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Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 14/02/13

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

BETWEEN:

ANTRIM BOROUGH COUNCIL

Appellant-Respondent;

-and-

MALACHY McCANN

Respondent-Claimant.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of an industrial tribunal ("the Tribunal") which found that Malachy McCann ("the claimant") had been unfairly dismissed from his employment by Antrim Borough Council ("the employer") (as a fitness instructor). The employer appeals on the grounds that the Tribunal failed to identify or determine the true reason for dismissal; the Tribunal failed to apply the band of reasonable responses test; the Tribunal failed to take into account relevant matters; the Tribunal took into account irrelevant matters and the Tribunal's decision was perverse. Although the notice of appeal sets out six points of law the real question of law raised in the appeal can be compendiously reduced to one: Did the Tribunal err in law in reaching its conclusion that the employer had unfairly dismissed the claimant?

[2] Mr Richards appears on behalf of the employer. Mr Sands appeared on behalf of the claimant. The court is indebted to each for his well marshalled and closely argued skeleton argument.

Factual background

[3] In its decision dated 29 June 2012 the Tribunal purports to set out what it called "Findings of Fact" in paragraphs [4] to [51]. As not infrequently happens in such decisions the recorded "findings of fact are not limited to the conclusions reached by the Tribunal on the evidence adduced but interspersed with a resumé of disputed evidence. This does not assist an appellate court which on occasions is left with a record of what a witness is reported to have claimed or said in the course of the hearing without the tribunal making clear what conclusion it has reached on the relevant evidential material. In formulating its decision a tribunal should follow the course of succinctly recording the relevant evidential material and set out its analysis of the evidence where this is necessary and set out its conclusions from its analysis of the evidence. It can then set out its findings of fact. Such findings will emerge from the conclusions arising from undisputed evidence or from the Tribunal's conclusions reached after analysis of disputed evidence.

[4] The Tribunal did reach certain clear conclusions which establish that:

(1) The claimant was from November 1999 employed as a fitness instructor by the employer at a leisure and fitness centre known as the Antrim Forum until he was dismissed on 7 March 2011. The claimant had family problems arising from his wife's hospitalisation for major abdominal surgery.

(2) He has two children, then aged 3 and 5 and domestic arrangements had broken down because of his wife's ill-health. Having had time off to deal with the family problems he returned to work, initially for a two week period on a phased basis.

(3) On 1 December 2010 the claimant met his line manager Elizabeth Gorman and Elizabeth Wilson for a rehabilitation interview. The employer operates a work-life balance policy which was explained to the claimant. The claimant informed the employer that his wife's operation had not been successful and the family was waiting for advice from the consultant on what had gone wrong. Reference was made to a scan to be carried out on 7 December. The claimant and the employer agreed to review the matter after the appointment with the consultant. On 3 December the claimant's wife received notice of an appointment on 6 December 2010 at 2.40 pm. The claimant learnt of that appointment later that day after his shift ended.

(4) On 6 December 2010 the claimant tried on arrival at work to speak to the duty manager Mr Gorman (the husband of Elizabeth Gorman). He managed to speak to him at midday. He asked for time off for a hospital appointment and

he was given permission to leave his shift two hours early. He did not make clear at that discussion that the hospital appointment was for his wife. There was no discussion about the question whether time off would be paid or unpaid.

(5) On 7 December 2010 during a discussion about bad snow conditions on 6 December 2010 the claimant told those present that he had been involved in having to drive to Whiteabbey as his wife had a hospital appointment that day. Present at that discussion was Ms Jackie Fulton, assistant manager at the Antrim Forum and who lived in the area. She had management responsibility for 17-18 staff including the staff in the fitness suite. This included the claimant.

(6) On 13 December 2010 Elizabeth Gorman told Ms Fulton that the claimant's time sheet for the previous week had been returned by the wages section with a query relating to a claim for payment for two hours for a hospital appointment.

(7) The claimant having been requested to produce a copy of the appointment letter, a duplicate of the letter of appointment was produced the original of which had been left at the hospital.

(8) At an informal and unrecorded discussion between the claimant and Ms Fulton and Elizabeth Gorman, the claimant was informed that the employer's policy was that paid time off for hospital appointments only applied to staff and not to family members. Mrs Gorman gave evidence that when she asked the claimant why he had claimed payment when the hospital appointment was in fact for his wife he said he was "not sure".

(9) In fact the claimant received no payment for the period when he was absent for his wife's hospital appointment.

(10) The claimant's evidence was that when he completed his time sheet he believed that he was entitled to be paid for his absence on foot of the employer's family friendly policy. He had been reassured at the rehabilitation meeting that the respondent would continue to help him in relation to his family circumstances. The Tribunal considered that that was a reasonable assumption in all the circumstances including the wife's unfitness to drive.

