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Judgment: approved by the Court for handing down | *Delivered:* **12/09/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

MALCOLM COLHOUN

Appellant;

-and-

SCHRADER ELECTRONICS LIMITED

Respondent.

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Before: Morgan LCJ, McLaughlin J and Sir John Sheil

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from the decision of an industrial tribunal which found that although there were significant procedural defects in the dismissal of the appellant rendering his dismissal unfair the appellant's conduct and manner caused the dismissal so that the basic and compensatory awards otherwise payable should be reduced by 100%. The tribunal dismissed the claim of sex discrimination. There was no appeal in relation to the award of £2280 to the appellant by reason of the respondent's failure to properly process his application for flexible working.

Background

[2] The appellant has a first-class degree in mechanical engineering and was employed as a graduate research and development engineer by the respondent on 1 June 2009. The respondent is a medium-sized company engaged in the development and manufacture of remote tyre pressure monitors.

[3] The appellant's original working hours, as set out in his written contract of employment were 8.30 to 5.00pm Monday to Thursday and 8.30 to 2.30pm on Fridays. That was changed at his request, at the start of his employment, to 8.00 to 4.30pm Monday to Thursday and 8.30 to 2.30pm on Fridays. That was done informally and was not expressly an application under the flexible working legislation or under the respondent's flexible working policy.

[4] On 11 May 2010 the appellant showed a completed application form under the respondent's flexible working policy to his line manager, Sam Porter. The tribunal was satisfied that this was not intended to be a formal flexible working application at this stage. The appellant was seeking advice on how to proceed. Mr Porter told the appellant that he was unfamiliar with the procedure and that he would have to ask for advice on the form. He sought advice from Steve Thomson, the appellant's section manager, Michael Dawson, HR advisor and Michael Robinson, HR manager.

[5] Mr Porter then came back to the appellant and advised him that there should be a reference to a child in the application form and that the childcare element in the application should be explained. The appellant's reaction to this was that there was no specific place in the standard form for such a reference. The tribunal concluded that the need for the childcare element to be explained in a flexible working application was entirely appropriate given the purpose of the flexible working scheme.

[6] The appellant's application was for an alteration to his working hours to allow for annualised hours incorporating on average at least one day's home working per week. Mr Porter advised, having checked the position, that the application for home working was unlikely to be successful. He informed the appellant that two female applicants in another part of the respondent's organisation who had applied for a reduction in their hours but not for home working had been successful. The appellant decided nevertheless to proceed with his application as originally formulated. He advised Mr Porter of that decision. He then handed the application to Ivan Bailie, the Research and Development manager, in or around mid-May 2010.

[7] Mr Bailie did nothing in relation to the application. He said that the application was overlooked in his in-tray. The tribunal found that excuse surprising given that there had been significant discussion within line management about the appellant's application. The appellant sent a reminder to Mr Porter on 17 June 2010. This was the same day on which the claimant received his Annual Performance Review (APR).

[8] The APR was the means by which the respondent judged the progress that employees had made in the previous year and was plainly a tool for giving encouragement in respect of good work done and advice as to how to improve

performance. The appellant's APR was largely favourable and met in every respect the basic standards expected of a first-year graduate trainee. The report noted that the appellant communicated well and got on well with everyone within the team as well as with external members of the team. Mr Porter recommended him for the maximum pay rise. He did, however, refer to the appellant missing some deadlines and suggested that he would need to work on this. The substance of this criticism related to a project run by the appellant which had a deadline at the end of February 2010 which had to be extended to March 2010. The appellant rejected the criticism that he had failed to meet the deadline.

[9] On the evening of 19 June 2010 the appellant sent an e-mail to Ms McNeill, the Head of Human Resources, complaining that his flexible working application had not been dealt with within the statutory timetable and noting the possible need for third party intervention. The tribunal recognised this as a threat of proceedings. He sent a further e-mail to Steve Thomson raising a grievance against Mr Porter. He alleged that Mr Porter had lied in stating that he had missed the deadline in relation to a project and that he had in fact delivered the project on time with absolutely no support or direction. He noted that Mr Porter had not conducted his six-month probationary review. He accused Mr Porter of blatantly lying and grossly misrepresenting his performance. He suggested that Mr Porter had acted maliciously. He accused him of dishonesty constituting gross misconduct under the disciplinary policy.

[10] The tribunal concluded that the content and wording of the grievance was extraordinary. The content of the APR was almost completely favourable to the appellant and given that he had been recommended for a full pay increase the tribunal concluded that the attitude of the appellant demonstrated in this grievance and maintained thereafter was appalling and a fatal blow to any ordinary working relationship between the appellant and his line management.

