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Judgment: approved by the Court for handing down | *Delivered:* **16/10/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF THE EMPLOYMENT RIGHTS (NORTHERN IRELAND) ORDER 1996

AND IN THE MATTER OF THE DECISION OF THE INDUSTRIAL TRIBUNAL DATED 6 SEPTEMBER 2007

BETWEEN:

WILLIAM JOHN McCONNELL AND GLENN LARMOUR

Appellants;

-and-

BOMBARDIER AEROSPACE – SHORT BROS PLC

Respondent.

SIR ANTHONY CAMPBELL

The background.

[1] The appellants claim that when a number of workers were made redundant by the respondents the principal ground upon which they were selected was in the case of one of the appellant's trade union activity as a shop steward and of the other trade union activity as a shop steward, together with his responsibilities as a health and safety representative.

[2] Each of the appellants applied for interim relief under Article 163 of the Employment Rights (Northern Ireland) Order 1996 (the Order) and at a preliminary hearing the Tribunal held that as it was arguable that their claims fell within Article 132 and Article 136 of the Order it had jurisdiction under Article 163 to hear their applications for interim relief.

[3] The respondents appealed this decision by way of case stated and on 10 July 2007 this Court held, by a majority, that the Tribunal had jurisdiction to entertain an application for interim relief.

[4] When the appellants' applications for interim relief were heard by the Tribunal on 7 August 2007 it was accepted by counsel for the appellants that there was a genuine redundancy situation. However, he submitted that the principal reason for the dismissal of the appellants was not redundancy but their trade union activities and health and safety responsibilities. The respondents' case was that the claims fell within Article 137 of the Order as it was being alleged that their selection for redundancy had been made on unlawful grounds. It is clear from Article 163 of the Order (as confirmed by the earlier decision of this Court) that where an employee presents a complaint that he has been unfairly dismissed and the reason for the dismissal (or if more than one the principal reason) is one of those specified in Article 137 an application for interim relief cannot be made.

[5] The Tribunal decided that the appellants were not entitled to this relief as their claims fell within Article 137 and at the request of the appellants it stated a case and posed the following questions for the opinion of this Court;

(i) Given the facts found by the tribunal, the concession made by counsel for the appellants that there was a genuine redundancy situation in this case and the contents of the claim forms, was the tribunal correct in law in concluding that this was a case which fell within Article 137 of the Order and therefore outside Articles 132 and 136?

(ii) Was the tribunal correct in law in concluding that interim relief is not available in a case which falls within the scope of Article 137 of the Order?

(iii) Was the tribunal correct in law in rejecting the contention on the part of the appellants that, notwithstanding that there was a genuine redundancy situation in this case, dismissal for trade union/ health and safety reasons under Article 136 and 132 of the Order could displace or co-exist with redundancy as the principal reason for the dismissal of the appellants?

(iv) In all the circumstances, was the tribunal correct in law in concluding that the appellants are not entitled to interim relief?

The Tribunal's decision.

[6] The facts found by the Tribunal, based on a statement agreed by the parties were as follows;

(i) A redundancy situation was identified by the respondent for 645 redundancies in or about the autumn of 2006.

(ii) The respondent sent the union advance notification of redundancies as required by Statute.

(iii) 180 employees accepted voluntary redundancy.

(iv) The respondent identified 141 employees for compulsory redundancy, including the claimants Mr McConnell and Mr Larmour.

(v) A total of 345 employees were dismissed in the period from 10th February 2007 to 24th March 2007.

[7] On these facts, together with the content of the appellants' claim forms, in which it were said that the system used for selection "was unduly subjective and allowed the respondents to elect employees for redundancy on the basis of unlawful and discriminatory considerations," the Tribunal concluded that the case fell within Article 137. It arrived at this decision having taken into account the scale of the redundancies and ruled out the possibility that this was a situation in which a redundancy had been created for the purpose of bringing about the dismissal of the claimants for trade union and health and safety reasons.

The legislation

[8] An employee has a right under the Order not to be unfairly dismissed by his employer. In determining whether the dismissal of these appellants was fair or unfair it is for the respondents to show under Article 130 (1);

(a) the reason (or, if more than one, the principal reason) for their dismissal, and

(b) that it was that they were redundant.

