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Judgment: approved by the Court for handing down | *Delivered:* **9/12/10**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE INDUSTRIAL TRIBUNAL

BETWEEN:

DAVID McMASTER

Claimant/Appellant

and

ANTRIM BOROUGH COUNCIL

Respondent

Before: HIGGINS LJ, GIRVAN LJ and COGHLIN LJ

COGHLIN LJ (delivering the judgment of the court)

[1] The appellant, David McMaster, brings this appeal from a decision of the Industrial Tribunal dated 21 April 2010 dismissing the appellant's claims for unfair dismissal upon the ground that the appellant's claim had not been brought within a period of 3 months beginning with the effective date of termination of the appellant's contract contrary to Article 145(2) of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order"). For the purposes of the appeal the appellant was represented by Mr Brian McKee while Mr Conor Hamill appeared on behalf of the respondent. The court wishes to acknowledge the assistance that it derived from the carefully prepared and succinct skeleton arguments and oral submissions of both counsel.

The Background Facts

[2] The appellant was employed by the respondent as a driver in one of its household recycling centres between January 2005 and June 2007. During the course of the formal training that he received it was made clear to the appellant that the removal of any waste for payment was an offence constituting gross misconduct. In his evidence before the tribunal the

appellant accepted that he understood that he could not remove waste of any type from the respondent's premises and could not transport waste of any type without the appropriate licence and papers.

[3] The appellant was apprehended by other staff in the act of taking home a length of plastic pipe from the respondent's premises. The matter was investigated by the respondent and the appellant attended a disciplinary hearing as a consequence of which he was dismissed for gross misconduct by letter dated 5 June 2007. There was an internal appeal hearing on 18 June 2007 and the appeal panel notified the appellant by letter dated 25 June 2007 that the decision of the disciplinary panel to dismiss him for gross misconduct had been upheld. The appellant's contractual disciplinary procedure provided at paragraph 12 that, in the event of the penalty being dismissal, an employee could avail of a further right of appeal to an external agency, in this case the Labour Relations Agency ("the LRA"). Such an appeal is heard by an Independent Arbitration Panel appointed by the LRA and according to paragraph 12*(8)* of the procedure*:*

> "The decision of the Arbitration Panel will be final and binding on both parties."

[4] The appellant duly lodged an appeal with the LRA on 28 June 2007 but the appeal hearing did not take place until 28 January 2008. The LRA panel unanimously found that the appellant had committed an offence which the respondent, under the terms of his disciplinary procedure, had reasonably regarded as one of "gross misconduct." However a majority of 2-1 expressed the view that dismissal was not the only possible outcome. The majority believed that a lesser penalty would have been appropriate in the circumstances. The decision of the LRA panel dated 7 February 2008 was forwarded to the respondent and communicated by the respondent to the appellant by letter dated 4 March 2008. The respondent was not prepared to implement the panel's recommendation regarding a lesser penalty or to take any further step and notified the appellant that his dismissal stood.

[5] On 3 April 2008 the appellant's solicitors issued a Step 1 letter under the Statutory Grievance Procedure alleging unfair dismissal and claiming unlawful deduction of wages from 5 June 2007 to 4 March 2008. The appellant then lodged three claims with the Industrial Tribunal dated, respectively, 4 April 2008, 8 May 2008 and 2 November 2008.

The Statutory Framework

[6] The following are the relevant provisions of the 1996 Order:

> "129-(1) Subject to the following provisions of this Article, in this Part `the effective date of termination' (EDR) –
>
> *(a)* in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
>
> *(b)* in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
>
> *(c)* in relation to an employee who is employed under a contract for a fixed term with expires without being renewed under the same contract, means the date on which the term expires.
>
> Article 145-(1) A complaint may be presented to an Industrial Tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) Subject to paragraph (3), an Industrial Tribunal shall not consider a complaint under this Article unless it is presented to the Tribunal –
>
> *(a)* before the end of the period of 3 months beginning with the effective date of termination, or
>
> *(b)* within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months."