[11] The grievance hearing took place on 28 June 2010 and was heard by Mr Thomson and Mr Robinson. The appellant maintained his criticisms of Mr Porter. He suggested that these were supported by four named workmates. These people were interviewed by Mr Robinson and all denied that Mr Porter had been in any way unfair in his treatment of the appellant and said that he got on well with the whole team. On 5 July 2010 the appellant was informed that the grievance appeal had been dismissed. The appellant appealed that decision on 14 July 2010.

[12] On 9 July 2010 the appellant had a meeting with the HR department about his flexible working application. The application was discussed with Mr Porter and Mr Bailie. They considered that his absence from the workplace would cause a detrimental impact on performance in that a design engineer needs to be present in the laboratory to develop, organise and validate relevant tests, to provide support to other departments, to attend meetings and to receive training as a graduate trainee engineer. There was also a perceived detrimental impact on the ability to meet

customer demand in that an on-site presence was required and a detrimental impact on quality in that home working would not allow for the assistance and the level of support that would be required as a trainee. These reasons were communicated in a refusal letter dated 28 July 2010. It is common case that this application was not dealt with within the statutory timescales and the award was made in respect of that.

[13] There had been problems with the electrical facilities within the appellant's workplace. On 20 July 2010 the appellant noted a flash as a result of a faulty socket. He sent an email to the Health and Safety Officer rather than reporting it to his relevant line manager stating that basic inspection or functionality testing had not been carried out. The tone of the email was highly critical. The conclusion within the respondent's organisation was that the fault was probably the result of a wire pulled or kicked after installation.

[14] On 27 July 2010 the appellant met with Mr Porter and Ms McNeill to seek to resolve the grievance informally. No progress was made and the matter proceeded to a hearing on 29 July 2010. The appellant maintained his stance that Mr Porter had behaved maliciously and dishonestly in his appraisal whereas Mr Porter maintained that it was the failure of the respondent to take direction that caused delay. The appeal was dismissed on 5 August 2010.

[15] The appellant appealed the refusal of his application for flexible working on 3 August. The appeal was heard on 11 August 2010 and was dismissed for the reasons given earlier on 17 August 2010.

[16] By letter dated 30 August 2010 the appellant was invited to attend a disciplinary hearing which took place on 6 September 2010. The hearing was to consider the issue of the appellant's difficult personality, the impact this was having on working relationships and whether his future employment with the company was tenable in light of those factors. The appellant sought clarification of whether gross misconduct was being alleged but received no satisfactory response from the respondent. He sought details of the specific allegations but received no substantive response.

[17] Having examined in detail the records of the disciplinary interview the tribunal concluded that the appellant did not at that stage dispute that the issue of his personality, and the way in which he had interacted with others in the workplace, had been the subject of frequent discussions between him and his line managers in the course of his employment. He was not, therefore, taken by surprise. The relevant issues which the respondent wished to discuss were read out at the start of the meeting:-

- abrasive approach when dealing with people
- confrontational approach
- difficult personality to work with

- difficulty establishing working relationships
- inability to see that he may be wrong
- unreasonably status conscious
- inability to adhere to established business processes
- lack of understanding of need to stick to timelines
- lack of understanding of customer needs- blame others for own non performance
- standard response to direction is "I don't agree"
- arrogant
- negative outlook with everything seen as a problem to him
- routinely disagrees with management decisions
- fails to take direction
- needlessly critical of colleagues skills and abilities.

[18] The tribunal noted that none of these matters was supported by any written record and indeed there were aspects of the APR which contradicted some of these factors. It concluded, however, that the relationship between the respondent and the appellant deteriorated significantly from 19 June 2010 when the claimant had lodged his grievance about his APR. The tribunal considered the tone and attitude of the appellant appalling and fatal to the maintenance of an ordinary working relationship. The appellant accepted before the tribunal that he could have worded the grievance differently but that had not been his attitude at any stage before the tribunal hearing commenced. In fact, in his grievance meeting, when challenged about the terms of his grievance, he made it plain that he could not think of any better words in which to express what had happened. The conclusion of the dismissal meeting was:-

> "Despite everything Malcolm just doesn't get it".

[19] The appellant appealed the dismissal on 10 September 2010. It is notable that during the appeal process, he did not put forward the proposition that he wanted to modify or reform his approach or that he recognised that his behaviour had caused difficulty. His appeal letter stated:-

> "I wish to appeal this decision on the grounds that it was based entirely on unsubstantiated accusations, speculation and rumour".

