. Mr Michael Lavery QC and Mr Ronan Lavery appeared for the applicant and Mr McCloskey QC and Mr McLaughlin appeared for the respondent.

[2] The applicant commenced employment with the respondent on 1 November 2001 as a Waste Disposal Operative at the respondent's landfill site at Aughnagun, Mayobridge. As a result of investigations undertaken by the respondent in relation to the unauthorised dumping of waste at the landfill site the applicant was arrested by police on 6 November 2002 and immediately suspended from his employment on half pay. A clerical member of the respondent's staff, who was employed on different terms and conditions, was also suspended but received full pay during the period of suspension.

[3] By letter dated 17 April 2003 the applicant received notice of a disciplinary hearing to investigate alleged offences. The hearing commenced on 28 May 2003 and was adjourned pending further investigations before being completed on 7 November 2003. By letter dated 11 November 2003 the

applicant received written notice that he had been found guilty of gross misconduct and he was liable to summary dismissal with effect from 7 November 2003. The applicant appealed against the dismissal decision and on Friday 21 November 2003 his appeal was dismissed.

[4] The applicant's Statement of Main Terms of Employment stated that his employment was governed by collective agreements negotiated and agreed by the National Joint Council for Local Government Services National Agreement on Pay and Conditions of Service as amended by Local Agreements and the Heads of Agreement for Contract Services. In addition it was stated that there were local collective agreements negotiated by the Council with a specific trade union representing the employment group to which the applicant belonged.

[5] Paragraph 11 of the Statement of Main Terms of Employment stated that grievance and disciplinary matters would be dealt with in accordance with the Council procedures. In a document entitled "Disciplinary Procedures for Manual Employees", paragraph 5 provided for "Precautionary Suspension Pending a Decision". It was stated that in special circumstances precautionary suspension may be imposed immediately by the disciplinary authority pending formal investigation of the alleged offence or pending the outcome of the appeal. In all such cases the employee would continue to receive half pay even though in some cases suspension may necessarily be for a period that could not be determined in advance. No employee would receive sick pay from the Council while absent due to a precautionary suspension.

<u>The collective bargaining machinery.</u>

[6] The Director of Administration of the respondent described on affidavit the development of arrangements for collective agreements negotiated and agreed by the National Joint Council for Local Government Services. The first national collective bargaining machinery was established for local government in 1944. The procedures included the establishment of National Joint Councils for each of the individual groups of local government employees. Each NJC was made up of trade union and local government representatives making nationwide agreements for pay and other terms and conditions of employment. The agreements reached were not binding on Councils and only covered certain aspects of employment with other matters being left to local or provincial negotiation. Northern Ireland representatives have only participated in three NJCs, namely those for manual workers, those for administrative, professional, technical and clerical officers and those for chief executives. Each group conducted separate negotiations between trade union and local government representatives. Accordingly separate agreements emerged for each of the different groups. The national agreement for manual workers is know as "the Green Book" and the national agreement

for clerical officers is known as "the Purple Book". The Green Book applied to the applicant as a manual worker and provided that during suspension he should receive half pay. The Purple Book applied to the clerical officer who was suspended at the same time as the applicant and provided that she should receive full pay during suspension.

[7] During the 1990s there began a process of harmonisation of the terms and conditions of manual and clerical workers. In 1997 a "Single Status Agreement" was reached between the various NJCs that identifies 18 core areas of employment terms on which national agreement has been reached. The Single Status Agreement is silent on the issue of pay during suspension of employees.

[8] On the issue of disciplinary procedures the single status agreement recommends the application of Council operated procedure, which accords with the Code of Practice and Guidance issued by ACAS. In Northern Ireland the relevant Code of Practice for disciplinary and grievance procedures was issued by the Labour Relations Agency pursuant to Article 90 of the Industrial Relations (Northern Ireland) Order 1990 and approved by the Northern Ireland Assembly on 14 October 2002. No provision is made for pay during suspension.

[9] The respondent also operates local collective bargaining through different forums. A "Single Status Committee" was established comprising management and trade union representation, which examines pay and conditions specific to the respondent. The application of disciplinary procedures was referred to the Single Status Committee and there has been a voluntary amendment of the disciplinary procedures for manual employees to provide for full pay during suspension with effect from 1 January 2004.

[10] Prior to the steps initiated by the respondent leading to the voluntary amendment on 1 January 2004 the provision of half pay for suspended manual workers was not an issue raised at the NJCs or under the Single Status Agreement or under the Labour Relations Agency Code of Practice or by the Staff Commission of Northern Ireland established under Section 40 of the Local Government (Northern Ireland) Act 1970 to facilitate the process of collective negotiation at provincial and local level and to make statutory recommendations to local councils regarding terms and conditions of employment.

