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Judgment: approved by the Court for handing down | *Delivered:* **11/09/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE FAIR EMPLOYMENT TRIBUNAL

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BETWEEN:

THOMAS McCANN

Appellant;

-and-

EXTERN ORGANISATION LIMITED

Respondent.

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HORNER J (giving judgment of the Court)

Introduction

[1] This is an appeal against the decision of the Fair Employment Tribunal ("the Tribunal") dated 14 June 2012 by the appellant who was dismissed from his employment on 12 May 2011 following 32 years continuous employment with the respondent. The Tribunal concluded unanimously that:

(a) The appellant had been unfairly dismissed.

(b) He had not been discriminated against on the grounds of his political opinion.

(c) He had not suffered a detriment for his trade union activity.

(d) He was not victimised as a result of a "protected act", namely his bringing proceedings for sexual discrimination.

[2] The appellant appealed on a number of different grounds. These included:

(a) Whether the Tribunal had erred in law by failing to make findings and/or provide adequate reasoning on material issues relevant to the appellant's political discrimination and victimisation claim.

(b) Whether the Tribunal had failed to provide reasoning which is adequate in law and sufficiently intelligible to the parties to understand the basis of the decision.

(c) Whether the Tribunal had properly failed to apply and interpret the relevant burden of proof regulations to the evidence.

(d) Whether the Tribunal had closed its mind to the probability that the appellant had been victimised.

(e) Did the Tribunal misdirect itself and/or act perversely by reaching findings which were misconceived and/or unsustainable given the oral and documentary evidence before the Tribunal and/or the Tribunal's findings?

In effect there were, as the respondent asserts in its skeleton argument, two causes of action in this appeal:

(a) Discrimination by way of less favourable treatment on the grounds of political opinion in relation to trade union activity;

(b) Victimisation by reason of the Claimant having brought sex discrimination proceedings.

Background

[3] The appellant had commenced employment with the respondent on 1 November 1978. He was a Programme Manager and one of his responsibilities was for the Ormeau Centre. His work included providing services to the adult homeless. In 2000 he had been awarded an MBE for his services to disadvantaged homeless people in Belfast. He enjoyed an exemplary disciplinary record.

[4] An incident at a staff Christmas dinner in December 2006 led eventually to the appellant bringing a claim for sexual discrimination when he was suspended by the respondent's Chief Executive, Ms Liz Cuddy. This claim was resolved by the end of 2007. The same year Mr Paul Rooney was appointed as Director of Adult Services and thus became the appellant's line manager. The relationship was tense. When Ms Melaugh, an employee at the Ormeau Centre, resigned from the respondent's employment, the appellant was directed to sign a letter, prepared by Mr Rooney and by Ms Stevenson, an HR manager. He refused to do so because he did not agree with the contents of the letter. He offered his own draft which was not acknowledged by Mr Rooney or Ms Stevenson. When disciplinary proceedings

were initiated he went off sick and issued a grievance against Mr Rooney and Ms Stevenson. At the grievance hearing held by Ms Cuddy on 26 November 2009 he was refused permission to return to work despite being declared fit for work. It was only after he had seen the Occupational Health Doctor on 8 January 2010 that he was permitted to return to work.

[5] When the respondent received a complaint of bullying and harassment at the Ormeau Centre under its whistleblowing policy, the appellant was placed on precautionary suspension in January 2010. An independent report was commissioned. Only three people, including the complainant, were interviewed. Its conclusion in March 2010 was that there was an oppressive culture and management style at the Ormeau Centre. However the complaint against the appellant was not substantiated.

[6] This outcome in turn led to an independent report being commissioned. This was flawed by, inter alia, references to findings in percentage terms of all the staff, yet only nine members out of thirty were interviewed. They found again that there was an unhealthy management culture. The appellant had no input into this report which was completed in April 2010.

[7] On 17 May 2010 Ms Cuddy wrote to the appellant telling him he remained suspended although bullying and harassment charges had not been substantiated. However further investigations were planned. Ms Cuddy did not consider permitting the appellant to return to those other duties which did not involve working at the Ormeau Centre or with its staff.

