Neutral Citation no. [2008] NICA 20

Ref: **KER7135**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: **08/04/08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

BETWEEN:

KIERAN JOSEPH HARKIN

Claimant/Appellant

-and-

KEVIN WATKINS trading as WATKINS SCAFFOLDING

Respondent

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of the Industrial Tribunal whereby it held that the appellant was not entitled to be granted an increase of award pursuant to article 17(3)(c) of the Employment (Northern Ireland) Order 2003 because he had less than one year's continuous service in the employment of the respondent.

Background

[2] The following findings of fact were made by the tribunal: -

> "(a) The respondent was the sole proprietor of a scaffolding business. That business owned and ran a fleet of vehicles including a seven and a half tonne flatbed lorry ("the lorry").
>
> (b) The appellant was employed by the respondent as the driver of the lorry and the appellant's job was to deliver scaffolding and equipment on site. The employment commenced at some date not precisely determined but certainly in or about mid-May of 2005.
>
> (c) The lorry at the material time which concerned the Tribunal, that is to say in late 2005, bore a goods vehicle certificate which was due to expire on 6 December 2005.
>
> (d) At the material time the claimant experienced certain difficulties with the lorry; one of the windscreen washers, on the driver's side, became inoperative and the lorry's horn did not work. Furthermore, there was a crack (or possibly a number of cracks) on the lorry's windscreen.
>
> (e) In the early part of December 2005, the appellant orally brought to the respondent's attention on at least two occasions the fact that the lorry's windscreen was cracked, that the horn did not work, and that the windscreen washer was defective.
>
> (f) The appellant returned to work after the Christmas vacation period. He became concerned, on account of documentation seen by him at that time, that the lorry did not have a current vehicle test certificate. On 11 January 2006, the appellant spoke with the respondent and stated that he was unwilling to drive the lorry on account of this and the matters referred to at 10(d) above. The appellant construed the subsequent conversation with the respondent to the effect that the respondent had clearly and unambiguously stated to him that if the appellant was unwilling to drive the lorry in its then current state

> and condition there was no work for him. The appellant took this as constituting a dismissal of him by the respondent.
>
> (g) The Tribunal found that the appellant was dismissed from employment by the respondent at this time, that is to say 11 January 2006, and at that time the appellant had less than one year's continuous service with the respondent."

Relevant statutory provisions

The Employment Rights (Northern Ireland) Order 1996

[3] Article 126 of this Order deals with the right of an employee not to be unfairly dismissed. It provides: -

> "**126.** — (1) An employee has the right not to be unfairly dismissed by his employer.
>
> (2) Paragraph (1) has effect subject to the following provisions of this Part (in particular Articles 140 to 144)."

[4] Various species of unfair dismissal are provided for in the Order. Article 130A makes provision in relation to dismissal as a consequence of the failure of an employer to observe procedures. Paragraph (1) provides: -

> "**130A**. - (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if-
>
> (a) one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (NI 13) (dismissal and disciplinary procedures) applies in relation to the dismissal,
>
> (b) the procedure has not been completed, and
>
> (c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements."

[5] Another of the ways in which an employee can be unfairly dismissed is dealt with in article 132. The relevant parts of this provision for the purposes of the present appeal are: -

"**132.** — (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

…

(c) being an employee at a place where—

(i) there was no [representative of workers on matters of health and safety at work or member of a safety committee], or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

…

(2) For the purposes of paragraph (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in paragraph (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

[6] In order to avail of the right enshrined in article 126, an employee must normally have been continuously employed for a period of not less than one year ending with the effective date of termination – article 140 (1). The Order

provides for a number of exceptions to this requirement, however, including article 140 (3), which is relevant to the appellant's situation. It provides: -

> "(3) Paragraph (1) does not apply if—
> …
> (c) paragraph (1) of Article 132 (read with paragraphs (2) and (3) of that Article) applies …"

[7] The appellant's complaint that he was unfairly dismissed was presented to the industrial tribunal under article 145, paragraph (1) of which provides: -

> "A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer."

