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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **12/02/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNALS

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Between:

ARISTIDAS BALCETIS

Appellant;

and

ULSTERBUS LIMITED

and

TRANSLINK

Respondents.

_____

Before: McCloskey LJ, Horner J and O'Hara J

_____

Representation:

Appellant: In person (with an interpreter)
Respondents: Mr Patrick Ferrity, of counsel, instructed by Carson McDowell solicitors

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Aristidas Balcetis (the "*Appellant*"), a Lithuanian national, was formerly employed by Ulsterbus Limited and Translink (the "*Respondents*") in a manual post. He was dismissed from his employment. He appeals to this court against a decision of the Industrial Tribunal (the "*Tribunal*") dated 30 June 2020 whereby his two inter-related claims against the Respondents were dismissed.

Chronology

[2] The two claims brought by the Appellant against the Respondents were received by the Tribunal on 18 October 2016 and 18 July 2017 respectively. His employment was terminated on 26 April 2017. This occurred when the first of the claims was pending and the second had not materialised.

[3] The context to which the two claims belong may be deduced from the following chronology of material dates and events:

(a) 09 June 2008: commencement of the Appellant's employment.

(b) 18 July 2014: surgery at Craigavon Area Hospital – diagnosis of renal cancer.

(c) 31 July 2014: commencement of sick pay.

(d) October 2014 – April 2016: periodic occupational health examinations of the Appellant by the independent agency Independent Occupational Health ("IOH").

(e) 26 April 2016: IOH report confirming the Appellant's fitness to resume his previous work from May 2016.

(f) October 2016 – March 2017: six redeployment vacancies communicated to the Appellant, without response.

(g) 18 October 2016: initiation of the first of the two Tribunal claims.

[4] It is appropriate to pause at this juncture as the initiation of the first of the Tribunal claims effectively ended the first chapter of the history of this litigation. It is convenient to describe as the second chapter the period between this date and the dates when the second Tribunal claim was initiated, just under one year later.

[5] The material dates and events during the second chapter are the following:

(a) 04 April 2017: formal meeting.

(b) 06 April 2017: letter to the Appellant requesting that he attend a meeting on 12 April 2017 to agree a date for his return to work and to discuss any adjustments of his duties.

(c) 12 April 2017: second formal meeting. The Appellant presented a letter stating that in consideration of being compensated in the amount of £33,140, he would withdraw his Tribunal claim.

(d) 24 April 2017: letter to the Appellant informing him that his employment was being terminated with notice and offering a right of appeal (which the Appellant did not pursue).

(e) 26 April 2017: termination of the Appellant's employment by the second Respondent, Ulsterbus.

(f) 18 July 2017: initiation of second Tribunal claim (unfair dismissal).

[6] The third phase, or chapter, of the history was occupied by the Tribunal proceedings, some of the features whereof were the dismissal of the Appellant's race discrimination claims; the striking out of his claims under Articles 68 and 132 Employment Rights (NI) Order 1996 (the "*1996 Order*"); the dismissal of the Appellant's claims against IOH and Dr O'Reilly; and the withdrawal of his claim against Sean Falls, employee of the Respondents (see [11] *infra*).

The Two Claims

[7] In the formal Tribunal documents the Appellant described his first claim as "*disability discrimination*", referring to the Disability Discrimination Act 1995. He asserted that in January 2016 his General Practitioner "*… allowed me to return to work as long as my daily duties were changed – she told me that I should stay away from working with chemicals (gas etc)*". He next asserts that on 18 January 2016 he wrote to the Respondents requesting a meeting "*to discuss the conditions of my return*", receiving no reply. He then refers to the IOH assessment of 26 April 2016 and disputes the outcome thereof, namely that he was fit to return to work in mid-May 2016. The named Respondents were Translink, Philip O'Neill (Chief Operating Officer), IOH and Dr Frank O'Reilly (OH Physician).

[8] The second of the two claims was brought against the two Respondents described in the title hereof and a named employee, Mr Sean Falls. In the formal Tribunal documents, the Plaintiff made two claims namely that he had been unfairly dismissed and had been the victim of discrimination on the ground of disability. The gist of this claim was an asserted failure by the Respondents to respond to the Appellant's intimation of his willingness to resume his previous employment subject to change of work conditions.