The Tribunal Decision

[7] The primary conclusion reached by the Tribunal has been helpfully summarised at paragraph 26 of its decision as follows:

> "26 The tribunal considered that the effective date of termination was 5 June 2007, and considered that the claimant's right of appeal did not have the effect of suspending the dismissal. There was no express term in the claimant's

> contract of employment to this effect. In fact the question of suspension pending the results of an appeal process was not dealt with expressly in the contract at all. The tribunal considered that the contract of employment had in fact been brought to an end by the effect of the dismissal on 5 June 2007. Effectively the claimant ceased to have the right to work under that contract of employment. The tribunal found support for this proposition by the evidence that the claimant had obtained other employment. The tribunal considered that there was nothing stopping the claimant lodging an appeal against the original decision of 5 June 2007. Indeed, Mr McKee (on behalf of the claimant) admitted that authority was against him on this point and that it would have been reasonably practicable to have lodged the claim within 3 months of that date. As such, the tribunal considers that it does not have jurisdiction to consider the claimant's three claims. The tribunal considered that this claimant was not well served by the appeals process in this case. No argument concerning the effect of the Employment (NI) Order 2003 Regulations, (Dispute Resolution) Regulations (NI) 2004 on the effective date of termination was advanced by either counsel. However, as the effect of this legislation is to extend the time-limit for presentation of claims by 3 months this would be insufficient to save the claimant's claims as they are all in excess of 11 months out of time."

The Submissions of the Parties

[8] On behalf of the appellant Mr McKee conceded that, unless there was an express contractual term providing otherwise, in the case of an unsuccessful appeal against dismissal the date of dismissal was the date of the original decision. However he submitted that the effect of a successful appeal was to revive the contract and reinstate the employee. In support of that proposition he relied upon a number of authorities including J. Sainsbury v Savage [1981] ICR 1, Roberts v West Coast Trains Ltd [2005] ICR 254, BBC v Beckett [1983] IRLR 43 EAT and London Probation Board v Kirkpatrick [2005] ICR 965 EAT.

[9] By way of response Mr Hamill emphasised the concession made on behalf of the appellant that he had failed to lodge his proceedings with the

Tribunal within the requisite 3 months and that there was no basis upon which he could argue that it had not been reasonably practicable to do so. Mr Hamill argued that, properly understood, the authorities relied upon by Mr McKee all involved cases in which the applicant's contract had been reinstated by the employer. He argued that the key to the determination of the case was the refusal to re-employ or reinstate by the respondent arguing that an employment relationship could not be recreated by the decision of a third party without the consent of both parties to the original contract. Mr Hamill accepted that the appellant's contract provided that the decision of the LRA Panel would be binding on both parties but, in his submission, failure to comply with that condition could only lead to a civil claim against the respondent for breach of contract. In support of his submissions Mr Hamill relied, in particular, upon a passage from the judgment of Bingham LJ in Batchelor v British Railways Board [1987] IRLR 136 at 139 and the analysis of the law appearing at paragraph [748] of Harvey on Industrial Relations and Employment Law, Division D1 (Unfair Dismissal) 5.E, Internal Appeals.

Discussion

[10] It seems to us that the determination of this appeal centres upon the fairly net point as to whether, in the absence of any relevant contractual provision providing for suspension of dismissal and/or temporary continuation of the contract, the effect of a successful resort by a claimant to a contractual appeal procedure can, of itself, revive the contract of employment.

[11] The fundamental purpose served by an agreed appeal disciplinary procedure is to ensure that both sides have a full and fair opportunity to put their respective cases and secure a just outcome to any dispute including putting right, where necessary, any errors or shortcomings apparent in the initial hearing. As a matter of principle, it is difficult to accept that the effective operation of an appeal could be simply prevented by an employer either refusing an employee the right to resort to such an agreed procedure or by rejecting an outcome considered to be adverse to his or her interest leaving the frustrated employee with compensation for breach of contract as his or her only remedy. While they were essentially delivered *per curiam,* we consider apposite the words of Lord Bridge who, when delivering the judgment in West Midlands Co-Operative Society Limited v Tipton [1986] AC 536 at 546 said:

> "Adopting the analysis which found favour in J. Sainsbury Limited v Savage [1981] ICR 1, if the domestic appeal succeeds the employee is reinstated with retrospective effect; if it fails the summary dismissal takes effect from the original date. Thus, in so far as the original dismissal and the decision on the domestic appeal are governed

> by the same consideration, sc. the real reason for dismissal, there is no reason to treat the effective date of termination as a watershed which separates the one process from the other. Both the original and the appellate decision by the employer, in any case where the contract of employment provides for an appeal and the right of appeal is invoked by the employee, are necessary elements in the overall process of terminating the contract of employment."

[12] In London Probation Board v Kirkpatrick [2005] ICR 965, when delivering the judgment of the EAT, the words of Lord Bridge relating to the analysis extracted from Sainsbury were quoted with approval by Judge McMullen when he said that:

> "It represents what the lay members on this tribunal consider to be absolutely standard employment relations practice since the whole point of internal appeals is to allow for bad or unfair decisions to be put right."