[8] On 27 July 2010 there was a lunchtime protest in favour of the applicant. This was organised by Ms Kerr as a trade union representative. It involved a leaflet which amongst other things, calculated that the cost of the protest involving the appellant and his suspension exceeded £80,000. The appellant was charged with making a contribution to the leaflet by providing information about his salary. He denied this. Ms Brown found him guilty but her investigation report was found by the Tribunal to be flawed in a number of important aspects. Mr Crossan said in evidence that he "could not conceive that the claimant was not involved throughout the preparation of the lunchtime campaign." However, this belief, the Tribunal found, was based on Mr Crossan's perception of the claimant's relationship with Mr Boomer and Ms Kerr, and not on the evidence. Both Mr Boomer and Ms Kerr were trade union representatives.

[9] The third and final report was commissioned by Ms Cuddy from Ms Brown to investigate the allegations against the appellant. There were now two further grounds:

(a) The appellant had breached his suspension by giving a reference to another employee of the respondent.

(b) The appellant had endorsed and supported the publication of misleading and inaccurate information concerning the respondent.

Ms Brown recommended disciplinary proceedings in respect of three charges. The disciplinary process was headed by Mr Crossan who had joined the respondent as the Director of Resources in September 2010. He added two further charges, namely that the appellant had made wilful representations and defamatory statements to Ms Brown. These included a claim by the appellant and his trade union representative, Mr Boomer, that Ms Cuddy had victimised the appellant. Mr Crossan gave the appellant no opportunity to contribute to the investigation.

[10] Meanwhile in a separate matter, Mr Crossan considered that Mr Boomer had behaved inappropriately and he was barred from the respondent's premises on 3 February 2011. Coincidentally, the following Monday Mr Boomer was due to represent the appellant and was thus unable to do so (subsequently NIPSA carried out its own investigation and acquitted Mr Boomer of any misconduct). The appellant obtained another NIPSA representative, Mr Graham, to act on his behalf. The hearing did not conclude and a further date was fixed for 11 April 2011. Meanwhile the applicant's health had deteriorated and he was declared unfit for work because of work-related stress, anxiety and depression. His GP thought he would be unfit for a further eight weeks. On 7 May 2011 the GP wrote stating a diagnosis of "severe clinical depression and anxiety" had been made and asked for a rescheduling of the hearing. He advised he could be contacted for further information if this was required.

[11] Mr Crossan refused to adjourn the hearing and it went ahead without the appellant. He was found guilty of each of the five charges including the ones aimed at that lunchtime protest in which there was an absence of any evidence. They were considered to constitute gross misconduct and the sanction was summary dismissal. The appellant's appeal was set for 14 June 2011. The appellant asked for an adjournment on the basis of further medical evidence from his GP. This was refused. A decision to dismiss was affirmed. The Appeal Panel did not see the medical evidence and was unaware of the nature of the appellant's illness.

[12] In its judgment the Tribunal considered the evidence of the respondent's witnesses to have been "less than impressive". Ms Cuddy and Mr Crossan "had significant passages where answers were evasive and at times contradictory…". The Tribunal concluded that the appellant had been unfairly dismissed because of flaws in the disciplinary process which were not cured by the appeal procedure. In fact the appeal process "only made matters worse". The Tribunal was satisfied that neither "the findings of gross misconduct against the appellant nor the sanction applied of dismissal were reasonable in all the circumstances of the case". However the Tribunal also concluded that the claim of victimisation arising from the initiation of industrial tribunal proceedings in 2007 was not made out. They concluded that there was no causative link between the "protected act" and the detriment claimed and gave five reasons. Further, in determining the claim for discrimination because

of his political opinion, the Tribunal concluded that it had heard "no credible evidence" of discrimination of the appellant because of his political opinion. It is these findings which lie at the heart of this appeal.

The victimisation claim

[13] At this stage it is important to record what this court observed in Curley v Chief Constable of the PSNI (2009) NICA 8 at paragraph [14]:

> "[14] It is clear from the relevant authorities that the function of this court is limited when reviewing conclusions of facts reached by the Tribunal and that, provided there was some foundation in fact for any inference drawn by a Tribunal the appellate court should not interfere with the decision even though they themselves might have preferred a different inference. As Carswell LCJ, as he then was, observed in Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A [2000] NI 261 at 273:
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> > '**[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'."