<u>The grounds of Judicial Review</u>.

[11] The applicant's grounds for Judicial Review are as follows –

> (1) The policy discriminates unlawfully between persons of different social groups.

(2) There is no rational basis for the distinction between classes of employees in the policy.

(3) The nature of work carried out by an employee is an irrelevant consideration.

(4) The policy is in contravention of the applicant's rights pursuant to Article 1 of the First Protocol of the European Convention.

(5) The application of the policy has interfered with the applicant's rights pursuant to Article 8 of the European Convention.

(6) The policy discriminates unlawfully against the applicant in contravention of Article 14 of the European Convention.

(7) The policy is Wednesbury unreasonable.

(8) The applicant has suffered a penalty by being deprived of half of his salary without a fair, proper or any hearing in breach of his rights pursuant to Article 6 of the European Convention.

Public Law Issues.

(12) The respondent contends that the issues raised by the applicant concern an employment dispute belonging in the realm of private law and do not involve a public law matter that should be addressed by Judicial Review. In *Re Phillips Application* [1995] NI 322 Carswell LJ considered whether there was a sufficient public law element arising on a dismissal from public employment. He relied on the principles set out by Wolff LJ in *McClaren v Home Office* [1990] ICR 824 at 836-837 as follows –

> "(1) In relation to his personal claims against an employer an employee of a public body is normally in exactly the same position as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceedings for damages a declaration or injunction…… in the High Court or the County Court in the ordinary way…...
>
> (2) There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will

> arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship……
>
> (3) In addition if an employee of the Crown or other public body is adversely affected by a decision of general application by his employer, but he contends that that decision is flawed on what I loosely describe as Wednesbury grounds (*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223) he can be entitled to challenge the decision by way of judicial review".

[13] To the above might be added such other grounds as now arise as a result of the Human Rights Act 1998 or otherwise provide a basis for judicial review. Carswell LJ in *Re Phillips Application* regarded it as a preferable approach to consider the nature of the issue itself and whether it had characteristics which import an element of public law rather than focussing upon the classification of the civil servant's employment or office (page 334e).

[14] In the present case the applicant contends that he is adversely affected by a decision of general application by his employer, namely the application of half pay to suspended manual workers generally. The situation is said to be comparable to the example given by Wolff LJ in *McClaren v Home Office* in relation to principle (3) above -

> "Within this category comes *Council of Civil Service Unions v Minister for the Civil Service* [1985] ICR 14. In the House of Lords there was no dispute as to whether the case was appropriately brought by way of judicial review. The House of Lords assumed that it was and I would respectfully suggest that they were right to do so. The decision under a challenge was one affecting employees at GCHQ generally. The action which was being challenged was the instruction by the Minister for the Civil Service in the interests of national security to vary the terms and conditions of service of the staff so that they could no longer be permitted to belong to trade unions. Although the decision affected individual members of the staff, it was a decision which was taken as a matter of policy, not in relation to a particular member of

> staff, but in relation to staff in general and so it could be the subject of judicial review."

[15] The decision to apply half pay during suspension was in accordance with the Council procedures that operated in the context of the collective bargaining machinery. So the decision under challenge is in reality the general policy on pay during suspension as established within the machinery for determining the terms and conditions of employment of manual workers. While affecting individual manual workers the decision is a matter of policy that applies to all such employees and raises public law issues. I am satisfied that this is a matter for Judicial Review.

The employment contract.

[16] Further the respondent relies on the applicant having undertaken employment in accordance with the agreed terms and conditions of employment as preventing complaint about the application of those terms and conditions. The applicant contends that there has been breaches of Convention rights and that such breaches cannot be disregarded by reliance on contractual terms entered into by the applicant. In *Rommelfanger v Federal Republic of Germany* [1989] 62 DR 151the applicant's contract of employment with a private employer restricted his freedom of expression and he was dismissed for breach of that restriction. The ECommHR found that the State had not failed to take adequate measures to protect the applicants right to freedom of expression under Article 10. However the ECommHR found that the applicant had not waived his rights by the terms of the contract, although in principle the Convention permits contractual obligations of the kind operating in that case, provided they are freely entered into by the employee. A violation of such contractual obligations normally entails the legal consequences stipulated in the contract. While contract may limit the Article 10 right the State must protect the employee against compulsion that would strike at the very substance of the right. The State Courts had weighed the applicant's interests against those of the employer and found no unreasonable demands of loyalty and a reasonable relationship between the restriction and the nature of the employment.