[8] The remedies available to a successful complainant and the orders that the tribunal may make are dealt with in articles 146 and 147. Article 147 is concerned with reinstatement and re-engagement and is therefore not directly relevant to the present appeal. Article 146 provides: -

> "**The remedies: orders and compensation**
>
> **146.**—(1) This Article applies where, on a complaint under Article 145, an industrial tribunal finds that the grounds of the complaint are well-founded.
>
> (2) The tribunal shall—
>
> (a) explain to the complainant what orders may be made under Article 147 and in what circumstances they may be made, and
>
> (b) ask him whether he wishes the tribunal to make such an order.
>
> (3) If the complainant expresses such a wish, the tribunal may make an order under Article 147.
>
> (4) If no order is made under Article 147, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with Articles 152 to 162) to be paid by the employer to the employee."

The Employment (Northern Ireland) Order 2003

[9] Article 16 (1) of this Order provides that every contract of employment shall have effect to require the employer and employee to comply, in relation to any matter to which a statutory procedure applies, with the requirements of that procedure. (The relevant statutory procedures are discussed in paragraphs [11] and [12] below).

[10] Article 17 of this Order is concerned with the adjustment of awards by industrial tribunals. The material provisions are these: -

> "**17.** — (1) This Article applies to proceedings before an industrial tribunal relating to a claim under any of the jurisdictions listed in Schedule 2 by an employee.
> …
>
> (3) If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,
> (b) the statutory procedure was not completed before the proceedings were begun, and
> (c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,
>
> it shall, subject to paragraph (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50 per cent."

[11] Among the jurisdictions listed in Schedule 2 are complaints made under article 145 of the 1996 Order. The statutory procedures referred to in article 17 (3) are defined by article 2 of the Order as those set out in Schedule 1. By virtue of article 16 of the 2003 Order, where a statutory procedure applies, every contract of employment has effect to require the employer and employee to comply with the requirements of the procedure. The statutory procedures with which the employer in the present case was required to comply with included setting out in writing the employee's alleged misconduct which led to the dismissal; what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct;

and the employee's right to appeal against dismissal. They also require the employer to send the statement or a copy of it to the employee. If the employee informs the employer of his wish to appeal, the employer must invite him to attend a meeting. It is indisputably clear that none of these steps was taken in the present case.

Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004

[12] Regulation 3 of these regulations applies dismissal and disciplinary procedures including those set out in the preceding paragraph to employment such as the appellant's. Regulation 4 deals with dismissals to which the dismissal and disciplinary procedures do not apply. It is clear (and it has never been suggested otherwise) that this regulation has no application to the present case.

The tribunal's decision of 9 May 2007

[13] The appellant's complaint was heard by the tribunal on 24 January 2007 and its original decision was given on 9 May 2007. It was held that the appellant's dismissal was for reasons connected with his having raised health and safety concerns. Accordingly, the tribunal found that the case fell within article 132(1) of the 1996 Order and that the appellant was unfairly dismissed. The tribunal applied article 140(3) (b) of the Order and determined that the qualifying period of twelve months' continuous employment was not required for a finding of unfair dismissal under article 132(1).

[14] The tribunal went on to find that the respondent had not engaged in any statutory dismissal procedures and that, therefore, the appellant's dismissal was also unfair under article 130A of the 1996 Order.

[15] Finally, it was held that article 17(3) (c) of the 2003 Order was applicable and, taking account of all the circumstances of the case, the tribunal concluded that an enhancement of 20% of the compensation should be awarded. A compensatory award of £8816.16 was made comprising £7246.80 for loss of income; £100 for loss of statutory rights; and £1469.36, representing the 20% enhancement.

The tribunal's decision on 18 July 2007

[16] The respondent sought a review of the original decision on the basis that article 130A of the 1996 Order was not engaged because the appellant did not have one year's continuous employment with the respondent and the exemptions to the requirement of a qualifying period of service were not applicable. Additionally, it was submitted that the question of possible enhancement of compensation had not been considered at the hearing and

there had been no opportunity to make submissions. The tribunal agreed to reconsider its decision and the review was conducted on the basis of written submissions of the parties. On foot of the review the tribunal decided that article 130A did not feature in the list of statutory exemptions to the one-year rule and it therefore reversed its earlier finding that the appellant had been unfairly dismissed pursuant to article 130A. Mr Wolfe, who appeared for the appellant on the appeal, but who had not appeared before the tribunal, accepted that the decision to reverse the finding of unfair dismissal under article 130A was correct for the reasons given by the tribunal in its revised ruling.

