Neutral Citation No: [2013] NICA 14 | *Ref:* **MOR8808**

Judgment: approved by the Court for handing down | *Delivered:* **15/03/13**
(subject to editorial corrections)*

IN THE COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

JOHN McCANN AND JONATHAN McCANN

Claimants/Respondents;

-and-

VECTOR FACILITIES MANAGEMENT

First-named Respondent;

-and-

WALLACE CONTRACTS (NBI) LIMITED

Second-named Respondent/Appellant.

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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MORGAN LCJ

[1] This is an appeal from a decision by an industrial tribunal to allow the claimants to amend their proceedings at the end of the evidence called on their behalf to add a claim against the second named respondent alleging failure to comply with the information and consultation duties under Regulation 13 of the Transfer of Undertakings Protection of Employment Regulations 2006 and the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006. The second named respondent contends that an identical application was dismissed by a tribunal chairman at a Pre Hearing Review held on 11 January 2012 as a result of which the tribunal hearing the claim had no jurisdiction to allow the amendment.

Background

[2] Prior to March 2011 the claimants were both employed by the first named respondent, Vector, as facilities operatives and in particular were employed in carrying out landscaping and gardening duties for the first named respondent as part of its contract with BT. In the early part of 2011 BT decided to conduct a procurement competition and invited tenders for those services. The second named respondent, Wallace, was successful. There was disputed evidence about the number of meetings between the claimants and each of the respondents but it is common case that on 28 February 2011 Vector wrote to the claimants advising them that they had lost the BT landscaping service contract.

[3] At some stage in March there was a meeting between the claimants and Mr Wallace who was accompanied by his operations manager Mr Hills. The claimants say that the discussions included issues around workloads, travelling time and whether the claimants would transfer on an employed or self-employed basis. On 18 March 2011 the claimants were advised by Vector that they would be transferred under TUPE. On 22 March and over the next few days it appears that there were e-mails offering terms of self-employment to the claimants. Both respondents now contend that the claimants indicated on 28 March 2011 that they objected to a transfer.

[4] On 1 April 2011 Wallace took over the BT contract. The claimants did not attend for work. The respondents contended that there was a meeting between the claimants, Vector, and Wallace on 8 April 2011 during which the claimants sought redundancy pay from Vector. On 26 May 2011 each claimant issued a claim form in the industrial tribunal for unfair dismissal against Vector in which it was stated that "no notice, statement or disciplinary meeting was ever made against us and our decision not to go to Wallace was because of the changes to working terms and conditions [and] constituted a clear breach of contract by Vector." On 6 July 2011 Vector lodged a response stating that there had been a relevant transfer and applying to have Wallace joined. An order was made joining Wallace but Vector then amended its response to contend that there had been a relevant transfer but that the claimants had objected to it.

[5] The case was moved on expeditiously. At a hearing on 9 December 2011 each claimant applied for leave to amend his claim form to include a claim against the respondents in respect of alleged failure to comply with the information and consultation duty referred to in paragraph 1 above. Leave was given to amend the claim form to include that claim against the first named respondent. The application in relation to the second named respondent was deferred until 11 January 2012.

[6] At that hearing there were three issues to be determined. The first was an application on behalf of Vector to amend their response as indicated at the end of paragraph 4 above. There was no objection to that course and leave was duly granted. The second application was that by the claimants for leave to amend the claim form to include an information and consultation duty claim against the second

named respondent. Leave was refused apparently on the basis there was no such duty unless the claimants became employees and they had not done so because of their objection. The chairman did not hear any evidence on these issues. The third application was that of Wallace to strike out the claimants' claims against that respondent. Those applications were dismissed.

The Industrial Tribunal (Constitution and Rules of Procedure) (NI) Rules 2005 (the 2005 Rules)

[7] Schedule 1 of the 2005 Rules sets down detailed rules of procedure which govern proceedings in an industrial tribunal. Rule 10(1) provides that a chairman may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Rule 10(2) then sets out examples of orders which may be made under the preceding paragraph. Rule 10(2)(q) provides that a chairman may give leave to amend the claim or response and a chairman also has power to vary or revoke such orders.

