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Judgment: approved by the Court for handing down | *Delivered:* **27/6/2011**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

TERRY ROONEY-TELFORD

Claimant/Appellant;

-and-

NEW LOOK RETAILERS LIMITED

Respondent.

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Before: Coghlin LJ, Hart J and Sir John Sheil

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HART J (delivering the judgment of the court)

[1] The claimant/appellant appeals from a majority decision of an industrial tribunal dated 11 January 2011 that it had no jurisdiction to entertain the claims of the claimant/appellant. The appeal gives rise to a net issue as to the correctness of the decision of the majority of the industrial tribunal that it did not have jurisdiction to consider her claims because she had been constructively dismissed, and as she had failed to send a written grievance to her employer before she entered her claim in the Industrial Tribunals the tribunal did not have power to entertain her application. The tribunal accepted the contention of the respondent that the word "dismissed" has the meaning given to it in Article 127(1)(a) and (b) of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order) and that this did not include constructive dismissal. As Regulation 6(1) of the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 (the 2004 Dispute Resolution Regulations) prescribes that the grievance procedures apply to any grievance arising out of constructive dismissal, and as the appellant did not send a written grievance to her employer before she entered her claim, the tribunal did not have jurisdiction to hear the complaint. The tribunal did not accept that it was not reasonably practicable for the appellant to put in a grievance.

[2] Ms McCrissican on behalf of the appellant initially argued that:

(i) The appellant was constructively dismissed because the conduct of the respondent's employers led her to resign. She accepted that in order for a claim for constructive dismissal to succeed the employer must first of all be in breach of contract, applying the test in Western Excavating (ECC) Limited v Sharp (1978) ICR 221,applied in Brown v Merchant Ferries Limited [1998] IRLR 682, a decision of this court.

(ii) She went on to argue that if the appellant was constructively dismissed, then the grievance procedure requirement under Regulation 6(4) of the Dispute Resolution Regulations requirement would not apply to her because it was not reasonably practicable for her to lodge a grievance.

[3] However, as Ms McCrissican developed her argument it became apparent to the court that the real issue was not whether the appellant had been constructively dismissed, but whether the respondent's employees in the course of the meeting deliberately manoeuvred the appellant into resigning. The main thrust of her submission appeared to be that, contrary to the tribunal's finding, there was an intention on the part of the respondent's employees to dismiss her, and that the conclusion of the majority was perverse. In the light of this we invited Ms McCrissican to apply for leave to amend her notice of appeal. Mr Algazy on behalf of the respondent pointed out that this application was made very late in the day, but ultimately he left the matter in the hands of the court. In all of the circumstances we considered that the justice of the case required the real issue to be properly identified in the amended grounds of appeal and we gave leave to the appellant to file an amended notice of appeal to add a further ground that the finding was perverse.

[4] Before turning to consider the respective submissions of the parties it is necessary to set out the facts as found by the majority of the tribunal. The relevant facts can be briefly stated. The appellant started work with the respondent around 4 February 2008 as a store manager at the respondent's store in Downpatrick. Later in 2008 she went on one year's maternity leave in order to have her second child. After that period of maternity leave she returned to work on 11 November 2009, and on that date was invited to attend a return to work interview. This took place in the Downpatrick premises, and in addition to the appellant, the others present were her line manager, Ms Wendy Connolly, and the respondent's human resources manager, Ms Nicola McDermott.

[5] Although there was a factual dispute as to what occurred, the majority of the tribunal preferred the appellant's version of events where there was a conflict of evidence. In particular, the majority considered that the case for

the respondent was weakened by the respondent's failure to produce Ms McDermott as a witness, despite Ms McDermott having been the principal participant on behalf of the respondent in the interview which resulted in the appellant's resignation. Before the appellant embarked upon her period of maternity leave she was required to open the store on one or two mornings a week at 7.00 am. At the return to work interview on 11 November 2009 she was told that she would now have to open the store at 7.00 am every weekday, and work some late nights and at weekends as required. We should say that there was apparently a dispute as to whether she was required to open at 7.00 am or 7.30 am, but the tribunal did not find it necessary to determine this. The tribunal found that the appellant was told that she would have to start early each day, despite this information being incorrect. Ms Connolly's evidence was that the appellant would not be required to work to cover every early start in the week, but would only have been required to do what she had done before she went on maternity leave, that is an average of 1-2 early starts per week. Despite Ms Connolly being aware that the appellant was being told something which was incorrect, the tribunal found that she did not intervene to correct this misapprehension.