Accordingly, 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: e.g. see McConnell v Police Authority for Northern Ireland (1997) NI 253 per Carswell LCJ.

[14] Essentially the appellant complained that the bringing of the sexual discrimination complaint against Ms Cuddy had resulted in his victimisation. The Tribunal found that there was no causative link between the protected act and the detrimental claimed. The IDS Handbook states at paragraphs 9.41 and 9.42:-

> "9.41 To succeed in a claim of victimisation, the claimant must show that he or she was subject to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protective act …
>
> 9.42 …. The essential question in determining the reason for the claimant's treatment is always the same: what consciously or sub-consciously motivated the employer to subject the claimant to the detriment?

> In the majority of cases, this will require an inquiry into the mental processes of the employer …"

[15] As Harvey said at paragraph [468] in respect of the test for victimisation:

> "Analysing the elements of any potential victimisation claim requires somewhat different considerations as compared to the other discrimination legislation.
>
> …
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> A claim of victimisation requires consideration of:-
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> The protected act being relied upon
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> The correct comparator
>
> Less favourable treatment
>
> The reason for the treatment
>
> Any defence.
>
> Burden of proof."

[16] In this case the appellant's claim failed on the "reason for the treatment". The Tribunal "found there was no causative link between the protected act and the detriment claimed …".

[17] As Harvey says at paragraph 488:-

> "The key issue in such situations will be the Tribunal's understanding of the motivation (conscious or unconscious) behind the act by the employer which was said to amount to victimisation."

[18] In respect of the victimisation claim:-

(a) The Tribunal's decision was clear and readily understood and in compliance with Rule 26 of the Fair Employment Tribunal (Rules of Procedure) Regulations (NI) 2005.

(b) The Tribunal is best placed having heard all the evidence and seen the witnesses to make an assessment in respect of causation.

(c) The reasons offered for the protected act and the detriment not being linked are compelling. The detrimental treatment complained of commenced before the protected act; the complaints of the appellant were against Rooney and Stevenson, not Cuddy; there was a significant time lapse between the protected act and the detrimental act, with no evidence in the interim of any lingering animosity or hostility; and the appellant made no complaints against Ms Cuddy in pursuing his grievance against Mr Rooney in November 2009.

In the circumstances the conclusion on causation was one which the Tribunal was best placed to make and was one, which on the evidence, appears reasonable. It cannot be said in anyway to be irrational or perverse. In the circumstances this ground of appeal must fail.

The discrimination claim

[19] Article 3(2) of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO") provides that:-

> "A person discriminates against another person on the grounds of religious belief or political opinion in any circumstances relevant for the purposes of the Order if:-
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> (a) On either of those grounds he treats another less favourably than he treats or would treat another person."

[20] Under Article 19(1) of FETO it is provided:-

> "It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland:-
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> (a) Where that person is employed by them.
>
> (b) By dismissing him or by subjecting him to any other detriment."

It is alleged that the appellant was treated less favourably because of his perceived involvement in the trade union lunchtime protest. In essence, it is claimed that his perceived involvement caused or contributed to his unfair dismissal.

[21] Article 38A of FETO provides:-

> "38A. Where, on the hearing of a complainant under Article 38, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—
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> (a) has committed an act of unlawful discrimination or unlawful harassment against the complainant; or
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> (b) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment against the complainant;
>
> the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

[22] At paragraphs [26]-[29] of the judgment the Tribunal set out the correct principles as to how the burden of proof provisions should be applied in these types of cases. The Tribunal said:

> "26. Guidance on how to apply the burden of proof was given by the Court of Appeal in the case of Igen Limited v Wong [2005] EWCA Civ142. The Court of Appeal in Igen set out their guidance in 13 paragraphs. The Court referred to a two stage test. The claimant must firstly show facts from which the Tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an unlawful act of discrimination. Once the Tribunal has so concluded, the burden then shifts to the respondent to prove that he did not commit an unlawful act of discrimination. The guidance in Igen has been endorsed in a number of cases including the Northern Ireland Court of Appeal in the case of Arthur v Northern Ireland Housing Executive and SHL UK Limited [2007] NICA 25.
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> 27. Following Igen the Court of Appeal again considered the burden of proof in Madarassy v Nomura International Plc [2007] IRLR 246. In that case Lord Justice Mummery said:-

> 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination.
>
> "Could conclude" in Section 63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it.'

