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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ARTICLE 22 OF THE INDUSTRIAL TRIBUNALS (NI) ORDER 1996; ARTICLE 90 OF THE FAIR EMPLOYMENT AND TREATMENT (NI) ORDER 1998; AND ORDER 60B RULE 1 OF THE RULES OF THE COURTS OF JUDICATURE 1980

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BETWEEN:

PATRICK BRESLIN

Claimant/Respondent ("the Claimant")

and

MARGARET LOUGHREY

Respondent/Appellant ("the Appellant")

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Before: Treacy LJ & Maguire J

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TREACY LJ

Introduction

[1] This is an appeal against a decision of the Fair Employment Tribunal ('the Tribunal') dated 17 December 2018.

[2] The Tribunal found that the Appellant in the case before it had discriminated against the Claimant on the ground of his sex and also on the ground of his religious beliefs.

[3] It also found that the Claimant had been unfairly dismissed by the Appellant on the basis that his dismissal was part of a course of discriminatory treatment against him.

[4] It ordered the Appellant to pay £30,000 to the Claimant for injury to his feelings.

[5] Before us the Appellant initially contended that the tribunal made two errors of law in reaching the decision it did. She asserts that no evidence was presented by the Claimant in relation to the reasons for his dismissal which could form the basis for the finding that this dismissal was unfair because it discriminated against him on any ground. This first ground was eventually abandoned at the hearing but since it provides an important part of the context to the second ground we consider it helpful to furnish our analysis. The second ground relied upon was the contention that the award of £30,000 for injury to his feelings was 'manifestly excessive'.

Factual Background

[6] The Appellant knew the Claimant for some three years prior to employing him. She acknowledged in her evidence that she was aware he had significant personal issues that affected his health and wellbeing. Prior to taking up employment with her the Claimant had been unemployed for some time. He was claiming benefits and living in rented accommodation.

[7] The Appellant employed him on a regular but informal basis from March 2016 and in May 2016 she provided him with a formal contract of employment. He was employed as an 'assistant' to her which involved attending meetings with her, general administrative duties and general labouring. When he started work with her she offered him the opportunity to live in one of her properties. He accepted, moved into the house she offered in June 2016 and asked for a formal tenancy agreement so he could claim a rent allowance from the NI Housing Executive. Despite repeated requests no tenancy agreement was ever provided. The Tribunal noted that by signing off benefits and moving into the accommodation the Appellant provided the Claimant's only source of income became his wages. In the absence of a formal tenancy agreement he was also reliant upon her in having somewhere to live.

[8] The Claimant gave evidence that in his early contact with the Appellant she had been friendly and civil towards him. He also acknowledged that getting a job from her was a major 'leg-up' for him after his long period of unemployment. He testified that her attitude towards him changed dramatically from May 2016 when she gave him the formal contract of employment. He gave evidence of a phone conversation he overheard on the day he signed off benefits in which the Appellant said 'I've got that bastard where I want him now.' He testified that when she became aware of his presence in the room the Appellant appeared startled and embarrassed and terminated her call. He presumed from the context that she had been referring to him in the call. The Appellant denied that any such call took place.

[9] On the issue of religion the Appellant confirmed that she knew the Claimant was a devout Catholic who attended Mass every day and who kept a number of religious statues in his home. She confirmed that she had bought one of these statues for him.

[10] The Claimant's evidence in relation to his time in the house his employer provided was that he had no privacy there. Shortly after he moved in he returned from work to find she had let herself in while he was out at work and moved one of his statues. His evidence was confirmed by a text message received from his employer in which she asked 'Did you like where I left your silly person?' He testified of his shock that she had entered his home without permission, moved his belongings and then sent him a mocking text about it.

[11] This was the first of a series of incidents in which the Appellant entered the Claimant's home. She frequently took two other female employees with her on these occasions. The pattern was that they would enter the Claimant's home when he was out at work, interfere with the Claimant's statues and other personal possessions, photograph what they had done and send the photographs to him. The nature of the interference with his property is described as follows by the Tribunal:

> "These incidents included:
>
> - a photograph of the Virgin Mary lying on the floor of the claimant's house, along with his personal documents removed from a drawer;
>
> - a photograph of the Virgin Mary statue with a cigarette in its arms and a glass of whiskey in front of it;
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> - a photograph of a teddy bear lying on top of the Virgin Mary, accompanied by a text message saying 'the puppet you worship is no longer a virgin';
>
> - a photograph of a statue of Padre Pio (a Roman Catholic Saint) lying on top of the Virgin Mary in a clearly sexual way."