[9] Once this has been established it remains to be determined under Article 130(4) whether the dismissal is fair or unfair (having regard to the reason shown by the employer) and this –

(a) depends on whether in the circumstances (including the size and administrative resources of the respondents' undertaking) the respondents acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the appellants, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

[10] If the reason for dismissal (or if more than one the principal reason) is in connection with health and safety at work (Article 132) or trade union

membership or activity (Article 136) the appellants are to be regarded as unfairly dismissed.

[11] Where the issue is one of redundancy Article 137 provides in paragraph (1) that an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if-

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason, or, if more than one, the principal reason for which the employee was selected for dismissal is (inter alia) health and safety or trade union activity.

[12] Article 163 provides for interim relief to be granted where an employee presents a complaint to an industrial tribunal that he has been unfairly dismissed by his employer and the reason, or, if more than one, the principal reason for the dismissal is one of those specified in Articles 132(1)(a) and (b), 133(1), 134 or 136(1) of the Order. Subject to certain conditions, which it is accepted have been satisfied by the appellants, if it appears to the tribunal that it is likely that on determining the complaint the tribunal will find that the reason, or, if relevant the principal reason, is one of those specified in Articles 132(1)(a) and (b) (health and safety) or 136(1) (trade union activity) it may grant interim relief in one of the forms specified in Article 164.

The appellants' case

[13] Mr Hendy QC (who appeared with Mr Potter for the appellants) submitted;

(i) Redundancy is potentially a fair reason for dismissal but it may not be conclusive as it remains to be decided under Article 130 (4) (a) and (b) whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissal and this is to be determined in accordance with equity.

(ii) If the three conditions in Article 137(1) are fulfilled an employee who is dismissed on the ground of redundancy is to be regarded as unfairly dismissed and Article 130 (4) provides enhanced protection. A similar overlap is seen in Articles 134,136 and 137.

(iii) In its initial decision on the issue of the jurisdiction to grant interim relief the Tribunal considered that the claims, as framed, fell squarely within the scope of Article 137 (1)(b) in particular (which makes dismissal for redundancy unfair if the circumstances constituting the redundancy applied equally to one or more other employees holding similar positions who have not been dismissed). It took the view that they fell arguably within Articles 132 and/or 136 of the Order. In its second decision the Tribunal was in no doubt that this was a case where there was a genuine redundancy and the respondent had not created or fabricated a redundancy for the purpose of bringing about the dismissal of the appellants for trade union and or health and safety reasons. It was accepted by the appellants that a substantial number of employees were also made redundant however, in order to establish the reason for the dismissal of an individual employee his case had to be considered separately. Answering the question does a redundancy situation exist does not provide an answer to the question what was the reason for the dismissal of this claimant?

(iv) In the alternative if Article 137 is relevant to the issue of jurisdiction under Article 163 this does not prevent Article 163 applying in selection cases as an employee can claim to have been unfairly dismissed under Articles 134 and 136 and also under Article 137. In the present case the appellants say there was a redundancy and it was a principal reason for dismissal but a principal reason was also health and safety and trade union activity. There may be more than one principal reason for dismissal.

The respondents' case

[14] Mr Brangam QC submitted on behalf of the Respondents;

(i) that the appellants' claims fell within Article 137 of the Order as it was alleged by them that they had been unfairly selected for dismissal on unlawful grounds. Counsel drew a distinction between dismissal for misconduct and dismissal through redundancy for economic reasons.

(ii) Article 130(4) leaves it open to an employee to raise other issues making dismissal unfair and provides guidance as to how the Tribunal is to assess the end result.

Conclusion

[15] The issue for the Tribunal on the hearing of the application for interim relief was whether it was likely that on determining the appellants' complaints it would find that the reason, or if more than one the principal reason, for their dismissal was trades union activity or health and safety activity. A person who is dismissed is to be taken to be dismissed by reason

of redundancy if the dismissal is "wholly or mainly" attributable to one of the economic situations provided for in Article 174 of the Order. The Tribunal found that there was a true redundancy in the respondent's business and this made it unlikely that on determining their complaints it would decide that the appellants' trades union activity or health and safety activity was the sole or principal reason for their dismissal. There remains a different issue to be determined by the Tribunal at the hearing namely, were they unfairly selected for dismissal under Article 137. This is not a question that permits an application for interim relief to be made under Article 163 (1) and I would therefore answer each of the questions posed by the Tribunal in the affirmative and dismiss the appeal.