(11) The relevant terms and conditions of the claimant's employment provided:

> "5.1 All employees are permitted one hour off work with pay to attend routine appointments with the doctor, dentist or optician. Such appointments should as far as possible be arranged for the start or

> end of the working day in order to minimise disruption of the services. In all cases time off to attend medical appointments must be authorised by line management. Such appointments are not recorded as annual leave or sickness absence.
>
> 5.2 In relation to hospital appointments, the Council recognises that the duration and timing of appointments is generally outside of the control of employees and in view of this reasonable time off with pay will be agreed with the line manager. Any abuse of this system will be viewed as a disciplinary matter.
>
> 5.3 All appointments must be evidenced by an appointment card, letter or agreed alternative."

(12) Ms Fulton invited the claimant to attend and he did attend the preliminary investigation meeting on 10 February 2011 to consider an allegation against the claimant of gross misconduct namely the dishonest completion of documents in order to obtain payment for wages on 6 December 2010. At that meeting the claimant was accompanied by a trade union representative. Ms Fulton was accompanied by a human resources officer.

(13) At the start of the meeting the claimant provided a document which stated:

> "I would just like to take this opportunity to say I was wrong in the way I filled out my time sheet. I realise that now but in my defence I have had a very stressful time with my wife being in hospital following a recent operation and to add to the stress the operation wasn't successful which put more stress on myself and my wife worrying about having to go through the operation again with higher complications. I usually don't have any family problems but with this case it was just hard to deal with trying to keep strong for my wife and children. I also had to try and sort out child care of our children getting to and from school as my wife couldn't drive. Also having to take my wife back to the hospital to find out where they went wrong. With my mind not fully on the job I ended up making a mistake which has never happened before. Hope you appreciate my honesty, many thanks, Malachy."

In response to a pre-set list of questions the claimant stated:

> "It was an unfortunate incident. I was not thinking clear due to my family circumstances."

(14) On 16 February the claimant was informed that the decision had been made to proceed to a disciplinary hearing. The disciplinary hearing took place on 1 March 2011. It was chaired by Mr Ivor McMullan, Assistant Director of Recreation accompanied by Elaine Magee, Assistant Director Human Resources. The claimant was accompanied by Mr Donnelly, his trade union representative.

(15) Mr McMullan and Elaine Magee were in agreement that the claimant should be dismissed. Mr McMullan said that this was partly to ensure consistency in relation to the employer's stance on fraud. He referred to a strong circular for managers on the topic which he described as zero tolerance. That circular was not put in evidence. He concluded that the claimant had made no effort to make his manager aware that he was making a family friendly request. He believed that the claimant's failure to talk to his duty manager was a dishonest attempt to conceal, a deliberate effort to defraud. He said he would have liked to have been able to consider a final written warning and he would have hoped that the claimant would have told a member of staff of the reason for the appointment but he had not done so. He was of the view that "as an organisation we have no tolerance of fraud and could not see how we could go back to a lesser decision." He said that in view of the Council's policy in relation to fraud he felt unable to give the claimant an opportunity to improve or take any mitigating circumstances into account. He formed the impression that the claimant had formed the intention to defraud the Council at the outset by asking for leave early. During the hearing he said he considered that the claimant had not conveyed any message of stress.

(16) The relevant provisions in the employer's disciplinary and dismissal procedures stated as follows:

> "3.2 The fundamental aim of these procedures is to provide employees with an opportunity to improve their behaviour and/or performance when making it clear that disciplinary action will be taken if improvements do not occur.
>
> 12.1 When determining the disciplinary action to be taken in any given case managers shall have discretion to vary the penalty in the light of relevant mitigating circumstances. Each case will be treated on its own merits.

> 17.1.3 After establishing the facts the manager may consider that there is no need to resort to the formal procedure and that it is sufficient to talk the matter over informally with the employee. The employee should be made aware that this is an informal discussion as opposed to action under the formal procedure.
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> 17.4.1 In reaching a decision the council will take account of an employee's disciplinary and general work record, any mitigating circumstances, actions taken in particular cases and the explanation given by the employee. The council will then decide what action is reasonable prior to making a decision.
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> 17.4.4 The Disciplinary Authority may decide because of mitigating circumstances to impose a penalty short of dismissal which may include (several alternative penalties as set out including suspension without pay etc)."

(17) The claimant was informed by letter dated 7 March 2011 that his employment had been terminated. The decision recorded that he had completed his time sheet dishonestly in order to obtain payment. It noted that he had a clean disciplinary record over ten years' service but that due to fundamental breach of trust and confidence arising from the incident, the Panel had decided to dismissed him summarily.