[17] The ECommHR envisages a contract freely entered into by the employee, an absence of unreasonable measures in the contract and protection for an employee against compulsion that would undermine protected freedoms. The application of this approach must vary with the Convention right concerned, with some rights not being capable of being affected by contract and other rights being capable of being affected to different degrees according to the requirements of reasonableness in the circumstances.

[18] In the present case the contract must be regarded as having been entered freely by the applicant. The contract terms were established in conditions of economic parity where trade union and employer representatives agreed standard terms and conditions by collective bargaining. There is a public interest in maintaining good industrial relations and securing employment terms and conditions by agreement.

Article 1 of the First Protocol.

[19] The applicant relies on the right to the peaceful enjoyment of his possessions under Article 1 of the First Protocol to the European Convention, which provides that –

> "Every natural or legal person is entitled to the peaceful possession of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[20] This Article concerns rights in respect of "possessions" and "does no more than enshrine the right of everyone to the peaceful enjoyment of 'his possessions', and consequently it applies only to a person's existing possessions and does not guarantee the right to acquire possessions …". *Marcx v Belgium* [1979] 2 EHRR 330 paragraph 50. In order to rely on Article 1 of the First Protocol an applicant needs to establish that he enjoys some right or interest as a matter of domestic law, which may be regarded as a property right from the Convention perspective. *Lester and Pannick* Human Rights Law and Practice 2nd Edition paragraph 4.19.4.

[21] The applicant claims interference with the one half salary not paid to the applicant during the period of suspension. However the absence of entitlement to the one half salary is a consequence of the agreed terms and conditions of employment. The applicant has entered into a contract of employment which provides that he will not receive one half salary in the event of suspension and accordingly the one half salary is not an existing possession during the period of suspension.

[22] However the applicant rejects the reliance on the terms and conditions of contract. I have found above that the contract must be regarded as having been entered into freely by the applicant. It is also necessary to consider the reasonableness of the measures and the absence of undermining of the applicant's rights. The reduction to half salary arises in the context of a disciplinary suspension. The obligations arising under the employment contract are liable to variation as a result of the new circumstances giving rise to the entitlement to suspend. The entitlement to work and to receive the benefits accruing as a result of work are altered. It is not unreasonable that the

suspension of the entitlement to work should carry with it an alteration of the benefits attached to the performance of work. There is a reasonable relationship between the reduction in payment and the employment context in which the reduction arises. It remains the conclusion that the half salary unpaid to the applicant was not a possession of the applicant. On that basis Article 1 of the First Protocol does not apply.

[23] If, contrary to the above finding, the one half salary not paid during suspension constitutes a possession of the applicant, the deduction will amount to an interference that must be justified in the public interest. It must serve a legitimate aim by proportionate means. The legitimate aim is the recognition and application of established negotiating arrangements for agreed national contracts in accordance with long established and agreed procedures. On the issue of proportionality there is a fair balance between the public interest and the private interest. The maintenance of ordered industrial relations is a significant public interest. Further, any interference accords with the conditions of domestic and international law.

Article 8.

[24] The applicant relies on the "right to respect for his private and family life, his home (and his correspondence)" under Article 8 of the European Convention. The applicant contends that the loss of one half salary during the period of suspension resulted in the applicant being unable to discharge the mortgage payments on his home with the result that the mortgagee undertook proceedings for possession of the property. In *Harrow London Borough Council v Qazi* [2003] 4 All ER 461 the House of Lords held that while a housing authority's recovery of possession from a secure tenant engaged Article 8 it did not violate the essence of the right to respect for the home under Article 8. Lord Hope expressed the character of Article 8 at paragraphs [50] and [82] –

> "The right to respect referred to in this paragraph extends to the person's home. But the essence of this right lies in the concept of respect for the home as one among various things that affect a person's right to privacy. The context in which the reference to the person's "home" must be understood is indicated by the references in the same paragraph to his private and family life and to his correspondence. The emphasis is on the person's home as a place where he is entitled to be free from arbitrary interference by the public authorities. Article 8(1) does not concern itself with the person's right to the peaceful enjoyment of his home as a possession or as a property right. Rights

> of that kind are protected by article 1 of the First Protocol.
>
> I believe that the key to a proper understanding of the issues in this case lies in an appreciation of the fact that article 8 regards a person's home as an aspect of his right to privacy. The interpretation which I would give to the concept of a person's home in this context is broad enough to give a full measure of protection in a wide range of circumstances that may be envisaged where a person's right to respect for his home is interfered with by the public authorities. The issue which arises in this case is, by way of contrast, a very narrow one which has much more to do with the law relating to property rights than respect for a person's privacy. "

[25] In the present case Article 8 is not engaged. The respondent has not undertaken any action that involves an interference with the applicant's right to respect for his home. The action for recovery of possession by the mortgagee does not involve any aspect of the applicant's right to privacy.