HIGGINS LJ

[1] This is a case stated by an Industrial Tribunal. The appellants are two former employees of the respondent company. On 15 February 2007 the appellants lodged claims with the Industrial Tribunal alleging unfair dismissal. In paragraph 7.1 of their claims each of them alleged they were employed by the respondent as a fitter until their dismissal by way of redundancy on 9 February 2007. Each challenged the grades determined in the respondent's assessment of their Productivity and Performance. All three also alleged that the system for selection for redundancy was unduly subjective and that in dismissing them by way of redundancy the respondent took improper account of their trade union activities. One of them alleged that in addition improper account was taken of his activities as a health and safety representative. Both stated in their application forms that they wished to claim Unfair Dismissal and to make an application under Article 163 of the Employment Rights (Northern Ireland) Order 1996 (the Order) for interim relief pending determination of the Unfair Dismissal claim.

[2] The appellants' applications for interim relief came on for hearing on 21 March 2007. At the hearing counsel on behalf of the respondents submitted that the Tribunal did not have jurisdiction to hear and determine the appellants' applications for interim relief because Article 163 of the 1996 Order did not apply in redundancy cases. The Tribunal concluded that it did have jurisdiction under Article 163 to hear and determine the applications for interim relief. The appellants requested the Tribunal to state a case for the Court of Appeal to determine the following question of law –

> "Was the Tribunal correct in law in deciding that it had jurisdiction to consider the respondents' application for interim relief under Article 163."

[3] On 10 July 2007 this Court held, by a majority, that the Tribunal had jurisdiction to entertain an application for interim relief. I held that the Tribunal did not have jurisdiction to hear the respondents' claims for interim relief.

[4] Following the decision of this Court the appellants' applications for interim relief came on for hearing before the Tribunal on 7 August 2007. The Tribunal was provided with an agreed statement of facts. Counsel on behalf of the appellants accepted, for the first time, that a genuine redundancy situation existed at the appellants' place of work. However it was submitted that the principal reason for the dismissal of the appellants was their trade union activities and health and safety responsibilities. The respondents submitted that the claims of both appellants fell to be considered under Article 137 as it was alleged that they had been selected for redundancy

because of their union activities and health and safety responsibilities, which are not permitted reasons under the legislation.

[5] The Tribunal found the following facts –

(i) A redundancy situation was identified by the respondent for 645 redundancies in or about the autumn of 2006.

(ii) The respondent sent the union advance notification of redundancies as required by Statute.

(iii) 180 employees accepted voluntary redundancy.

(iv) The respondent identified 141 employees for compulsory redundancy, including the claimants Mr McConnell and Mr Larmour.

(v) A total of 345 employees were dismissed in the period from 10th February 2007 to 24th March 2007.

[6] The Tribunal concluded that this was a genuine redundancy situation which led to the dismissal of 345 employees and that this was a case which fell within the "scope of Article 137, that is alleged selection for redundancy on unlawful grounds". Accordingly the Tribunal concluded that the appellants were not entitled to interim relief.

[7] The appellants requested that the Tribunal state a case for the opinion of this Court on the following questions –

> (v) Given the facts found by the tribunal, the concession made by counsel for the appellants that there was a genuine redundancy situation in this case and the contents of the claim forms, was the tribunal correct in law in concluding that this was a case which fell within Article 137 of the Order and therefore outside Articles 132 and 136?
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> (vi) Was the tribunal correct in law in concluding that interim relief is not available in a case which falls within the scope of Article 137 of the Order?
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> (vii) Was the tribunal correct in law in rejecting the contention on the part of the appellants that, notwithstanding that there was a genuine redundancy situation in this case, dismissal for trade union/ health and safety reasons under Article 136 and 132 of the Order could displace or co-exist with redundancy as the principal reason for the dismissal of the appellants?