In the course of delivering the judgment of the Court of Appeal in Roberts v West Coast Trains [2005] ICR 254 Mummery LJ noted at paragraph 24 that the appeal decision had been taken within the terms of the relevant contract and that it was not necessary to effect an express reinstatement to the position previously held by the employee nor was it necessary to make an offer to him to enter into a new contract in order to continue the contract of employment. At paragraph 29 he referred with approval to the general principles enunciated by Lord Bridge in Tipton. Arden LJ delivered a concurring judgment in the course of which she said at paragraph 34:

> "The applicant's demotion was not a dismissal and the decision of the appeal process of the employer, made pursuant to the applicant's contract with the employer, to demote the applicant, resulted in the continuation of the original contract of employment. That is the normal result of an internal appeal procedure unless the contract otherwise expressly provides: see per Lord Bridge in *West Midlands Co-Operative Society v Tipton* [1986] ICR 192, 198."

[13] Finally, we refer to the useful review of the authorities by Silber J when giving judgment in the EAT in Ladbrooke Betting and Gaming Limited v Ally

[2006 WL 1666940]. After noting Tipton and Sainsbury Silber J then referred to Roberts and went on to say at paragraph 18:

> "18. Pausing at that stage, that case is, to my mind, clear authority for the proposition that – unless there was a contractual provision to a contrary effect as a result of an appeal process – the decision to dismiss is replaced by the decision which means that the employee is not to be regarded as having been dismissed."

He then proceeded to deal with the argument in that case that there was a distinction in legal effect to be made between a decision that dismissal had been wrongful and a decision that, while dismissal may have been justified, an alternative sanction was appropriate and said at paragraph 23:

> "23. I am unable to accept that reasoning, because in both cases, the effect of the appeal being allowed is to stop the original decision to dismiss from taking effect, but to replace it with a decision which continues the employment of the employee. I agree with the point made by Mr Sendell in his admirable written skeleton that it makes no difference at all whether the decision on the appeal is that the initial decision was wrongly made, or that – although dismissal might have been permissible – some other penalty is more appropriate. Once the decision to dismiss is overturned, the inevitable consequence is (in the absence of any contractual provisions to the contrary) that the employment continues."

[14] Applying the principles derived from the above authorities to the decision of the Industrial Tribunal in this case we have reached the conclusion that the appeal must be allowed. The appellant enjoyed a right of appeal to an external agency, namely the LRA, as an integral part of his contract of employment agreed with the respondent and that contract specifically provided that the decision of the Arbitration Panel appointed by the LRA would be "final and binding on both parties." The appellant exercised that right of appeal and obtained a successful outcome. The legal result is that the plaintiff's contract must be regarded as reinstated at the date of the successful appeal. In our view the refusal by the respondent to accept the contractually binding result of the appeal could arguably, in itself, amount to a repudiatory breach of the contract giving rise to potential grounds for wrongful dismissal. In such circumstances his applications to the Industrial Tribunal are not out of time. The case will be remitted to the Tribunal to proceed accordingly.

[15] At paragraph 26 of the decision the Industrial Tribunal expressed the view that the claimant was not "well served" by the appeals process in this case. This court fully endorses that view. Not only was the eventual decision of the LRA Appeal Panel scarcely a model of clarity but there was also the issue of delay for which there was little by way of either explanation or justification. The contractual provisions relating to External Appeals provide at paragraph 12*(e)* that the Arbitration Panel shall meet the parties to hear the appeal within 20 working days of the matter being referred to the Labour Relations Agency. Paragraph 12*(f)* provided that the decision of the Arbitration Panel shall be given in writing to both parties within 10 working days of the hearing. In this case the applicant appealed to the LRA by letter dated 26 June 2007, the day following his receipt of notification from the respondent that his internal appeal had been dismissed. The appeal to the Arbitration Panel of the LRA was heard on 28 January 2008, some 7 months later with the decision being promulgated on 7 February 2008. On 12 February 2008 the appellant's trade union representative requested that the LRA decision be implemented but no reply was received from the respondent until almost a month later when the respondent indicated by letter dated 4 March 2008 that it intended to take no further action. It is to the appellant's credit that, in the meantime, he had sought and found other full-time employment, a factor that will ultimately have to be considered by the Tribunal. However that produced the somewhat surreal situation in which, contemporaneously, he was also availing of his contractual rights to appeal against the dismissal and lodging his applications with the Industrial Tribunal. In practice, the only way in which he could have safely complied with the time limits in order to ensure that his right of resort to the Industrial Tribunal was protected would have been to lodge his application and seek an adjournment/adjournments pending the outcome of the external appeal procedure. Such an unnecessary investment of time and expense should, if possible, be avoided as unnecessarily increasing the burden on already heavily engaged Tribunals and being contrary to the overriding objective set out in Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005. Consideration might now be given to incorporating additional flexibility into the provisions of Article 145(2) of the 1996 Order in order to avoid such an undesirable result.