Article 14.

[26] The applicant relies on the right to non discrimination under Article 14 of the European Convention which provides that –

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The character of Article 14 is described by *Lester and Pannick* at paragraph 4.14.1 - "The Convention, unlike other international human rights instruments, contains no freestanding guarantee of equal treatment without discrimination. Instead Article 14 is restricted to a parasitic prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention."

[27] In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 Brooke LJ set out four questions as a framework for dealing with Article 14 claims –

> "1. Do the facts fall within the ambit of one or more of the substantive Convention provisions.
>
> 2. If so was there different treatment as respects the right between the complainant on the one hand and other persons put forward for comparison on the other.
>
> 3. Were the chosen comparators in an analogous situation to the complainant's situation.
>
> 4. If so did the difference in treatment have an objective and reasonable justification – in other words did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved."

[28] The applicant relies on Article 14 in conjunction with Article 1 of the First Protocol and in conjunction with Article 8. It is first of all necessary to establish whether the case comes "within the ambit" of either Article 1 of the First Protocol or Article 8. In the Court of appeal in *McDonnell and Lilley's Applications* [2004] NICA 7 Coghlan J at paragraphs 20 to 32 discusses the meaning of "ambit" and refers to the situation where the "subject-matter of the disadvantage [complained of] … constitutes one of the modalities of the exercise of a right guaranteed" (National Union of Belgian Police v Belgium(1975) 1 EHRR 632 [para 39]); or the measures complained of are "linked to the exercise of a right guaranteed" (Kroon v Netherlands (1995) 19 EHRR 263); or that "it is sufficient that the `subject matter falls within the scope of the Article in question' " (X v Germany (1976) 19 Year Book 276) or, that challenged measures were "linked" to the substantive Article (Schmidt & Dahlstrom v Sweden (1979-80) 1 EHRR 632).

[29] For reasons set out above I have found that neither Article 1 of the First Protocol nor Article 8 apply to the present case. However that does not conclude the matter as far as the applicant's claim is concerned because Article 14 may apply in conjunction with a substantive Article even though that substantive Article does not apply on its own. There is no clear test by which it can be established that this point has been reached, as it is a matter of fact and degree in each case. Whether by the measure of the subject matter being "within the ambit" or "one of the modalities" or "linked to" or "within the scope" of the substantive Article I am satisfied that the present case is not one where the applicant can rely on Article 14 in conjunction with Article 1 of the First Protocol or Article 8. The reasons for finding that Article 1 of the First Protocol and Article 8 do not apply also persuade me that the present case is not within the ambit of those Articles.

[30] Having found that the present case is not within the ambit of a substantive Article it is not necessary to consider the other aspects of the claim under Article 14. However I propose to outline the position I would adopt had I been satisfied that the present case was within the ambit of Article 8 or Article 1of the First Protocol. The second question set out in *Wandsworth* concerns the existence of differential treatment. In the present case there is such differential treatment between the applicant, as a manual worker who receives half pay during suspension, and the clerical officer who receives full pay during suspension.

[31] The applicant contends that the differential treatment amounts to discrimination on the ground of "social origin". It is asserted that the half pay provision impacts on those of working class origins while the respondent contends that there was no evidential basis for such assertion. If an applicant is to establish a ground of discrimination under Article 14 of the European Convention it is necessary to provide an evidential basis for a finding on that ground of discrimination. No such evidential basis has been provided in the present case for a finding based on social origin. However I am satisfied that there has been differential treatment on the ground of the applicant's status as a manual worker.

[32] The third question concerns the comparator being in an analogous situation. The comparator, the clerical worker, is a member of a different employment structure recognised by the representative bodies over many years, and in particular by the representatives of the employees. While there may be movement towards a unitary structure, there has been in the past and no doubt continues to be at present, several respects in which the terms and conditions differ between the groups, with members in each group being at a disadvantage in some respects and perhaps at an advantage in other respects. For this reason I do not accept that the applicant and the comparator are in an analogous situation. The respondent's chosen comparator is another member of the manual workers in relation to whom the applicant does not receive any differential treatment. I have not been satisfied that the applicant should be treated as comparable to the clerical worker. I take account of the approach of the employers and the trade union representative members of the NJC in maintaining separate terms and conditions of employment whilst striving to secure single status agreements.