The Respondents' Reply

[9] The Respondents' grounds of resistance – in essence, a formal pleading in the Tribunal proceedings - make clear that three matters in particular have at no time been in dispute between the parties. These are:

(i) The Appellant had a contract of employment with the Respondents (although the Appellant raised the technical issue of which Respondent).

(ii) The Respondents terminated the Appellant's contract on 26 April 2017.

(iii) The Appellant was suffering from a disability when his contract was terminated.

In the Respondents' reply to the first of the Appellant's Tribunal claims, a degree of conflict in the matter of medical opinion is ascertainable. We shall revisit this discrete issue in [25] - [27] *infra*. The "*Grounds*" continue at [16] – [17]:

> "*The Claimant remains on the redeployment register and the First Respondent continues to actively seek redeployment opportunities for the Claimant …*
>
> *The Respondents contend that the Claimant has failed to adequately particularise his claim for disability discrimination …. It is denied that the Claimant was discriminated against on the grounds of his alleged disability whether as alleged or at all.*"

The first Respondent was Ulsterbus Limited. The second Respondent was Translink. The Tribunal held that Ulsterbus was the employer in law.

[10] In their formal reply ("grounds of resistance") to the Appellant's second Tribunal claim, the Respondents summarised their defence thus:

> "*[21] The First Respondent* [Ulsterbus] *admits that the Claimant was dismissed, but denies that the dismissal was unfair as alleged or at all. The Claimant was dismissed on the grounds of some other substantial reason ….*
>
> *In the alternative, the First Respondent contends that the Claimant was dismissed on the grounds of his conduct ….*
>
> *[22] Accordingly, the First Respondent had a fair reason for dismissing the Claimant. The First Respondent avers that the decision was substantively fair in that it was a decision which any reasonable employer would have made in the circumstances.*"

This response invoked Article 130(1)(b) and (2)(b) of the 1996 Order.

[11] The out-workings of the Respondents' aforementioned defence are discernible in the following passages:

> *"In a report dated 26 April 2016, IOH confirmed that the Claimant was medically fit to return to his substantial post by mid-May 2016 and that there was no risk to his health in doing so. In the period between September 2016 and March 2017, the First Respondent offered the Claimant seven alternative positions within the organisation. Throughout this time, and until his dismissal, the Claimant refused to engage with the First Respondent with regards the seven alternative positions offered to him however, he remained on the First Respondent's redeployment register.*
>
> *The Second Respondent* [Mr Falls, the Appellant's line manager] *met with the Claimant on 4 April 2017 to discuss his ongoing absence from work, despite him being medically fit to return. The Claimant advised the Second Respondent that he would not consider returning to his substantive post until a decision had been made by the Tribunal in respect of his ongoing claim (case reference number 2267/17 IT)*
>
> *By letter dated 6 April 2017, the Claimant was invited to attend a further meeting with the Second Respondent on 12 April 2017 in order to agree a date for the Claimant's return to work and to discuss any adjustments that the Claimant considered would support his return. The Claimant was advised in this letter that one possible outcome of this meeting could be the termination of his employment as a result of his continued refusal to return to work or to enter into any constructive discussion with regard to alternative employment.*
>
> *The meeting on 12 April 2017 was conducted by the Second Respondent and Ms Carol Conn (HR Business Partner) attended as note taker. Despite being offered the right to be accompanied, the Claimant attended the meeting alone. When asked about whether and when he would return to his own role, the Claimant stated he would never return to his substantive role as Cleaner/Fuel Issuer. When asked if there were any reasonable adjustments that would facilitate his return to work (either to his substantive role or an alternative role), he again stated that he would never return to his substantive role.*
>
> *On numerous occasions during the meeting, the Second Respondent asked the Claimant what work he would be willing to do. The Claimant advised the Second Respondent that he was*

not willing to discuss alternative work because he was preparing for his Tribunal hearing. As such, the Claimant advised that he would not be able to discuss alternative work until at least October 2017. When asked if he wished to be redeployed, the Claimant advised the Second Respondent that he was not ready to discuss this.

Having considered all of the evidence available to him, including the representations made by the Claimant, the Second Respondent took the decision to terminate the Claimant's employment with notice. The Second Respondent considered that the Claimant's behaviour was unreasonable and that his absence from work could no longer be sustained."

