Neutral Citation no. [2008] NIQB 31 | *Ref:* **WEA7109**

Judgment: approved by the Court for handing down | *Delivered:* **07/03/2008**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY CHRISTINA McALEER
FOR JUDICIAL REVIEW

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WEATHERUP J

[1] This is an application for Judicial Review of the decision of an Industrial Tribunal dated 27 February 2007 refusing to state a case for the opinion of the Court of Appeal. The case stated was requested by the applicant in relation to the earlier decision of the Tribunal refusing to extend time for the applicant to present a claim for unfair dismissal. In the alternative the applicant seeks an Order quashing the earlier decision of the Tribunal of 23 November 2006 refusing to extend time for the applicant to present a claim for unfair dismissal. The application raises the issue of the appropriate procedure to be adopted by a party aggrieved by a decision of an Industrial Tribunal. Mr Denver appeared for the applicant and Mr McLaughlin appeared for the President of Industrial Tribunals.

[2] On 18 March 2005 the applicant was dismissed from her employment as manager of Cookstown and Magherafelt Citizens Advice Bureau. She submitted a claim for unfair dismissal to the Tribunal on 9 August 2005, which was outside the statutory limit of three months from the effective date of termination of employment, as provided by Article 145 of the Employment Rights (Northern Ireland) Order 1996. Accordingly the applicant applied to the Tribunal for an Order extending the time to make the application for unfair dismissal. Article 145(2)(b) of the 1996 Order provides that the Tribunal may consider a complaint which is out of time if it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months and the complaint is then presented within such further period as the Tribunal considers reasonable. The Tribunal held an oral hearing and issued a written decision on 23 November 2006 refusing

to extend time for making the claim for unfair dismissal and accordingly found that the Tribunal did not have jurisdiction and dismissed the application for unfair dismissal.

[3] In the written decision issued on 23 November 2006 the Tribunal found that from March to August 2005, being the period from the termination of her employment to the application for unfair dismissal, the applicant was receiving medical treatment for depression, anxiety and stress related symptoms. Her GP provided two medical reports and expressed the opinion that during the period of her illness the applicant would have been unable to apply her mind to her legal affairs to her normal capacity. It was noted that the applicant had taken no part in the internal disciplinary process leading to her dismissal; she did not drive during that period; she was unable to deal with incoming post, her pattern of life changed and she was unable to walk in the park as before; she stopped going to church; she was on medication and was prescribed Fluoextrine with increased dosage from the Autumn of 2005 and had occasional use of sleeping tablets; she contacted the Trade Union which assisted in the disciplinary process, but gave no advice about Tribunal proceedings or time limits for lodging Tribunal claims; she wrote to the Tribunal on 16 November 2005 seeking postponement of her pre-hearing review; in the Tribunal claim form she had stated that she must make an application to the Tribunal to keep within the time frames; she did not know whether the time limit was three months or six months; she had assistance from her son in completing the form; she believed that the internal appeal would have to be heard before the Tribunal proceedings; after lodging the claim she was advised by the Labour Relations Agency to seek assistance from the Bar Council and she made contact but got no assistance; she later got legal assistance from a solicitor approximately ten days before the hearing.

[4] The Tribunal concluded that while the applicant was not well she was well enough to contact the Trade Union for representation in the disciplinary procedures. There was no evidence her condition was worse from March to June 2005, when the claim should have been presented, than in August 2005 when the claim was presented. Indeed she required increased medication in the autumn of 2005 and she took no steps to establish her Tribunal rights. She was aware in general terms of time limits and had the ability to fully complete the claim. She drew attention to her awareness of time limits. She had assistance in completing the form but did not seek advice on time limits and did not obtain legal advice until shortly before the hearing and the letter from her GP did not state that she was incapable of making decisions. The Tribunal concluded that it was reasonably practicable for the applicant to have presented her claim within the specified time limit.

[5] On 4 January 2007 the applicant applied to the Tribunal for a review of the decision issued on 23 November 2006 and for extension of time for the making of an application for review. Rule 35(1) of the Industrial Tribunals

(Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 provides that a request for a review of a Tribunal decision be made within 14 days from the date when the decision was sent to the parties, which time may only be extended if it is considered just and reasonable to do so. The Tribunal's decision may be reviewed under Rule 34(3) (e) in the interests of justice. By letter dated 27 February 2007 the Chairman of the Tribunal was not satisfied that there were any circumstances to justify a review on the grounds of the interests of justice and found that it was not necessary to consider the application for an extension of time.