[33] The applicant has obtained a negative answer to the first and third questions. Were it necessary to proceed to the fourth question the position would be that differential treatment is discriminatory unless the respondent establishes objective and reasonable justification. That justification requires proof of a legitimate aim for the disputed measure and the adoption of proportionate means of achieving that legitimate aim. I accept that the

justification set out in relation to Article 1 of the First Protocol above applies in relation to Article 14.

Article 6.

[34] The applicant relies on the right to a fair trial under Article 6 of the European Convention which provides that –

> "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The decision under challenge is the respondent's decision to maintain the terms and conditions relating to half pay and to apply the same to the applicant. The applicant claims a right to a fair hearing in respect of a "civil right" not to be treated unfairly or in a discriminatory manner and further not to have a financial penalty imposed in the course of disciplinary proceedings.

[35] The extent to which those employed in the public service can rely on the right to a fair trial under Article 6 has been extended in *Pellegran v France* [2001] EHRR 26. From initially applying a broad general exclusion of the public service from the operation of Article 6 the ECtHR has moved to a general inclusion of the public service. The only disputes excluded from the scope of Article 6 are those that are raised by "public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police."
The applicant's dispute is not excluded from the scope of Article 6.

[36] Article 6 applies to the determination of civil rights and obligations. This applies to rights and obligations in private law and extends to a wide range of administrative decision making where the decision determines or decisively affects rights or obligations in private law - *Runa Begum v Tower Hamlets LBC* [2003] 1 All ER 731 Lord Hoffman at paragraph 30. There is no abstract civil right not to be treated unfairly or not to be discriminated against or not to be subject to a financial penalty in disciplinary proceedings. The matters affecting the applicant derive from the terms and conditions of employment determined by agreed procedures by collective agreement at national level and the applicant has secured such rights as he is entitled to under those terms and conditions. A dispute about the operation of the terms and conditions may give rise to private law rights for which an Article 6 compliant hearing would be available. However the rights claimed by the applicant in relation to the application of those terms and conditions do not

give rise to a "civil right" for the purposes of Article 6. Further, the application of the contractual arrangements do not amount to a determination for the purposes of Article 6.

[37] If Article 6 applied I am satisfied that the availability of Judicial Review of the respondent's decision is sufficient to render the decision process compliant with the requirements of Article 6. In addressing this issue in *Runa Begum v Tower Hamlet LBC* [2003] 1 All ER 731 Lord Hoffman at paragraph 51 referred to the general principle which *Bryan v UK* [1996] 21 EHRR 346 decided as being –

> "……in assessing the sufficiency of the review …. it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

The subject matter of the decision is the application of an agreed term in the employment contract upon the applicant's suspension. The manner in which the decision was arrived at was upon the condition precedent being established, namely suspension. The content of the dispute is to challenge the condition rather than the circumstances in which it was applied. The nature of Judicial Review is such that it is able to provide what amount to full appeal rights in the circumstances of the case.

Irrationality.

[38] The applicant contends that the decision was irrational. There has been a weakening of the application of Wednesbury unreasonableness as a ground of review in cases that do not concern community law or human rights protected by the European Convention. In *ABCIFER v Secretary of State for Defence* [2003] EWCA Civ Dyson LJ stated that the Wednesbury test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests and he expressed the view that the Court of Appeal had difficulty in seeing what justification there was for retaining the Wednesbury test (paragraph 34). However he stated "we reconsider that it is not for this court to perform its burial rights" (paragraph 35) and that it is the correct test to apply in a case which does not involve community law and does not engage any question of rights under the ECHR (paragraph 37).

[39] The decision was taken in accordance with the standard terms and conditions of employment applicable to the applicant and neither the content of those terms and conditions nor their application in the circumstances can be said to be Wednesbury unreasonable.

[40] In addition the applicant objects to the reduction to half pay being applied to manual workers. It is contended that the distinction between classes of employees has no rational basis and that the nature of the work is an irrelevant consideration. The differences that have existed in the different national agreements have arisen out of the historical development of the arrangements and reflect the approach of the respective groups of representatives. The representatives may have elected to take a different approach to different employees but I have not been satisfied that the approach chosen in the past is liable to be set aside on any legal basis.

[41] Accordingly, I am not satisfied that the applicant has established any of his grounds for Judicial Review. The application for Judicial Review is dismissed.