(viii) In all the circumstances, was the tribunal correct in law in concluding that the appellants are not entitled to interim relief?

[8] The main submissions of counsel are set out in the judgment of Campbell LJ and I need not repeat them in this judgment. I have not been persuaded that I should alter the view I expressed in the earlier decision when I decided that interim relief was not available to these appellants. Article 164 sets out the threshold for an application for interim relief to succeed. It must appear to the Tribunal at the time of that application that it is likely that when determining the complaint at the full hearing the Tribunal will find that the reason (or if more than one, the principal reason) for dismissal was one of those specified in Article 132, 133 134 and 136 and not redundancy. It was submitted by counsel on behalf of the appellants that there could be more than one principal reason of dismissal. I do not think that is so. The word 'principal' means primary and there is only ever one primary reason, all others are subordinate. That this was the intention of the legislature is evident from the words in parenthesis. It is clear that the principal reason in this case was redundancy. The appellants allege selection for redundancy by reason of their other activities. Even if that were so the principal reason for dismissal was redundancy. Therefore I would answer each of the questions posed in the case stated in the affirmative.

GIRVAN LJ

[1] The background to this appeal is set out in the judgments delivered by this court on 10 July 2007 in an earlier appeal by way of case stated from the Industrial Tribunal ("the Tribunal"). As a consequence of the decision of this court the Tribunal proceeded to determine the issue whether the appellants were entitled to interim relief under Articles 163 and 164 of the Employment Rights (Northern Ireland) Order 1996 pending determination of their complaints of unfair dismissal. In its decision issued on 6 September 2007 the Tribunal concluded that the appellants were not entitled to interim relief. The appellants requisitioned a case stated on 16 October 2007 and the Tribunal agreed to state a case and pose various questions, the essential question being whether in all the circumstances the Tribunal was correct in law in concluding that the appellants were not entitled to interim relief.

[2] The appellants' applications for interim relief were heard on 7 August 2007. The Tribunal did not hear oral evidence but was provided with an agreed Statement of Facts. The Tribunal found that the respondent identified a need to make 645 employees redundant in the autumn of 2006. The relevant union was notified of the proposed redundancies as required by statute. 180 employees accepted voluntary redundancy and 141 employees were identified for compulsory redundancy including the appellants. A total of 345 employees were dismissed in the period from 10 February 2007 to 24 March 2007.

[3] Paragraph 11 of the case stated states:-

> "Detailed submissions were made by counsel for both parties. Counsel for the appellants submitted that, since the Court of Appeal held the Tribunal did have jurisdiction to hear the appellant's applications for interim relief, it was now a matter for the Tribunal to determine what was the principal reason for dismissal in this case. Counsel for the appellants accepted that there was a genuine redundancy situation. However, he contended that, in this case, the principal reason for the dismissal of the appellants was not redundancy, but rather the appellants' trade union activities and/or health and safety responsibilities. He submitted that the appellants had been targeted for dismissal by the respondent and that this took the case outside Article 137 of the Order. It was necessary for the Tribunal to consider the specific dismissal of the individual rather than the general situation."

[4] It appears from paragraph 4 of the decision of the Tribunal that counsel for the claimants sought to introduce evidence as to the history of the appellants trade union and health and safety activities including instances of where the claimants had been in conflict with management. He contended that this evidence would demonstrate that whilst there was a redundancy process the respondent took the opportunity to dismiss the claimants for trade union/health and safety reasons. He sought to call detailed evidence in relation to the selection and marking of the claimants and indicated that the evidence would take some considerable time.

[5] On the basis of the facts as found and the concession by the appellant that there was a genuine redundancy situation the Tribunal concluded that there was indeed a genuine redundancy situation which led to the dismissal of a total of 345 employees during the relevant period. The Tribunal on its interpretation of the earlier judgment of the Court of Appeal concluded that the case being made by the appellants was one of unfair selection for redundancy thus bringing their cases under Article 137 of the Order if the case of unfair dismissal were ultimately made out. The Tribunal could see no distinction between the concept of the appellants being targeted for redundancy and the language of Article 137 of the Order. It concluded that the appellants were not entitled to interim relief.