28. In the case of Laing v Manchester City Council [2006] IRLR 748, Mr Justice Elias said:-

> 'The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect "there is a neat question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".'

29. In the recent Northern Ireland Court of Appeal decision of Nelson v Newry & Mourne District Council [2009] NICA24, Lord Justice Girvan referred to the Court of Appeal's decision in Madarassy and went on to say:-

> 'This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant

> alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude, in the absence of adequate explanation, that the respondent has committed an act of discrimination.
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> In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination'."

This statement of the current applicable legal principles cannot be faulted. Unfortunately the Tribunal in giving its judgment failed to follow it.

[23] The appellant's claim was rejected by the Tribunal on the basis that:-

> "… the Tribunal heard no credible evidence that the claimant was discriminated against because of his political opinion."

[24] However, nowhere in the judgment did the Tribunal refer to what the evidence was or to the reason(s) why it was not credible. In an attempt to cure these obvious omissions which did not comply with the advice given in Igen v Wong this court accepted the invitation of the respondent to send this issue back to the Tribunal under the Burns/Barke procedure. It is so named following the decisions in England of a number of cases and in particular, Burns v Consignia (No. 2) (2004) IRLR 42 and Barke v SEETEC Business Technologies Centres Limited (2005) IRLR 63. This is a process whereby the court can refer a matter back to the Tribunal where there is an issue as to the adequacy of reasoning or findings, for amplification or clarification. In this case the court invited the Tribunal to indicate, inter alia:-

> "(a) What evidence the FET concluded could constitute discrimination of the claimant because of the applicant's political opinion;

(b) In respect of each piece of evidence referred to above why it was not credible."

[25] In retrospect the invocation of the Burns/Barke procedure was not appropriate. Firstly, administrative delays led to the response not being received until April 2014. There had been a delay in the request to be made to the Tribunal Chairman, for which he bears no responsibility, and this had been compounded by the perfectly reasonable need for the Chairman to retrieve his old notebooks and the bundles of documents and then to convene the Tribunal Panel for discussions. Secondly, there is always the difficulty in drawing the fine line between amplifying and explaining a decision and defending the decision. This was a case in which the decision was such that almost certainly any response was at risk of producing a justification rather than an amplification. This is unfortunately what occurred.

[26] This court, despite the further response from the Tribunal, can still not be sure of the basis upon which the Tribunal concluded that there was no credible evidence that the appellant was discriminated against because of his political opinion. The following facts relied upon by the appellant do not appear to be contested:-

(i) Mr Keenan, who took part in the lunchtime protest and was the Project Manager for the Ormeau Centre was found by another Tribunal to have suffered "detriment" for taking part in the lunchtime protest by the respondent bringing forward the date of his departure from the original agreed date of 14 October 2010 to 13 August 2010. The Tribunal's explanation for ignoring this decision is not entirely satisfactory although blame appears to rest to some extent with the appellant and his advisors for not specifically drawing it to the Tribunal's attention.

(ii) Mr Crossan had found the appellant was involved in contributing to the lunchtime protest leaflet (as did Ms Brown) despite the absence of any evidence.

(iii) The advice of Ms Stevenson was not to speak to Ms Kerr, the trade union representative, because her input was "not likely to be objective", when investigating the appellant. Ms Kerr was particularly well placed to advise whether or not the appellant did contribute to the leaflet as was alleged by the respondent.

[27] It is still not at all clear from the further clarification provided:-

(i) What facts were found by the Tribunal and what were rejected as not being credible.

(ii) If the facts were rejected as being not credible, the basis for the Tribunal so concluding.

[28] In all the circumstances we consider that the proper course is to send this issue back to a differently constituted Tribunal for determination. We offer, and of this there should be no doubt, no view whatsoever as to whether the claim of discrimination should or will succeed. It will only be possible to reach a conclusion after the Tribunal has made findings in respect of those matters that are alleged to constitute discrimination and secondly, if the burden does shift, whether the respondent can provide a satisfactory explanation for its actions.

Conclusion

[29] The appellant's appeal on the ground of victimisation fails. The appellant's appeal on the ground of discrimination succeeds for the reasons set out above.