[12] His evidence in relation to these events was that the Appellant had entered his home without his knowledge or consent. He testified that, after the whiskey incident, he asked her not enter the house again and in response she had shouted 'I pay your fucking wages, not some make believe puppet'. He also testified that she complained that he was 'always running to Mass' and told him he would have to choose between her and God.

[13] In relation to sex discrimination he gave evidence that she constantly berated him because he was male and told him that 'all men are bastards'.

[14] The Appellant's evidence in relation to the photographs and texts she sent to him was that he knew she would be accessing his home and consented to it. She claimed she needed access to the house he was living in because she needed to use

the washing machine there. She alleged that the Claimant knew this and consented to her use of the property. In relation to her treatment of his statues and personal effects she testified that these incidents were harmless: 'just three girls having a laugh', that the Claimant also found it funny and that he had laughed with them. In relation to her criticism of him for 'always running to Mass' she claimed this was 'a bit of banter between friends'.

The Sacking Incident

[15] The Claimant's evidence in relation to the sacking was that it was done by text message on 24 June 2016. The text, which was produced in evidence, read 'you are fucked Paddy….. Get back up to the old house, you will need to sign back on.' He replied asking 'Am I sacked or something?' to which she responded 'Yes.' He asked why and said 'I never did nothing wrong' to which she replied 'Yes u did now go away.'

[16] The Claimant understood this exchange to mean he had been dismissed from his job and as a result he did not present for work the following Monday.

[17] The Appellant's evidence in relation to the sacking took several turns. In her written witness statement prepared as her evidence for the Tribunal and signed and adopted by her after affirmation at the outset of the Tribunal hearing she said that there hadn't been a sacking and, in effect, that the Claimant had become redundant. She stated that his employment ended because 'there simply wasn't any work for him to do', that he knew this and so 'he simply didn't turn up for work'.

[18] In her subsequent oral evidence to the Tribunal she said that the dismissal was 'due to the Claimant not washing and returning the dishes after a meal they had had together at her house.' Under cross-examination she added that the Claimant knew she was not serious about sacking him. He, 'as an employee and a friend', knew that she had dismissed him 'as a friend' and therefore he knew that he could come back to work on Monday. The Tribunal noted that when he didn't turn up for work on Monday she did not contact him to enquire why not.

The Tribunal's Conclusions

[19] Proving discrimination on any protected ground entails two stages. The first stage requires the Claimant to prove facts from which the Tribunal could conclude that a detrimental act had happened on a protected ground. If the Claimant proves such facts the burden of proof moves to the employer who must then prove that the detrimental act was not motivated by any protected characteristic of the Claimant.

[20] In the present appeal the Appellant asserts that no facts were proved about the reasons for the dismissal. The skeleton argument presented on her behalf asserts that there was 'no direct evidence given by the Claimant in relation to the dismissal specifically that it happened on the grounds of his sex and/or religion.' It further

claims 'the evidence was not there to justify an inference being drawn that the applicant was sacked because he was a man and/or catholic. Whilst there were other incidents, later held to be discriminatory, these incidents involved explicit reference to religion or gender. In contrast there was no specific reference to either of these protected characteristics with respect to the dismissal.' For this reason it is asserted the finding of the Tribunal set out below was unsupported by evidence and therefore wrong in law:

> '[The dismissal] flowed from and was inextricably linked to both characteristics and was simply an extension of her less favourable treatment of him. As such … his dismissal was a detriment for the purposes of the relevant discrimination legislation.' [Para 59 Tribunal Judgment].

Discussion

[21] It is important to recall that none of the anti-discrimination legislation that applies in Northern Ireland, regardless of the protected characteristic that is in play, requires a Claimant to present direct evidence of the reasons behind the actions he/she is complaining about. All the legislation, both here and in England, only requires the complainant to prove facts from which the Tribunal 'could conclude' that a discriminatory act had occurred. The Tribunal reminds itself of this at para 36 of its judgement where it states:

> "The burden is on the claimant to prove facts from which the Tribunal could conclude that a detrimental act on prohibited grounds has occurred."

[22] The Tribunal then reminds itself of the case law that considers why direct evidence of discrimination is not required. At para 39 it considers the case of *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 as amended by *Ingen v Wong* [2005] IRLR 258. Para 3 of the amended Barton guidance reads:

> "It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of…. discrimination. Few employers would be prepared to admit such discrimination, even to themselves."

[23] In relation to how it should treat the primary facts presented in evidence, para 5 of the *Barton* guidance reads:

> "At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them."