[8] Rule 17 deals with case management discussions which are interim hearings that may deal with matters of procedure and management of the proceedings. They are conducted by a chairman. Any determination of a person's civil rights or obligations shall not be dealt with in a case management discussion but the matters listed in Rule 10 (2) are examples of matters which may be dealt with.

[9] Rule 18 provides for Pre Hearing Reviews which are interim hearings conducted by a chairman or in particular circumstances which are not relevant to this appeal by a tribunal and in contrast to case management discussions take place in public. At a Pre Hearing Review the chairman may carry out a preliminary consideration of the proceedings and he may by virtue of Rule 18 (2) –

> (a) determine any interim or preliminary matter relating to the proceedings; or
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> (b) issue any order in accordance with Rule 10 or do anything else which may be done at a case management discussion…

The remaining powers are not relevant for the purposes of this appeal. Notwithstanding the preliminary or interim nature of a Pre Hearing Review the chairman may make a decision on any preliminary issue of substance relating to the proceedings. Orders made at a Pre Hearing Review may result in the proceedings being struck out or dismissed or otherwise determined with the result that a hearing under Rule 26 (which deals with hearings for disposing of the proceedings) is no longer necessary in those proceedings. Such orders are, therefore, final orders which can be reviewed under Rule 34 but are otherwise binding upon the parties. There are particular provisions in relation to the striking out of a claim which were material to the third issue dealt with at the hearing 11 January 2012 but are not material to this appeal.

[10] Rule 34 provides that parties may apply to have a decision which is a final determination of the proceedings or a particular issue in those proceedings made by a tribunal or a chairman reviewed. There are limited grounds upon which a decision may be reviewed and there is a 14 day time limit governing any application for review.

The tribunal's ruling

[11] The substantive hearing of the applications commenced on 11 June 2012. At the end of the claimants' evidence Wallace made an application to have the claim for unfair dismissal against it struck out on the basis that the claimant's employment had not transferred to it at 1 April 2011. The claimants applied to amend their claim to include the information and consultation duty claim. The tribunal refused the application to dismiss the case against Wallace. It concluded that there was a certain amount of confusion over the events which occurred in late February and March 2011 after the claimants were advised that their employment was to transfer to Wallace. The claimants indicated to Vector's manager that they were unwilling to transfer as self-employed contractors but the tribunal considered that they appeared to be under the impression that this was the only offer on the table from Wallace. There was a further meeting on 8 April 2011 between the claimants, Vector and Wallace at which the issue of the claimants starting work for Wallace as employees was discussed. For the reasons already given this court considers that any issues arising from this decision should be dealt with in the context of any final appeal which might arise from the tribunal's decision.

[12] The tribunal allowed the claimants' claim to include the information and consultation duty against Wallace. Wallace opposed this ruling on the basis that the matter had already been determined by a tribunal chairman at a Pre Hearing Review and in those circumstances the decision could only be reviewed under Rules 34 and 35 of the 2005 Rules by the chairman who made the original decision or appealed to this court. The tribunal, it was argued, had no jurisdiction to deal with the amendment. The tribunal rejected that submission. It considered that the chairman had granted the application to amend the claimants' claim to include the information and consultation duty against Vector in exercise of its general management powers and under Rule 10(2)(q). It concluded that the decision to refuse to allow the amendment in respect of Wallace was, similarly, a decision made in exercise of its general management powers and could be varied or revoked under Rule 10. The power to grant an amendment under Rule 10 must include a power to refuse an application to amend. The tribunal recognised that the power to vary or revoke should be exercised sparingly.

