Neutral Citation No.: [2009] NICA 28

Ref:	**HIG7452**
Delivered:	**12/03/09**

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

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CARA COLEMAN

Claimant/Respondent;

and

NORBROOK LABORATORIES LIMITED

Respondent/Appellant.

Before Higgins LJ, Coghlin LJ and Treacy J

HIGGINS LJ

[1] This is an appeal by way of case stated from a decision of the Fair Employment Tribunal (the Tribunal) that the respondent employee was unfairly dismissed from her employment. The Tribunal had considered only one of the substantive issues to which the claim gave rise. The Court determined that the case should be remitted to the Tribunal for a hearing on all issues and I stated that I would give our reasons for that decision at a later stage which I now do.

[2] The question posed for the opinion of the Court of Appeal was –

> "Was the relevant determination of the Tribunal, having regard to the facts found by the Tribunal, a conclusion that an Industrial Tribunal, properly directed, was entitled to make."

[3] The respondent was dismissed from her employment with the appellant company following a disciplinary hearing and an appeal from that

decision. The respondent was employed as a Credit Controller within the Finance Division of the appellant company. The ground for dismissal was gross misconduct in that she refused a request that she work in the Chairman's office as a temporary personal assistant in the absence of a full-time personal assistant. What she was expected to do was mainly to answer the phone. The respondent had been employed by the appellant company for thirty years almost exclusively in the Finance Department. She was highly regarded in her employment in the Finance Department but she considered she did not have the necessary skills to work in the Chairman's Office. The respondent claimed unfair dismissal on various grounds including that the request to work in the Chairman's Office was unreasonable, that the procedures adopted for the disciplinary hearings and the appeal were unfair and that the decision to dismiss her was unreasonable. When the case came on for hearing the Tribunal identified two complaints by the respondent. First that the dismissal was procedurally unfair and secondly that even if the dismissal was procedurally unfair, it was substantively unfair. Both issues were contested by the appellant.

[4] The case had been reviewed on different occasions and fixed for hearing for one week. It became clear after the case had commenced before the Tribunal that it would last much longer than one week; more likely three weeks. In its decision the Tribunal records that Mr O'Donoghue QC made an application that the liability issues should be dealt with in stages. This was opposed by Mr Mulqueen who appeared on behalf of the respondent. Both counsel appeared before this Court. Their recollection was slightly different. This was that the Tribunal first raised the question of dealing with the case in stages and that Mr O'Donoghue then made an application that it should do so. The Tribunal acceded to that request and gave as its reason for doing so the contents of the respondent's letter appealing the decision of the disciplinary hearing. This was to the effect that the respondent disagreed that the request to work in the Chairman's Office was a reasonable request. It was noted that this contention was also the reason that it was contended before the Tribunal that the refusal to work in the Chairman's Office was not an act of misconduct and that the decision to dismiss was so disproportionate as to be out-with the range of reasonable responses by a reasonable employer. Accordingly the Tribunal continued with the hearing on two issues. First whether the respondent had committed a disciplinary offence and secondly, if so whether the dismissal was within the range of reasonable responses assuming, for the purposes of that hearing, that a fair procedure had been adopted. In the event the Tribunal found that the request to the respondent to work in the Chairman's Office was a reasonable request and that by refusing to comply the respondent had committed a disciplinary offence. The Tribunal went on to find that the decision to dismiss the respondent was not within the range of reasonable responses by a reasonable employer in the circumstances. The appellant appeals against the second decision that the dismissal was within the range of reasonable responses. There is no appeal against the first

decision, that the respondent had committed a disciplinary offence. The Tribunal did not consider the issue whether the procedures adopted were fair or unfair. Should the appellant be successful on the appeal the case would be remitted to the Tribunal to consider the procedural issue.

[5] In making this decision the Tribunal was aware of the guidance offered by the Court of Appeal in Ryder v Northern Ireland Policing Board 2007 NICA 43. In that case the Lord Chief Justice stated at paragraph 16 –

> "[16] A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points – see, for instance, *Bombardier Aerospace v McConnell and others* and *Cunningham v Ballylaw Foods*. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe, often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."