[6] Also on 4 January 2007 the applicant required the Tribunal to state a case for the opinion of the Court of Appeal pursuant to Article 22 of the Industrial Tribunals (Northern Ireland) Order 1996. The point of law was stated to be "the adequacy of the evidence relating to the question of whether the claimant was able to complete the claim form within the stipulated limitation period and whether the discretion of the Tribunal should have been exercised to allow a jurisdiction to entertain the claim." By letter dated 27 February 2007 the Chairman stated that the request for case stated did not disclose any point of law and refused to state a case.

[7] On 30 May 2007 the applicant obtained leave to apply for judicial review of the decision of the Tribunal of 27 February 2007 refusing to state a case for the opinion of the Court of Appeal. The grounds for judicial review are as follows:

> "The decision of the Chair of the Industrial Tribunal by letter dated 27 February 2007 refusing to state a case was perverse and failed to acknowledge that a point of law arose in the application of the statutory discretion to extend time pursuant to Article 145 of the Employment Rights (Northern Ireland) Order 1996 in the following respects –
>
> (a) the Chair of the Industrial Tribunal erred in law in that he failed to have any or adequate regard to the following matters –
>
> (i) the question whether in all the circumstances of the case the applicant was reasonably ignorant of the existence of a time limit for presenting her claim and of the length of such time limit.
>
> (ia) That throughout the period from June 2005 until the time of filing of the applicant's IT1 claim form on 9 August

2005 the applicant was not fit to manage her affairs

(ii) That throughout the period from June 2005 until the time of filing of the applicant's IT1 claim on 9 August 2005 the applicant was dependent upon her family for assistance in managing her affairs and in particular to prepare and file her industrial tribunal claim for unfair dismissal.

(iii) That throughout the period from June 2005 until the time of filing of the applicant's IT claim form on 9 August 2005 the applicant's behaviour manifested an inability on her part to cope, in particular that her established pattern of regular religious worship was disrupted.

(b) The Chairman of the Industrial Tribunal erred in law in that he made findings of fact against the weight of evidence, in particular

(i) he attach too much weight to an increase in Autumn 2005 in the dosage of medication taken by the applicant to treat her medical condition;

(ii) he attached too much weight to her communications with a trade union officer and her communications with the Office of Industrial Tribunals regarding an adjournment of pre-hearing review;

(iii) he failed to give any or adequate weight to the evidence that the applicant was not fit to manage her affairs throughout the material time, was dependent upon her family to manage her affairs throughout the material time and was unfit to follow her normal pattern of religious observance.

(c) In exercising his discretion of Chair of the Industrial Tribunal failed to apply correctly the ruling of the Court of Appeal in the case of Schultz v ESSO Petroleum (1999) IRLR 488."

[8] At the initial hearing of the application for judicial review on 23 October 2007 the applicant obtained leave to undertake an additional and alternative course of action, namely to challenge the decision of the Tribunal of 23 November 2006 refusing to extend time for the application for unfair dismissal by way of judicial review. The application was adjourned for notice to be given to the President of Industrial Tribunals, who was represented upon the resumed hearing.

Case Stated and Judicial Review.

[9] There is considerable overlap between a point of law that would warrant a case stated to the Court of Appeal and the traditional grounds of judicial review that would warrant an application to the High Court. Such overlap occurs in the present case and the applicant contends that time and expense and convenience require that the substantive issue of the extension of time to submit a claim for unfair dismissal be addressed by this Court so that the decision refusing to extend time would be quashed and a fresh decision required from the Tribunal. The alternative mechanism would involve this Court directing the Tribunal to state a case for the opinion of the Court of Appeal, the Tribunal then completing a case stated, the matter then being heard by the Court of Appeal and if appropriate referred back to the Tribunal.