Discussion

[13] There is a great deal that is not in dispute in this appeal. An application to amend a claim is among the matters that can be dealt with by a tribunal under Rule

10. When such an application is made to a chairman he must either grant it or refuse it. The power to grant leave to amend must, therefore, include the power under Rule 10 to refuse leave to amend. That is consistent with the fact that there is power under that Rule to revoke an order giving leave to amend. The jurisdiction to vary or revoke a decision made under Rule 10 of the 2005 Rules will rarely be exercised unless there is some material change of circumstances which justifies such an intervention.

[14] Rule 18(2)(a) of the 2005 Rules enables a chairman to determine any interim or preliminary matter relating to the proceedings and where that power has been exercised such a determination can only be challenged by way of review or appeal to this court. We accept that a decision to refuse an application to amend a claim is a preliminary matter relating to the proceedings which can be the subject of a determination under Rule 18(2)(a). We also accept, however, that at a Pre Hearing Review by virtue of Rule 18(2)(b) of the 2005 Rules a chairman may make any order that he could make under Rule 10 or at a case management discussion. Orders made in exercise of that power at a Pre Hearing Review do not constitute a final determination and are capable of being varied and revoked under Rule 10 by a tribunal at a hearing disposing of the claim. The issue, therefore, is whether there was any error of law by the tribunal in concluding that the earlier determination by the chairman was the exercise of the jurisdiction given by Rule 18(2)(b).

[15] There are certain basic principles which help to inform the answer to that question. First, it is necessary to examine the decision itself and the circumstances surrounding the making of it to establish whether the basis under which the chairman made the decision is set out. Secondly, the nature of the decision itself may be sufficient to establish the power under which the chairman acted. If, for instance, the decision was one within Rule 18(7) it would inevitably follow that the decision was under Rule 18(2)(a) of the 2005 Rules.

[16] Thirdly, where a final determination of some aspect of the claim is made the opportunities to challenge that decision are limited. An application to review the decision must be made within 14 days and can only be made on the following grounds.

> "(a) the decision was wrongly made as a result of an administrative error;
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> (b) a party did not receive notice of the proceedings leading to the decision;
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> (c) the decision was made in the absence of a party;
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> (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; or

(e) the interests of justice require such a review"

Any appeal against the decision on a point of law must be lodged within 6 weeks. Almost invariably, subject to any extension of time application, these avenues of challenge will no longer be available to the party affected if they wait until the outcome of the final hearing. It is therefore vital that the party affected by a final decision is adequately informed that the decision is final. That should preferably be done by the chairman when giving the decision. Fourthly, if there is ambiguity about the power under which the chairman acted that should normally be resolved against the party seeking to exclude the power to reopen. A party should only lose his right to pursue any part of a claim if he has been given unequivocal notice of the substantive determination of that part.

[17] Applying those principles to this case the decision on the 11 January 2012 hearing was given in writing and was entitled as a Pre Hearing Review decision. There was no indication within the decision as to the relevant Rule under which the chairman was acting. The decision was one which was within the case management powers of the chairman and for the reasons given above also within Rule 10. It was, therefore a decision which could have been made under Rule 18(2)(b) of the 2005 Rules. The parties were provided with a pro forma attachment to the two separate decisions made as a result of the hearing on 11 January 2012 indicating what consequence flowed from final decisions but there was nothing in that attachment to indicate whether either of the decisions was final and, if so, on what basis. There was no express indication that this was a final decision and the suggestion that it was final was at best equivocal.

[18] In those circumstances we are satisfied that the tribunal was entitled to conclude that the chairman's decision on the application to amend to add the consultation and information duty against Wallace on 11 January 2012 was made under Rule 18(2)(b) of the 2005 Rules and that the tribunal had jurisdiction to revoke or vary it. The decision to exercise that jurisdiction was based on the tribunal's evaluation of the evidence before it, evidence which the original chairman necessarily did not have available. It was suggested before us that Wallace should properly have been joined pursuant to Rule 10 as a party which may be liable for the remedy sought by the claimant. That submission was not made to the tribunal and no doubt will be considered by it.

[19] For the reasons given we dismiss the appeal and remit the matter to the same tribunal for continuation of the hearing.