[6] The appellant told Ms McDermott that because of her childcare commitments she would not be able to manage an early start everyday, but could do 1-2 early starts a week as before. The tribunal also found that the respondent's handbook containing the appellant's contract of employment contained a provision which would allow her apply for flexible working hours, but the appellant was not told, or reminded, of this provision. The appellant was then asked by Ms McDermott did she wish to resign, was handed a piece of paper and told what to write.

[7] On behalf of the respondent Mr Algazy accepted that whilst the respondent could be said to have acted insensitively, and he conceded, had handled the situation badly, nevertheless he founded his argument upon the express finding by the majority of the tribunal that:

> "Whilst the majority accepted that the claimant had an unhappy prior relationship with Ms Connolly, it found no credible evidence that Ms Connolly and Ms McDermott intended to dismiss her."

He went on to submit that the appellant was therefore bound by these findings of fact, and so could not establish that the decision of the majority was wrong, and he reminded the court of the very high threshold set for an appellant who wishes to show that the decision of the tribunal was perverse, referring to Crofton v Yeboah [2002] IRLR 634. In that case at paragraph 92 Mummery LJ said that an appeal can only succeed on the grounds of perversity:

> "where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached."

[8] We were referred to a number of decisions in other cases to which it is unnecessary to refer because decisions as to whether an employee has been forced to resign, dismissed, or constructively dismissed are highly fact specific. We appreciate, and must give proper recognition to this, that the tribunal not only had the advantage of seeing and hearing from the witnesses, but made certain findings of fact. However, an appellate court is entitled to consider whether the inferences drawn from the primary findings of fact by the lower court are correct, although, as Crofton v Yeboah emphasised, that deference to the decision-making process of the lower court requires the appellate court to respect that decision unless it is one which no reasonable tribunal on a proper appreciation of the evidence would have reached. As Lord Radcliffe put it in Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 at p. 56 in an oft-quoted passage which has been applied on many occasions, as for example in McConnell v Police Authority for Northern Ireland [1997] NI at p. 253 per Carswell LCJ,

> "…it may be that the facts found are such that no person acting judicially and properly instructed in the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law."

[9] In this case we consider that the only proper inference open to the tribunal was that the respondent deliberately contrived a set of circumstances which had the effect of provoking the appellant into resigning. We consider that this is the only proper inference to be drawn from the respondent leading the appellant to believe that she would be required to start at 7.00 am each day she worked, when it was known to Ms Connolly that this was not the case. This was of vital importance to the appellant who now had two children, and who, not surprisingly, stated that she could not manage to fulfil such an obligation in view of her childcare commitments. Nevertheless, notwithstanding that the respondent therefore knew that the appellant could not work such hours, a decision was made by Ms Connolly not to intervene to tell the appellant that she would only be required to start early on 1 or 2 days a week on average, as had been the position prior to her going on maternity leave. Not only that, but the respondent's employees failed to tell the appellant that she was entitled to apply for flexible hours in accordance with the company's handbook. We consider that the evidence points

unmistakably to the contrived nature of the meeting which culminated in the appellant being asked did she wish to resign. That conclusion is strengthened by the contents of the list of topics that were sent to Ms McDermott for discussion. It is noteworthy that nowhere in the list of topics is there any reference to the appellant having to start early on every working day. In addition, the handwritten note made of the meeting records Ms McDermott as saying in response to the appellant's statement that she could not do these hours, and that a position as part-time deputy manager would not suit her either, "So are you saying you have to resign", to which the appellant is noted as replying "Yes". A further significant pointer is that when the appellant applied for benefits and was told that she could not receive them, she was asked to provide a letter from her employer stating that they could not accommodate her requirement for flexible working hours. When the letter was eventually provided by the respondent, the reason for the appellant's leaving was described as a "non-return from maternity leave". We are unable to see how such a statement could have been made in view of the course of the events during the return to work interview.

[10] For these reasons we have concluded that the majority of the tribunal erred in law by making a perverse finding that Ms Connolly and Ms McDermott did not intend to dismiss the appellant. On the contrary, the evidence to which we have referred satisfies us that, as we have already stated, this was a contrived set of circumstances manipulated by the respondent in order to provoke the appellant into resigning on the basis of a materially incorrect state of affairs represented to her in relation to an exceptionally important part of her working conditions. The only conclusion which the majority of the tribunal could have drawn from the facts they found was that the appellant was dismissed because she was manipulated into resigning. That being the case, we allow the appeal and quash the decision of the tribunal. We remit the matter to a differently constituted tribunal to consider the appellant's case in the light of this court's decision, and to assess any compensation that may be due to the appellant in the light of such aspects of her claim as have not yet been considered by an industrial tribunal.