[10] The High Court has jurisdiction to hear an application for judicial review of a decision of an Industrial Tribunal. However, when the decision of the Tribunal gives rise to a point of law, the more appropriate procedure is that provided by statute under the Industrial Relations (Northern Ireland) Order 1996, namely an appeal by way of case stated to the Court of Appeal. In Darley's Application (1997) NI 384 the Court of Appeal considered an appeal from an order of Girvan J on an application for judicial review brought by an employee to quash the decision of Industrial Tribunal that it had no power to review its earlier decision and strike out a claim for unfair dismissal for failure to comply with an order to furnish particulars of claim. Carswell LCJ at page 387f stated that the Queen's Bench Division has a supervisory jurisdiction over the decisions of Industrial Tribunals and accordingly it has jurisdiction to hear an application for judicial review of a decision of an Industrial Tribunal; that the more appropriate procedure is the statutory remedy of an appeal by way of case stated to the Court of Appeal; that judicial review is a discretionary remedy and the Court would have power in the exercise of its discretion to refuse a remedy or refuse leave to

apply for judicial review if it considered that the applicant ought to have proceeded by way of case stated. As the point had not been raised in the Court below and as the Judge had not resorted to the exercise of his discretion, the Court of Appeal allowed the appeal to proceed "…. while referring to the point for guidance in future cases."

[11] On behalf of the President of Tribunals, Mr McLaughlin emphasised the statutory framework of proceedings before Tribunals, including statutory provisions for the review of decisions and the limited nature of appeals against decisions, which statutory framework should be the primary basis on which to deal with all proceedings. Further it was contended that it would be inappropriate, save in rare cases, for the Tribunal to adopt an adversarial position in relation to an aggrieved party and to have to defend its decision and that the appropriate contestant should be the opposing party before the Tribunal. Such rare cases might arise if there were allegations of bias or misconduct on the part of Tribunal members, being matters that did not arise in the present case. It was contended that any increase in those cases where issues might be addressed by application to the High Court for judicial review, rather than by case stated to the Court of Appeal, would present difficulties to Tribunals in providing guidance to the many unrepresented parties in Tribunal proceedings who seek advice on appeal rights.

[12] The applicant's argument is attractive in terms of time and expense and convenience, but regard must be had to the statutory provisions and the decision of the Court of Appeal must be followed. The result is that where there is an alternative statutory remedy by way of case stated, the Court of Appeal has found the alternative to be "the more appropriate procedure". Where the matters that form the basis of the application for judicial review are the same as the matters that could form the basis of a case stated to the Court of Appeal the latter remains the more appropriate procedure.

[13] Nevertheless there may be circumstances where the High Court, in the exercise of its discretion, would proceed to deal with the matter by way of judicial review, even where the matter could proceed by way of case stated to the Court of Appeal. It is not appropriate or possible to outline the circumstances in which such an exceptional step will be taken. Where the application for judicial review concerns issues of procedural fairness in the Tribunal the High Court may deal with the matter by way of judicial review. In Podblyski Application (Unreported 10/10/2007) the applicant/employee complained about the manner in which the Tribunal dealt with the disclosure of documents to the applicant. The applicant, the employer and the Tribunal were represented at the hearing of the judicial review, where the application was ultimately dismissed.

[14] In the present case the applicant's grounds for judicial review of the substantive decision to refuse to extend time to bring the application for

unfair dismissal correspond with the grounds on which the applicant seeks to appeal to the Court of Appeal on a point of law. There is no basis on which this Court should displace the more appropriate procedure of appealing by way of case stated. Accordingly I reject the applicant's additional and alternative ground for judicial review concerned with a challenge to the substantive decision of 23 November 2006 refusing to extend time for the application for unfair dismissal. The remaining issue concerns the decision of 27 February 2007 refusing to state a case for the opinion of the Court of Appeal.

[15] I would summarise the position in relation to applications for judicial review of Industrial Tribunal decisions as follows. The High Court has jurisdiction to hear an application for Judicial Review of a decision of a Tribunal. Where the Tribunal decision is capable of giving rise to grounds of appeal on a point of law the more appropriate procedure is the statutory remedy of a case stated to the Court of Appeal – and in such cases the High Court will generally exercise its discretion to refuse leave to apply for Judicial Review or refuse a remedy. Where the issue arising from the Tribunal decision concerns only the procedural fairness of the Tribunal hearing the High Court may give leave for the matter to proceed by way of Judicial Review. Where the Tribunal decision involves a refusal to state a case for the opinion of the Court of Appeal the remedy is by way of Judicial Review for an Order compelling the Tribunal to state a case.