[24] In relation to the meaning of 'could conclude' in the legislation the Tribunal reminded itself of the guidance given by the English Court of Appeal in the case of *Madarassy v Nomura International PLC* [2007] IRLR 247 where it said 'could conclude' must refer to what *'a reasonable tribunal could properly conclude' from all the evidence before it.*

[25] Before applying the above case law to the facts before it the Tribunal again reminded itself of the primary purpose of the rules in relation to the burden of proof in discrimination cases. It quoted the guidance given by the EAT in *Laing v Manchester City Council* [2006] IRLR 748 in the context of a claim of race discrimination, which guidance is equally applicable in cases of discrimination on grounds of sex or religious belief. The EAT said:

> "The shifting of the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race."

[26] Once again the case law here recognises that the motivation behind an employer's acts of less favourable treatment is likely to be hidden or undeclared or perhaps even unrecognised by the employer itself and therefore it is inappropriate to expect a claimant to provide direct proof of what that motivation might be. For this reason there is no statutory requirement on him to provide such proof.

[27] Having conducted its careful review of the applicable law the Tribunal then applies the law it to the evidence in the case before it. It states in paras 44-47 that it:

> "considered that the evidence adduced by the complainant was much more credibly supportive of his complaints than that of the respondent, who did little to dispute that the incidents had occurred as described by the claimant.
>
> The Tribunal unanimously concluded that the individual acts regarding the religious statues were, in the absence of credible explanation, associated with the claimant's religious beliefs. The respondent's explanation that it was all done as a joke between friends, and with the willing participation of the claimant, did not bear close scrutiny.
>
> The Tribunal found the claimant to be a steady and reliable witness. His evidence was credible, consistent and straightforward, and was supported by the objective evidence of the photographs and text messages. …

> The respondent was found by the Tribunal to be a very unsatisfactory witness. She presented as volatile and aggressive during the hearing, and she repeatedly contradicted herself, not only during her own oral evidence, but also as between her oral evidence and her written statement …"

[28] Having made this assessment of the quality of the evidence before it the Tribunal concluded that the complaint of religious discrimination was made out. It noted that it:

> "accepted the claimant's evidence that he was genuinely and deeply offended, and concluded that he was reasonable in being so. Not only had his privacy been breached, but his employer also openly mocked his religion, to him and to the colleagues she brought with her to his home. She desecrated his religious statues, and, in her role as employer, instructed two of his colleagues to be actively complicit in it.
>
> In those circumstances the Tribunal concluded there was no need for a comparator, as the Tribunal was satisfied that the respondent's conduct as his employer towards the claimant was on the ground of the relevant protected characteristic, namely [his] religion. Such conduct therefore was direct discrimination on the ground of religion. [Paras 50 and 51]."

[29] It also found that his claim of sex discrimination was well founded. It noted that although '*there was no independent evidence*' in relation to this ground, it was persuaded that it had occurred because it *'accepted the claimant's much more credible evidence'*. [Para 52]

The Dismissal

[30] The parties' evidence about the dismissal was evaluated in the same way by the Tribunal. At para 54 it declared itself:

> "satisfied … that the claimant reasonably viewed the message of 24th June 2016 as the respondent dismissing him, confirmed by her when he sought clarification."

[31] It dismissed her evidence on this subject as follows:

> "Her account of what in effect was an assertion of redundancy was regarded by the Tribunal as being untrue, and was in any event flatly contradicted by the respondent in her oral evidence. The Tribunal regarded the late alternative explanation ... [about unwashed dishes] ... as also being untrue." [Para 55]

[32] It then draws the conclusion that is challenged in the present appeal, namely:

> "The tribunal concludes that her treatment of him in dismissing him flowed from and was inextricably linked to both protected characteristics, and was simply an extension of her less favourable treatment of him. As such, his dismissal ... was a detriment for the purposes of the relevant discrimination legislation." [Para 59]

Approach of the Court of Appeal to an Appeal from the decision of a Tribunal on a point of law

[33] We remind ourselves that this is an appeal which is confined to considering questions of law arising from the decision of the Tribunal. It is not a rehearing. The approach to be taken by the Court of Appeal to factual findings made by a Tribunal is succinctly encapsulated by Coghlin LJ in *Mihail v Lloyds Banking Group* [2014] NICA 24 where he stated:

> "[27] This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, 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 (McConnell v Police Authority for Northern Ireland [1997] NI 253 per Carswell LCJ; Carlson Wagonlit Travel Limited v Connor [2007] NICA 55 per Girvan LJ at para [25])."

[34] The relevant principles governing the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance were recently summarised by Lord Kerr at paragraphs [78]-[80] in *DB v Chief Constable* [2017] UKSC 7.

[35] In *Re B (a Child)* [2013] 1 WLR 1911 Lord Wilson said at paragraph [53] that:

> "... where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support; (ii) which was based on a misunderstanding of the evidence; or (iii) which no reasonable judge could

> have reached, that an appellate tribunal will interfere with it."