(18) On 10 March 2011 the claimant wrote to the employer's Director of Development and Leisure, Ms Geraldine Girvan, seeking to appeal against the decision. He alleged a lack of thorough investigation and a failure to take mitigating circumstances into account. He alleged that the decision was unreasonable and unjustifiable in all the circumstances.

(19) The appeal took place on 22 March 2011. Ms Girvan chaired the meeting accompanied by John Balmer, Assistant Director of Finance. The claimant provided a letter from his GP Dr O'Hanlon which confirmed that the claimant "was required to take his wife to a hospital appointment following recent gynaecological surgery. She was unwell and unfit to drive. There was no one else available. This is a genuine reason and I know Mr McCann has been acutely stressed by his wife's recent health problems. This situation has only added to that stress. I do feel it would be unfair to penalise him for looking after his wife when so much time is taken off on the sick for spurious reasons."

(20) The Appeal Panel upheld the decision to summarily dismiss. It concluded that it was reasonable for the Disciplinary Panel to determine that the claimant had deliberately and dishonestly attempted to obtain payment when he knew that he was not entitled to it. It considered that if he had felt that he was entitled to payment he would specifically have stated that to his employer. Ms Girvan gave evidence that no manager would have refused time off to a member of staff in the circumstances if he had been honest he would have been given time off.

The Tribunal's determination

[5] In paragraphs [58] and [64] of its decision the Tribunal set out its conclusions thus:

> "[58] The Tribunal has given lengthy consideration to the material set out above and to its own overriding objective in the Industrial Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 of ensuring justice between the parties. We have determined that the claimant was unfairly dismissed by the respondent contrary to Article 130 of the 1996 Order on the grounds that the decision to dismiss did not fall within the band of reasonable responses that a reasonable employer would have adopted in all the particular circumstances of this case. The decision to dismiss was made on the basis of investigations that were deficient in several respects and thus unreasonable."
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> ……
>
> [64] The seriousness of the findings of dishonesty and fraudulent intent leading to summary dismissal of this claimant were unfair (sic) and not in accordance with equity and the substantial merits of the case."

[6] In paragraphs [59] to [63] the Tribunal sought to explain its reasoning:

(a) It was critical of Ms Fulton failing to disclose at the investigation stage that she was personally aware that the claimant had driven his wife to hospital for an appointment. She should not have taken part in the investigation in those circumstances.

(b) It was clear that the claimant was asserting that it was custom and practice for managers not to ask for evidence of hospital appointments.

Mr McMullan relied on a response from Ms Fulton which admitted that 100% adherence was not guaranteed. The Tribunal concluded that there had been an inadequate investigation of what the Tribunal considered to be a key element of the claimant's response to the charge.

(c) The Appeal Panel reached its conclusion to uphold the Disciplinary Panel's determination on the basis of the material before the Disciplinary Panel. By the time of the appeal hearing the Appeal Panel had additional evidence in the form of medical reports that the claimant was acutely stressed and evidence that the duty manager and assistant manager had not followed proper procedures.

(d) In paragraph [63] of the decision the Tribunal stated:

> "63. The disciplinary and dismissal procedures for misconduct provides at paragraph 18.7 that the appeal will usually be limited to the grounds set out by the employee in their written request. The claimant's request of 10 March 2011 included his belief that the investigation in this case had been flawed in that it had not been thorough enough. [T]he dismissal had not been in accordance with the respondent's policies and procedures, no account had been taken of mitigating factors, other staff had been treated better and that a decision to dismiss was unreasonable in all the circumstances. The Tribunal has found that there was merit in several of these grounds but there is little in the decision of the Appeal Panel which demonstrate that these matters were properly addressed. Rather it appeared that the Appeal Panel had simply looked to see if the Disciplinary Panel's conclusions could be supported without a proper consideration of the grounds of appeal in the light of the additional material available to them. The fact that the Appeal Panel stated that Ms Fulton's failure to follow procedure had been addressed and rectified, a comment repeated in the response to the originating application, when even Ms Fulton was not aware what this meant was an indication to the Tribunal of an attempt to mislead. The Tribunal also noted that there was no action taken against Trevor Gorman for his failure to follow procedure."

The relevant legal principles

[7] Article 130(1) of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provides:

> "1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal ….."

Misconduct is a potentially fair reason under Article 130(2)(b) of the Order.

[8] Article 130(4) provides:

> "Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

[9] In its decisions in Rogan v South Eastern Health and Social Care Trust [2009] NICA 47 and Dobbin v Citybus Limited [2008] NICA 42 the Court of Appeal sets out the proper sequencing of issues for determination in a case of alleged unfair dismissal. In Dobbin at paragraphs [49] to [51] Higgins LJ stated:

> [49] The correct approach was settled in two principal cases - British Homes Stores v Burchell [1980] ICR 303 and Iceland Frozen Foods Ltd v Jones [1983] ICR 17 – and explained and refined principally in the judgments of Mummery LJ in two further cases Foley v Post Office and HSBC Bank Plc v Madden

reported at [2000] ICR 1283 (two appeals heard together) and J Sainsbury v Hitt [2003] ICR 111.