[12] This is followed by *inter alia* two specific denials:

> *"It is specifically denied that in 2016, IOH made recommendations to change his "work conditions." It is also specifically denied that the Claimant contacted the manager of Enniskillen Depot regarding the conditions of his return, yet never received a response."*

And next this "Conclusion":

> *"The Respondents deny that the Claimant has been discriminated against on the grounds of his alleged disability whether as alleged or at all. The Respondents further deny that it has failed to make reasonable adjustments in respect of the Claimant's alleged disability whether as alleged or at all."*

The Tribunal's Decision

[13] The Tribunal, having noted that the two claims entailed separate complaints of disability discrimination and unfair dismissal respectively, was disposed to construe them widely:

> "*[7] The Tribunal recognised however that the claimant's lack of professional representation, and his likely inability to understand technical legal language outside his proficiency in everyday English, warranted inclusion in its considerations of the additional heads of complaint of disability-related harassment and victimisation, in the form of his dismissal, as a direct result of his health and safety complaints and his first Tribunal complaint of Disability Discrimination."*

In passing, the Tribunal accepted the Respondents' joint contention that the Appellant's employer was Ulsterbus Limited, with effect from 2015.

[14] The decision of the Tribunal neither identifies any material factual matters in dispute nor makes any clear findings in respect thereof. The content of the lengthy section "*Conclusions*" confirms the correctness of its title. As noted in the passages from the Respondent's grounds of resistance quoted in [11] above, two matters of factual dispute between the parties were highlighted. While the Tribunal by its decision did not specifically resolve either of these we shall comment *infra* on whether this is a matter of any significance.

[15] The exercise of reading together the terms of the two claims, the Respondents' grounds of resistance and the Tribunal's decision suggests that this case proceeded and was determined on the basis of largely undisputed evidence, with the result that the material facts were essentially uncontested. The Tribunal's "*Conclusions*" contain, to a significant extent, (a) a series of commentaries on evidently undisputed facts and (b) evaluative assessments thereof. This confirms that the real issues in dispute between the parties concerned the motivations of the Respondents in the various aspects of their conduct vis-à-vis the Appellant under scrutiny, culminating in their decision to terminate his employment.

[16] The main conclusions of the Tribunal were the following:

(i) The complaint that the Appellant was subjected to less favourable treatment on the ground of his disability had no evidential foundation.

(ii) The Respondents' assessment, made following extensive and appropriate enquiries, that the Appellant was fit to return to work was a reasonable one.

(iii) The Respondents acted reasonably thereafter in the steps which they took to explore the issue of the Appellant returning to work.

(iv) The Respondents acted reasonably in their assessment that the Appellant could safely return to his former post.

(v) The Appellant's outright failure to engage in any way with the numerous alternative employment positions offered to him evidenced "*a marked lack of genuine interest in returning to work*".

(vi) The Appellant "*… was prepared to unnecessarily and artificially prolong matters, with a view to securing a favourable financial outcome*".

(vii) The Respondents acted reasonably in requiring the Appellant to attend IOH appointments.

(viii) The Respondents acted reasonably in accepting the IOH medical opinions and assessments.

(ix) The Respondents acted reasonably in their assessment that the Appellant had unreasonably refused to return to work or to engage in discussions about redeployment.

(x) The Appellant's dismissal had nothing to do with his previous (unsuccessful) complaint to HSE.

(xi) The Respondents' act of dismissing the Appellant was based on the Appellant's conduct; such conduct was unreasonable; and the Respondents' motivation was fair and reasonable.

(xii) The Appellant's complaints of harassment and victimisation were dismissed for want of evidential foundation.

[17] To summarise, the Tribunal's determination of the two conjoined claims was:

(i) The complaints of discrimination on the ground of the Appellant's disability, harassment and victimisation had no evidential foundation.

(ii) The Appellant's employment with the Respondents was terminated for a statutorily fair reason.

All claims were dismissed accordingly.

The Appeal

[18] The only point of substance raised in the Appellant's Notice of Appeal is the contention that the Tribunal "*… conducted the proceedings unfairly/violated the party's right to a fair trial*". The Notice also makes reference to a decision of this court in *Veitch v Red Sky Group* [2010] NICA 39, without elaboration. *Veitch* is a fact sensitive decision, determining no issue of law, in which this court determined to remit the case to the tribunal on the ground that it had not clearly or adequately applied the established legal tests for determining whether the claimant concerned was suffering from a disability. In the present case, as highlighted in [9] above, it was common case that the Appellant was suffering from a disability. It follows that the decision in *Veitch* adds nothing to his appeal.