[6] Similar views were expressed in Faulkner and Others v BT, a case which the Lord Chief Justice identified as exemplifying the situation which can arise when a preliminary point is segregated from the substantive issue. In that case the Court exercised its powers under section 38(1) of the Judicature Act 1978 to refuse to express an opinion on the preliminary point and remitted the case to the Industrial Tribunal for a hearing on all the substantive issues. The reason for doing so was that the defence that would have been put forward by the employers sounded on the issue of that was posed to the Court of Appeal for its opinion.

[7] In the present case the Tribunal segregated the issue relating to the procedure adopted that led to the dismissal, from the issue whether the dismissal fell within the range of reasonable responses open to the appellant company once the respondent was found to have committed a disciplinary offence. It has long been the law that where the issue relating to the procedures adopted is a live one for the Tribunal that the manner in which the dismissal decision is arrived will sound on the question whether the dismissal was within the range of reasonable responses open to the employer. Lord Mackay of Clashfern LC identified the difficulty in Polkey v AE Dayton Services Ltd [1988] ICR 142 when he stated -

> "Further, in my opinion, the statutory test shows that at least some aspects of the manner of dismissal fall to be considered in considering whether a dismissal is unfair since the action of the employer in treating the reason as sufficient for dismissal of the employee will include at least part of the manner of the dismissal. Accordingly, it is not correct to draw a distinction between the reason for the dismissal and the manner of dismissal as if these were mutually exclusive, with the industrial tribunal limited to considering only the reason for dismissal."

In the same case, Lord Bridge of Harwich said

> "But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating that reason as a sufficient reason for dismissal unless and until he had taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action ... in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation ... If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by s.[98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."

[8] The case of Polkey concerned redundancy without consultation. However the same approach has been adopted in cases involving dismissal for misconduct. In Whitbread Plc v Hall [2001] ICR 699 the Court of Appeal cited Polkey with approval and said,

> "These expressions of principle undoubtedly apply to dismissals for misconduct as much as they apply to dismissals for redundancy" before saying, "as the House of Lords made clear in Polkey … the one thing which the tribunal cannot do is to ask itself whether

> the outcome of a fair procedure would have been the same".

[9] In Taylor v OCS Group Ltd [2006] IRLR 613 the Court of Appeal considered how Tribunals should approach the issue whether the procedures adopted for a disciplinary hearing had been fair. Smith LJ giving the judgment of the Court expressed herself in these terms -

> "[48] In saying this, it may appear that we are suggesting that ETs [Employment Tribunals] should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that s.98(4) requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in Union of Construction, Allied Trades and Technicians v Brain [1981] IRLR 224 at p.227 are worth repetition:
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>> 'Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity – and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's

> technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.'"

[10] It is clear from these passages that the issues relating to reasonableness of the dismissal and the procedures adopted impact on each other and should, very exceptional situations apart, be tried together. There will be cases in which the reasonableness of the dismissal, considered alone, will be decided in favour of the employer, but if combined with unfair procedures may produce a different result. Such an approach to a claim for unfair dismissal may result, as was suggested in this appeal, in two hearings before the Tribunal and two appeals to the Court of Appeal. While the desire on the part of the Tribunal to make the best use of the time fixed for hearing and to save time is to be commended, such an approach can only be justified in exceptional circumstances. In most cases the fairness of the dismissal procedures will impact on the reasonableness of the decision to dismiss and a hearing of those issues separately may occasion an injustice to either side in the outcome of the segregated hearing. There are also the costs of appeals and further hearings to be borne in mind. Even where exceptional circumstances might justify a preliminary hearing or a split trial of the issues, a Tribunal should be slow to do so where one party objects on firm ground to the adoption of that procedure. Mr Mulqueen informed the Tribunal that he had a number of points to make about the fairness of the dismissal procedure and wished both issues to be tried together. Mr O'Donoghue informed this Court that a hearing of the unfair procedures issue may well result in a return to the Court of Appeal. But if it did it should be in circumstances in which the Tribunal has considered all the issues and the impact, if any, one might make on the others. For these reasons and in the absence of exceptional circumstances we declined to state an opinion on the case stated and exercised the power contained in Section 38(1) of the Judicature Act to remit the case to a differently constituted Tribunal to hear all the issues in the claim for unfair dismissal and made no order as to the costs of the appeal.