[50] In Iceland Frozen Foods Browne-Wilkinson J offered the following guidance –

> 'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the [Employment Protection (Consolidation) Act 1978] is as follows:
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> (1) The starting point should always be the words of section 57(3) themselves;
>
> (2) In applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;
>
> (3) In judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
>
> (4) In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> (5) The function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

> [51] To that may be added the remarks of Arnold J in British Homes Stores where in the context of a misconduct case he stated -
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> 'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being sure, as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter beyond reasonable doubt. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion'."

[10] Higgins LJ in paragraphs [53] and [54] commented further on the judgment of Mummery LJ in Foley v Post Office and pointed out:

> "The first question is – Why did the employer dismiss the employee? (in other words did the reason for his dismissal relate to his conduct within the meaning of Article 130 and was that reason based on a set of facts known to the employer or a set of beliefs held by the employer which caused him to dismiss the employee?). The second question is – Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the employee? In this regard the Tribunal has to consider whether the employer has established reasonable grounds for its belief that the employee was guilty of misconduct and whether it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
>
> [54] When satisfied as to the employer's beliefs and investigation, the Tribunal must ask itself whether objectively the dismissal was within the range of reasonable responses for this employer to have dismissed the employee."

Conclusions

[11] It was common case between the parties that the Tribunal had not reached a conclusion on the question whether if the claimant had indeed been dishonest in making a claim for payment for the hours when he was attending the hospital appointment with his wife, dismissal in the all the circumstances of the case fell within the band of reasonable responses which a reasonable employer might have adopted. That would ultimately be a decision for an industrial tribunal for as Longmore LJ pointed out in Bowater v Northwest London Hospitals NHS [2011] EWCA 63:

> "The employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the tribunal to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."

[12] Counsel for the employer sought to argue that the Tribunal failed to make a finding on the question whether the professed reason for dismissal (gross misconduct, namely dishonestly claiming remuneration for the relevant hours) was genuinely the employer's reason for the dismissal. The claimant had sought to present his case on the basis that the real reason he was selected for dismissal was because of his stance on a change by the employer of shift patterns which had

antagonised the employer. Underlying the claimant's case was his argument that the employer was insincerely relying on his monetary claim as an excuse to get rid of someone the employer viewed as a troublemaker. Counsel for the employer contended that it was not possible to say why the Tribunal found in favour of the complainant – was it solely because of insufficient investigation or was it because alternative impermissible reasons underpinned the employer's decision to dismiss?

[13] If correct, this line of argument (which, it should be noted, was made not by the claimant but by the appellant employer) would support a rehearing. Overall the Tribunal's reasoning in its decision is opaque. On the employer's argument the Tribunal did not in fact permit the claimant, then a litigant in person, to pursue the evidential basis for his contention. It seems clear from the reasoning of the decision that the Tribunal was satisfied that the ground upon which the employer dismissed the claimant was that he had dishonestly applied for payment for the hours when he was attending the hospital with his wife. The burden of the Tribunal's decision appears to be that in reaching that conclusion the employer had not carried out a sufficient investigation of all the circumstances to warrant the making of a finding of actual dishonesty by the employee.

[14] We have considerable difficulty in distilling the full reasoning of the Tribunal as set out in paragraph [59] to [64] of its decision. We have already noted the difficulty arising from the lack of definitive express conclusions in relation to matters of evidence which were adduced before the Tribunal. We are left in some doubt as to what exactly the Tribunal was purporting to decide on the relevant questions which on the relevant case law fall to be answered in a case if a dismissal is alleged to be unfair. In particular, it is unclear from paragraph [63] whether the Tribunal's finding of an inadequate investigation related solely to the question whether the employer had not properly investigated whether there was actual dishonesty by the claimant in making his monetary claim or whether, in addition, the employer had failed to adequately investigate the questions whether (a) in all the circumstances, even assuming that there had been dishonesty on the part of the claimant, this was a case meriting summary dismissal as opposed to some lesser sanction and (b) having regard to equity and the substantial merits of the case dismissal of the claimant was the appropriate response. Paragraph [63] might, on one reading, suggest the Tribunal was tending to the conclusion that dismissal was not warranted in the circumstances because the employer had not properly investigated the circumstances to see whether dismissal of the claimant would have been justified, even if the claimant had acted dishonestly in these circumstances.

[15] In these circumstances we conclude that in the interests of justice it is necessary to remit the case to another tribunal for determination de novo. We will hear counsel on the question of costs.