[6] The majority decision in the Court of Appeal in the earlier case stated upheld the original decision of the Tribunal that it had jurisdiction to entertain the interim relief claims and rejected the argument that the applications should fail in limine because the cases clearly and obviously fell within Article 137. The Tribunal had a duty to consider the applications provided the statutory requirements for jurisdiction were satisfied and the majority concluded in the earlier decision that the statutory requirements for jurisdiction existed. All three judgments of the earlier Court of Appeal decision, however, agreed that interim relief cannot be granted in a case which if successful falls within Article 137. In paragraph 15 of my judgment I stated that the Tribunal had not at that stage moved to the point of considering whether the claimants had discharged the onus lying on them of showing that they were likely to succeed in establishing that they were dismissed for one of the inadmissible reasons. It would have to reach conclusions on that question and in doing so would have to consider the case made by the respondent that the cases if made out fell within Article 137 and that there was a genuine redundancy situation showing that at their height the appellants' claims were claims of unfair selection for redundancy.

[7] For the appellants to succeed in their interim relief applications under Article 163 they had to persuade the Tribunal that it was likely that in determining the relevant complaints the Tribunal would find that the reason for the dismissals fell within Article 132(1) or 136(1). If it was more likely that the Tribunal would find that the reason or principal reason for dismissal was

that the appellants were dismissed for redundancy, even though the reason for their selection for redundancy fell within Articles 132 or 136, then the appellants would not be entitled to interim relief. It was not, as counsel for the appellants argued before the Tribunal, incumbent on the Tribunal at the interim relief stage to determine what the principal reason for dismissal was. It was for the appellants to show the Tribunal that they were likely to establish at the full hearing that these were not cases of dismissals by way of redundancy in which they were unfairly selected but rather that these were cases of dismissals not for redundancy but in breach of Articles 132 or 136. If it is more likely that the cases fell within Article 137 then interim relief would be inappropriate. At the stage of an interim relief application the Tribunal did not have to be clearly satisfied that the cases fell within Article 137. If it was likely that the dismissals were for the principal reason of redundancy even if the applicants were likely to succeed in establishing that they had been unfairly selected then the appellants could not succeed in their claim for interim relief.

[8] The Tribunal approached the question in a different way and expressed itself satisfied that the cases clearly fell within Article 137. As noted the question whether a particular outcome is likely or not differs from the question whether the outcome is clear. Since the Tribunal at the stage of an interim relief application is required to decide the matter on a provisional basis pending a full consideration of the matter the Tribunal went further than it should have gone in rejecting the interim relief application. It is, however, necessarily implied in the Tribunal's decision that it was not persuaded that it was likely that the appellants would succeed in establishing that their dismissals were in breach of Articles 132 or 136 and it was satisfied that the cases were more likely to fall within Article 137. On the material before the Tribunal that was the proper conclusion to be drawn.

[9] Bearing in mind that an interim relief application is intended to be heard expeditiously and that it is not intended to be a lengthy trial the suggestion made by counsel for the appellants that detailed evidence should be called in relation to the selection and marking of the claimants was misconceived. It was open to the appellants to present a succinct written statement on oath of the material relief on in support of the applications if they considered that further evidence should be put before Tribunal in support of the applications. It would have been open to the respondents to reply to such a succinct written statement by a succinct and written statement of their own. Even if such evidence had been adduced the appellants would still have faced the hurdle of persuading the Tribunal that the case was more likely to be an Article 132 or 136 case rather than an unfair selection case under Article 137. For the reasons given having regard to the manner in which the case was presented, to the concession that redundancies were truly necessary and to the formulation of the claims as unfair selection cases the Tribunal was bound to conclude that the appellants had not shown that it was more likely that the cases fell within Articles 132 and 136 than within Article 137. For these reason I too conclude that the Tribunal's

decision to dismiss the interim relief claim of the appellants was correct. I would answer the Tribunal's fourth question "Yes." It is not necessary to answer the other questions but I agree with Campbell LJ's proposed disposal of the appeal.