[19] The second source to which we have resorted in identifying the contours of this appeal is the Appellant's skeleton argument. While this is framed in somewhat diffuse terms and requires some interpretation, its central theme involves the

contention that the Tribunal could not reasonably have decided as it did. This is apparent from, for example, the statement in one of the numbered paragraphs –

> "*.. my priority is that the Decision is manifestly erroneous …*
>
> *It is the existence of a 'manifest error' in the Decision which enables the Appellant to seek the annulment of the Decision.*"

[20] In the elaboration of his central contention aforesaid, the skeleton argument poses a lengthy series of questions. Many of these lack coherence and/or relevance. This assessment applies particularly to the questions relating to the Appellant's employment status, his contract of employment, the identification of his employer, the legal relationship between the Respondents and IOH, the conduct of the IOH physician, the Tribunal's conduct of case management listings and the Respondents' late compliance with case management time limits. This assessment further applies to the Appellant's questions relating to "*the relevant legal criteria … the correct criteria …. established factual circumstance … the legal requirements …* [and] *the legal obligation.*" While the use of these linguistic formulae by an unrepresented litigant is understandable and is in no way prejudicial to the court's determination of his case, in the absence of particulars and elaboration they are essentially meaningless.

[21] In addition to the two written formulations of his case noted above, the Appellant responded positively to the court's invitation to make an oral presentation. His submissions were made in his native language with the assistance of an interpreter engaged by the court. The Appellant also spoke intermittently in the English language. His oral submissions were fluent and appeared to be carefully prepared. The exercise of comparing his oral submissions with his skeleton argument confirms that the former were largely based on the latter. Thus nothing of any real novelty emerged from what he said to the court. There was some sparing judicial questioning and intervention, largely of the clarificatory variety. The Appellant confirmed unequivocally that he had said all that he wished to say.

[22] At this stage the judicial panel, having adjourned to confer, informed the parties that it had no specific questions to address to either the Appellant or Respondents' legal representatives. The parties were further informed that taking into account the skeleton argument of the Respondents and other materials the court did not require any clarification or elaboration of the written submissions. For completeness, the court further satisfied itself that the Appellant was in possession of all documents relating directly or indirectly to the appeal. More specifically, he had been in possession of the appeal bundle for some two weeks, this bundle contained no documents which would not already have been in his possession, the Respondent's solicitor had complied with the case management order of this court by offering to make available to the Appellant copies of the documents belonging to the first instance hearing bundles (thereby complying with the relevant case management order of this court), the Appellant did not seek to avail of this facility and, finally, the Appellant confirmed to this court on the occasion of two separate

listings that he retained possession of the Tribunal hearing bundles. The court, having explored this topic in appropriate detail, concluded without hesitation that the Appellant was at no disadvantage and that there was full equality of arms.

Legal Framework

[23] Both the statutory framework and the governing principles were rehearsed *in extenso* in the recent decision of this court in *Nesbitt v The Pallett Centre* [2019] NICA 67 at [55] – [61]. It suffices to reproduce what is stated in the judgment at [60]:

> *"A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ* ***in Chief Constable of the Royal Ulster Constabulary v Sergeant A*** *[2000] NI 261* at 273:
>
> *"Before we turn to the evidence we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.*
> ……..
>
> *4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.*
>
> *5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless –*
>
> *(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (****Fire Brigades Union v Fraser*** *[1998] IRLR 697 at 699, per Lord Sutherland); or*
>
> *(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse:* ***Edwards (Inspector of Taxes) v Bairstow*** *[1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."*

This approach is of long standing, being traceable to decisions of this court such as ***McConnell v Police Authority for Northern Ireland*** *[1997] NI 253. "*

At [61] the judgment continues:

> "*Thus in appeals to this court in which the* ***Edwards v Bairstow*** *principles apply the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance tribunal and appellate court.*"

Our Conclusions

[24] At [12] – [16] above we have outlined the main elements of the Tribunal's decision. At [17] – [20] we have identified the contours of this appeal, adding some comments where appropriate. All of these passages speak for themselves. At [9] above we have identified a medical issue upon which we shall elaborate.