Conclusion

[36] Having reviewed the careful reasoning of the Tribunal this Court is entirely satisfied that it was entitled to draw the conclusions it did draw from the primary facts before it. Its findings that the appellant discriminated against the respondent on both of the protected grounds he alleged are well supported by his own consistent and reliable evidence, and, in the case of his claim of religious discrimination, also by the supporting evidence of the texts and photographs he received from the appellant. Given the nature and the quality of the evidence presented to it we have no difficulty in concluding that the Tribunal's findings of fact were justified in this case. This includes its finding that there was an unjustified and unexplained dismissal of the respondent which was so closely linked to the other discriminatory actions in the case that it could reasonably be viewed as a continuation of the campaign of discriminatory abuse that occurred in this case.

Quantum

[37] The appellant asserts that the award of £30,000 for injury to feelings in this case was 'manifestly excessive' and therefore the Tribunal made an error of law in making this award. She refers to the guidance issued by the English Court of Appeal in the case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871. The *Vento* guidance identifies three broad bands of compensation that Tribunals may use to assist them in making appropriate awards in cases of injury to feelings. In 2010 the Vento guidance was updated by the EAT in *Da'Bell v NSPCC* [2010] IRLR19 and these updated guidelines were the ones that were in force at the time the Tribunal issued its judgment. The upper limit of the compensation bands set out in the revised guidelines were: lower band £6000; middle band £18000; upper band £30000.

[38] The *Vento* guidance suggested that the maximum award should only be made in the 'most serious cases'. It also stressed that there is 'of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'

[39] There were certainly aggravating features in this case which the Tribunal took into account in setting the level of award. There was the public nature of her campaign against him. At para 50 it notes:

> "His employer had openly mocked his religion, to him and to the colleagues she brought with her into his home. She desecrated his religious statues and, in her role as employer, instructed two of his colleagues to be actively complicit in it."

[40] There was the level of impact this campaign had on this particular employee. The tribunal found that the 'overwhelming tenor' of the communications between them showed he was 'offended, bewildered and upset' by her communications and 'genuinely and deeply offended' by the photographs she sent him. In forming this view it had access to his medical notes and to personal journals which it accepted he had written as these events were unfolding around him.

[41] At para 58 the Tribunal states that the Appellant's behaviour displayed:

> "All the hallmarks of a campaign of control and denigration of the claimant, whom she already knew to be a vulnerable individual, embarked upon by the respondent from her position of control over him."

[42] The Appellant complains that this conclusion 'clearly relates to the fact that she had provided him with somewhere to live as well as employing him' for the purposes of compensation.

[43] It cannot be right that discriminatory conduct which an employer commits in a house that it provides for an employee to live in cannot be taken into account by a Tribunal adjudicating a discrimination complaint. If it were otherwise then migrant workers housed in accommodation the employer provides would have great difficulty in making good any complaint of discrimination.

[44] Whether that be so or not, it is our view there was so much crossover between this Claimant's place of work and the house his employer provided for him to live in that the distinction argued for has no real validity. The Appellant argues that only matters which occurred at work are relevant in this case. His dependence on her for a house as well as a job is just part of the particular factual matrix in this case. That entire matrix is relevant to the evaluation of his claims. This is especially so when the Appellant's conduct, while it happened to originate in the house in which he lived, was plainly relevant to his working life including his relationships with her as his employer and with his colleagues.

[45] The Tribunal concluded at para 61 that:

> "This case properly falls at the upper end of the scale. It is difficult to conceive of a more blatant and corrosive campaign of conduct conducted by the respondent, who additionally involved other members of staff in the humiliation of the claimant, in his house and at work."

[46] It is clear from this finding that the Tribunal carefully considered where in the *Vento* bands this case should fall. Having had the benefit of hearing the oral evidence of both parties, observing their demeanour at hearing and cross referencing

what they said with the other evidence available to them, they came to the unanimous view that the case fell at the upper end of the scale. We see no basis for interfering with the Tribunal's decision.

[47] It is well understood that our Tribunals are regarded as 'industrial juries' whose decisions within their own area of expertise will only be interfered with in very exceptional circumstances. In the case of a challenge to the level of an award of damages this will only happen when the award is 'manifestly excessive'.

[48] In the present case we are satisfied that the Tribunal considered the course of conduct that the Appellant pursued against this employee to be extremely serious. There were many aggravating features in the case which exacerbated its seriousness and the Tribunal rightly took these into account when setting the level. They found that it justified an award at the top end of the applicable band of compensation. We respect that decision and conclude that there is no justifiable basis upon which it could be condemned as 'manifestly excessive'.

[49] Accordingly, we dismiss this appeal.