In the appeal meeting on 30 September 2010 he stated that "insult after insult" had been fired at him during the disciplinary hearing and that Mr Porter had capitalised on the grievance which the claimant had lodged against him. He did not suggest that the grievance was inappropriately or extravagantly worded. He did not offer to withdraw the allegation against his line manager of lying and gross misconduct. He felt that management were out to get him and that there was nothing to refute as he had no case to answer. The appeal was dismissed on 11 October 2010.

The Tribunal's Conclusions

[20] There is no issue in this appeal about the finding of the tribunal in favour of the appellant on the issue of the manner in which the flexible working application was considered. There is also no appeal directed to the dismissal of the sex discrimination claim. That claim was based on the refusal of the flexible working application. The comparators advanced by the appellant were female employees who had succeeded in such applications. The evidence, however, indicated that they had successfully obtained a change to their hours of work in order to carry out child care responsibilities whereas the appellant wanted to work at home. The respondent indicated sufficient business related reasons requiring his attendance at work during working hours. In our view any appeal would have failed as, applying the test in Igen v Wong [2005] ICR 931, there was insufficient evidence before the tribunal upon which it could reasonably conclude that sex discrimination had been established. The burden of proof did not therefore pass and the tribunal properly dismissed that claim.

[21] Although at the tribunal hearing the respondent maintained that the reason for dismissal was some other substantial reason, the tribunal properly found that the letter of 30 August 2010 invited the appellant to a disciplinary hearing and the respondent failed to clarify at the appellant's request whether this was a misconduct hearing. The tribunal was satisfied, however, that the appellant was sufficiently on notice of the contention that there was an issue about the way in which he interacted with others in the workplace. The tribunal noted the lack of written records relating to the appellant's alleged difficult personality and concluded that the approach of the respondent was amateurish and slipshod. The tribunal noted in particular the failure to conduct the probationary review and the terms of the APR.

[22] The tribunal recognised however the extremely damaging terms of the grievance. This was compounded by the comment in his tribunal statement that he did not know of any more pleasant words to describe the issue. The tribunal took a similar view about the manner in which he reported the electrical fault. It found that the issue to be determined at the disciplinary and appeal hearing was whether or not the appellant had a difficult personality which was adversely affecting working relations. It was satisfied on the evidence that this was the reason for dismissal. It noted procedural flaws. Mr Thomson co-chaired the dismissal meeting despite the fact that he was one of those complaining about the appellant's personality. The appeal hearing did not correct that procedural fault.

[23] The tribunal described the approach to training and supervising the appellant as shambolic. It concluded, however, that the appellant had no real understanding of the difficulties he had caused in the workplace and he had no real intention of reforming. The tribunal also found that the appellant had misrepresented other colleagues when he claimed that they supported his allegation that Mr Porter was

treating him unfairly. The tribunal concluded that the dismissal was unfair but that compensation should be reduced by 100%.

Discussion

[24] In his submissions on the finding of unfair dismissal the appellant challenged the way in which the case had been pleaded by the respondent. In its response to the claim the respondent had submitted that the reason for the dismissal was for some other substantial reason as provided for in Article 130(1)(b) of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order) but commenced its recital of the circumstances with a reference to the invitation to the appellant to attend a disciplinary hearing on 30 August 2010. The appellant submitted that the claims in respect of the appellant's difficult personality were fresh claims and were in truth claims of misconduct.

[25] As is clear from the decision of the English Court of Appeal in Perkin v St George's Healthcare NHS Trust [2005] EWCA Civ 1174 there can be difficulty in determining the appropriate label for a particular set of facts so as to fall within the reasons set out in Article 130 of the 1996 Order. That was a case where the tribunal found a breakdown in trust and confidence between a finance director and other senior staff. The possible reasons for the dismissal were misconduct, capability and some other substantial reason. Some of the same issues arise in this case. We agree with the observation of Wall LJ at paragraph 59 that personality of itself cannot be a ground for dismissal but the manifestation of personality can result in conduct which can fairly give rise to dismissal. That was the case made by the respondent. It was not a case of misconduct. Clearly the manner in which the appellant approached his complaints was in issue in determining whether the dismissal was fair.

[26] The appellant submitted that the grievance concerning his line manager had been considered by the tribunal as a legitimate factor in his dismissal despite no finding of bad faith or inaccuracy. On the latter point it is clear from paragraph 46 of the tribunal's decision that in light of the APR which was almost completely favourable to the appellant the attitude of the appellant demonstrated by the form in which he raised his grievance was fatal and appalling. The same issue arises in respect of his submission that his report of the electrical fault was relied upon to justify his dismissal. The appellant seems not to appreciate the effect of the manner of his approach.

[27] On this issue the appellant relies on the observations of Underhill J in Martin v Devonshires Solicitors [2010] UKEAT 0086/10. That was a victimisation claim made by an employee who, because of mental illness, made extravagant claims against her senior managers. Her dismissal for some other substantial reason was fair. The issue was whether she was victimised by dismissal for carrying out a protected act. The appellant relied on the following passage.