[17] It is clear from the revised ruling that the tribunal considered that the question of enhancement of the award was uniquely connected to the finding of unfair dismissal under article 130A for it dealt summarily with that issue in the following passage from paragraph 10: -

> "… the tribunal takes the view that the 'one year rule' exemption as provided for by Article 140 of the 1996 Order in respect of a number of statutory heads of claim is not applicable in respect of Article 130A of the 1996 Order. That being the case, the conclusion is that the tribunal's decision as promulgated cannot stand insofar as it provides for a finding of unfair dismissal grounded upon Article 130A and as a consequence proceeds to make an award of additional compensation upon that basis."

[18] The tribunal duly deleted the enhanced element of the original award and ordered that the compensatory award should be £7346.80, comprising £7246.80 loss of income and £100 for loss of statutory rights.

The appeal

[19] Mr Wolfe argued that the revocation of the article 17(3) enhancement failed to take account of the finding of unfair dismissal under article 132. The view that the tribunal appeared to have formed that only in unfair dismissal cases falling under article 130A of the 1996 Order could an increase in award be made under article 17(3) was erroneous. The decision of the Employment Appeal Tribunal in *Scott-Davies –v- Redgate Medical Services* [UK EAT 0273/06] was authority for the proposition that article 17 of the 2003 Order (and its GB equivalent) does not give rise to a stand alone claim, but accompanied by a valid claim of unfair dismissal, afforded a basis for an increase in award.

[20] It was submitted that the application of article 17(3) was not limited to article 130A cases and was not limited to those cases in which the complainant had at least one year's continuous service. There was nothing in

the language of the 1996 Order or the 2003 Order to suggest that there are any grounds for excluding from the benefit of article 17(3) those employees who had established valid unfair dismissal complaints but who had less than one year's service.

Discussion

[21] The starting point in the debate whether article 17(3) of the 2003 Order applies to the appellant's case must begin with the terms of article 17(1). It applies the provisions of the article to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 2. One of those jurisdictions is a claim under article 145 of the 1996 Order. This is, of course, precisely the species of claim that the appellant in this case made and succeeded in.

[22] Article 17 of the 2003 Order makes provision for adjustment of awards by the tribunal where applicable statutory procedures have not been completed, the statutory procedures being the dispute resolution procedures provided for in Schedule 1 to the 2003 Order. As we have already observed, these procedures were not complied with in the appellant's case. There is therefore no inhibition to the invocation of article 17 in the present circumstances.

[23] By article 17 (3) the tribunal is required to increase any award which it makes to the employee by 10 per cent where the statutory procedure was not completed before the proceedings were begun and the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure. This requirement is expressed to be subject to article 17 (4) which provides: -

> "(4) The duty under paragraph (2) or (3) to make a reduction or increase of 10 per cent does not apply if there are exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances."

[24] In light of the tribunal's findings about the stance of the employer in the present case, and, indeed, in view of the earlier award of an increase in the compensatory amount, it seems clear that it was satisfied that these conditions were fulfilled. It appears to us, therefore, that this uplift in the compensatory award should have been made and that the tribunal ought then to have considered whether to increase it by a further amount.

Conclusions

[25] The question for the opinion of this court posed in the case stated was:

> "Was the Industrial Tribunal wrong in law to conclude that the claimant/appellant was not entitled to be granted an increase of award pursuant to Article 17(3)(c) of the Employment (Northern Ireland) Order 2003 by reason of the fact that he had less than one year's continuous service in the employment of the respondent?"

[26] We answer that question 'Yes', allow the appeal and remit the matter to the tribunal with a direction that it apply the statutory uplift of 10% provided for in article 17 (3) of the 2003 Order and consider whether to apply a further increase beyond that percentage.