[25] A review of the extensive medical materials in the Tribunal hearing bundles (which this court has considered) reveals the emergence of one particular theme, namely the Appellant's expressed concern that in the event of returning to his previous post exposure to chemicals or fuels could be detrimental to his kidney tumour. On 08 December 2015, the IOH physician confirmed in his report that he had communicated with the Appellant's "*treating consultant*", who declined to make any specific recommendation that the Appellant, in the event of returning to work, should avoid handling chemicals or fuels, confining himself to advice that normal precautions only should be taken. The IOH physician effectively endorsed this view.

[26] Next, on 18 January 2016, the Appellant's general practitioner certified him fit for work in the following terms – "*… Amended duties… Advised to avoid working with chemical agents.*" In his letter of the same dates the appellant had adverted to this:

> "*… I am able to work. However, it is recommended that I change my duties from gas filler and janitor to something else.*"

In this letter, the Appellant also, in substance, made the case that his situation should be resolved by a negotiated severance package. Three months later, following two successive failures by the Appellant to attend scheduled appointments, IOH advised, in its report of 26 April 2016, that the Appellant would be fit to return to his posts by mid-May 2016. The report stated inter-alia:

> "*His GP has indicated that he should avoid chemicals. His GP has not been specific in this comment. He has been reassured that there are no chemicals within Translink workshop that would require restriction based on his previous illness. This has been discussed with him in detail today.*"

[27] In its decision, the Tribunal did not resolve this issue explicitly. However, we consider it appropriate to infer from the Tribunal's decision read as a whole a finding that the Respondents both accepted this medical advice and acted reasonably in doing so. We would add that whether one views this as a properly

inferred finding or one that the Tribunal would inevitably have made addressing its mind to this discrete issue, the Respondents' conduct in this respect is legally unimpeachable.

[28] Further to our summary of the Tribunal's decision above, it is appropriate to highlight some of the irremediable frailties in the Appellant's claims. His identified comparator for the purposes of his disability discrimination claim was an employee whose situation was manifestly different as he had applied for redeployment whereas the Appellant had not. Moreover, in April 2017 the Appellant was medically assessed fit for his normal post. Notwithstanding, the reasonableness of the Respondents' conduct is epitomised by their actions in opening the door to him to seek redeployment and the succession of redeployment proposals which followed. Next, there was no evidence whatsoever of harassment or victimisation of the Appellant. Furthermore, while it is clear that he could have returned to work in a number of capacities, he refused to engage with the offers of redeployment, choosing rather to adopt the course of pursuing a significant financial settlement to which he had no entitlement.

[29] We have considered all of the materials and arguments presented to this court by the parties. Mindful of the Appellant's unrepresented status, we have endeavoured to view his appeal as broadly and sympathetically as possible. In our endeavours to ensure fairness to the Appellant this court, throughout the case management phase, in its conduct of the hearing and in this, its substantive determination of the appeal, has almost certainly exceeded the more restrained role envisaged in the judgment of Girvan LJ in *Magill v Ulster Independent Clinic* [2010] NICA 33 at [16], to the Appellant's advantage. We have further considered every authority brought to our attention by the parties.

[30] Having conducted the foregoing exercise, the unhesitating conclusion of this court is that the Tribunal's decision is not infected by any material error of law. It comfortably withstands critical analysis applying all of the recognised legal touchstones. In brief compass, the Tribunal took into account all material evidence; it did not leave out of account any material facts or considerations; it did not misinterpret or misunderstand the evidence in any material fashion; there was ample evidence supporting its conclusions; it contains no material legal misdirection or misunderstanding of the law; and there is not the slightest hint of procedural unfairness. The Tribunal's decision was made in the context of a fact sensitive case wherein, as we have observed, the material facts were in large part either undisputed or indisputable. While the Tribunal may not have expressly resolved some of the very few contentious factual issues (noted above), it is clear by implication that it favoured the Respondents' case on these matters. Furthermore, and in any event, nothing of particular significance turned on them. We consider that all of the material evidence before the Tribunal, objectively and fairly analysed, provided no support for the Appellant's case and pointed irresistibly in the

Respondents' favour. There was nothing borderline about the Tribunal's decision. It was, rather, in our estimation, the only decision rationally available to it.

[31] For the reasons given the appeal is dismissed and the decision of the Tribunal is affirmed.