Compelling a Tribunal to state a case.

[16] The applicant's point of law concerns the adequacy of the evidence relating to the question of whether the claimant was able to complete the claim form within the stipulated limitation period and whether the discretion of the Tribunal should have been exercised to allow jurisdiction to entertain the claim. Judicial review to compel a Tribunal to state a case is only available where it can be shown that the applicant enjoys at least a reasonable prospect of success in establishing the grounds adopted to challenge the Tribunal's decision. In University of Ulster's Application (1999) NIJB 61 the applicant applied for judicial review of a Tribunal refusal to state a case for the opinion of the Court of Appeal. Kerr J referred to the test propounded by Carswell J in Limavady Borough Council's Application (1993) 5 NIJB 43 that:

> "If the Tribunal declines to state a case (the applicant) must, when he goes before the court from which he seeks an order compelling it to do so (the issue of which is discretionary), establish facts on which an arguable case for setting aside the decision can be founded."

Kerr J stated that the reference to "an arguable case" is not used as it might be on an application for leave to apply for judicial review. The applicant must establish that there is a reasonable prospect of success.

[17] Thus the issue for this Court is whether the proposed case stated has a reasonable prospect of success. The applicant's grounds for compelling a case stated are wider than those on which the Tribunal was requested to state a case. The applicant's grounds include the Tribunal's failure to apply correctly the ruling of the Court of Appeal in Schultz v ESSO Petroleum. An employee commenced proceedings before an Industrial Tribunal for unfair dismissal outside the three months statutory time limit. The Tribunal found the complaint to be time barred because, while the applicant suffered from illness, he had been sufficiently well to instruct solicitors in the period immediately following his dismissal and therefore it had been "reasonably practicable" for him to present his claim within time. The Court of Appeal allowed the appeal on the basis that the Tribunal's approach had been too restrictive; that in determining whether it was "reasonably practicable" to present a claim within the statutory period the Tribunal had to consider the surrounding circumstances and the aim to be achieved, including whether the applicant was hoping to avoid litigation by pursuing other remedies; that where illness was relied on, the weight to be attached to a period of disabling illness varied according to whether it occurred in the earlier weeks or the far more critical weeks leading up the expiry of the limitation period.

[18] The approach to a late applicant affected by illness was considered by the Court of Appeal in Marks & Spencer v Williams Ryan [2005] EWCA Civ 470. Lord Phillips MR set out certain principles. First of all the statutory power to extend time was to be given a liberal interpretation in favour of the employee. Second, in considering whether it was "reasonably practicable" for an employee to complain to a Tribunal regard should be had to what, if anything, the employee knew about the right to complain and of the time limited for complaining and what the employee should have known if he or she had acted reasonably. Thirdly, if an employee is given incorrect or inadequate advise, the employee cannot rely on that fact to excuse a failure to make a complaint in due time.

[19] The applicant's grounds are that the Tribunal failed to have any or adequate regard for certain matters, made findings against the weight of the evidence and failed to apply correctly the ruling in Schultz. The Tribunal dealt with the matters in its written decision. The Tribunal referred to the matters specified by the applicant, but did not reach the conclusion the applicant would have wished. The applicant's broad approach emphasises the limited capacity of the applicant during the relevant period, the assistance required by the applicant throughout the process and the absence of protection for incapacity apparent in the Tribunal's consideration of the issues. It has not been established that the applicant has a reasonable prospect

of success on the ground that the Tribunal failed to have any or adequate regard to the specified matters. Nor has it been established that there is a reasonable prospect of success on the ground that the Tribunal made findings of fact against the weight of the evidence. Nor has it been established that there is a reasonable prospect of success on the ground that the Tribunal failed to apply correctly the ruling of the Court of Appeal in Schultz. The Tribunal took into account the relevant considerations and reached a decision it was entitled to reach. It does not avail the applicant that this Court or another Tribunal might have reached a different conclusion.

[20] The application for judicial review is dismissed.