> "It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases."

[28] He excluded in his submissions the following sentence which says:

> "But the fact that the distinction may be illegitimately advanced if made in some cases does not mean that it is wrong in principle."

The principle in question was set out in the same paragraph of the same judgment.

> "We prefer to approach the question first as one of principle, and without reference to the complex case-law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the Managing Director at home at 3 o'clock in the morning. In such cases it is neither artificial nor

> contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint."

We are satisfied that paragraph 46 of the tribunal's decision proceeds on the basis that it is the manner of the complaint that is the issue in the application before it.

[29] The principal issue raised by the appellant on the unfair dismissal matter was the contention that the tribunal's conclusions were perverse. The appellant noted that the evidence of difficult personality was given by Mr Thomson who claimed that the appellant had a difficult personality from day one. Mr Porter made no reference to the appellant's personality in his witness statement but said in evidence that there had been some improvement up to the date on which the grievance was lodged. The workers who made statements denying the allegations against Mr Porter were not called. In his favour was the absence of any indication in the APR of such difficulties and the failure to carry out a probationary review after 6 months.

[30] All of this was considered by the tribunal and its finding was that the relationship between the respondent and the appellant deteriorated significantly from 19 June 2010 when the appellant lodged his grievance. The tribunal clearly examined the material critically and did not accept every aspect of the case put forward by the respondent. The tribunal did, however, note that there was no challenge by the appellant to the assertion in the disciplinary hearing that his personality had been the subject of frequent discussion. The appellant submitted in the appeal that he should have been given direction about whether to challenge that statement. This was an issue which was absolutely fundamental to the issues before the tribunal. We do not see how the appellant could have failed to appreciate the significance of this evidence. Although the details of the aspects of his personality were not spelt out in advance of the hearing on 30 August 2010 the nature of the issues was presented in a comprehensive manner as set out in paragraph 17 above. The tribunal were entitled to take those issues into account in coming to their decision.

[31] The appellant complained that the investigation carried out at the grievance stage with other colleagues was not supported by evidence from them at the tribunal. The appellant did not suggest that the statements made were inaccurate but did say that he had been told that everyone was a bit annoyed about being pulled in for questioning by HR. Hearsay evidence is freely taken into account in tribunal hearings and given appropriate weight.

[32] The appellant also submitted that the tribunal erred at paragraph 56 of its judgment in relation to the extent of investigation carried out. The tribunal record that the issue of what was said by the four team members arose at the "first meeting" and that this was a reference to the disciplinary hearing on 30 August 2010 rather than the grievance hearing on 28 June 2010. We agree that the passage can be interpreted in that way but do not accept that it casts any doubt on the validity of the tribunal's finding. The statements of the four workers were material to the issues discussed at the disciplinary hearing and the appeal and were obtained as a result of the grievance process. The fact that the investigation occurred at the earlier stage rather than the later stage is not material.

[33] The appellant also relied on a passage at paragraph 59 of the tribunal decision in which it recorded that the appellant had misrepresented the views of his working colleagues to bolster his case at the dismissal meeting whereas he had done so at the grievance meeting albeit for the same purpose. In our view the occasion on which this assertion was made was not the material issue. The issue was the fact of such an assertion having been made and the effect it would have on working relationships.

[34] The test to be applied by the court in a perversity appeal is set out in Yeboah v Crofton [2002] IRLR 634.

> "When the principal ground of appeal is perversity of the decision of the fact-finding tribunal, there is an increased risk that the appellate body's close examination of the evidence and of the findings of fact by the employment tribunal may lead it to substitute its own assessment of the evidence and to overturn findings of fact made by the tribunal. A ground of appeal based on perversity ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. An appeal based on perversity should always be fully particularised, so that the respondent can be fully prepared to meet it and in order to deter attempts to pursue hopeless and impermissible appeals on factual points. No appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the EAT."

[35] The tribunal was the expert industrial jury who were well placed to determine how the actions of this appellant affected his ability to continue to work in this workplace. For the reasons set out we do not consider that the arguments advanced by the appellant come close to satisfying the perversity test and we

accordingly dismiss the appeal on perversity and the other criticisms in relation to the determination of the unfair dismissal claim.

Breach of Contract

[36] One of the arguments advanced by the appellant was that the failure to comply with the disciplinary process constituted a breach of contract. He claimed that he was part of a company share scheme and that he would have received a benefit of £6,700 if he had still been employed on 23 September 2010. We accept that the tribunal has not dealt with this aspect of the claim. We conclude, therefore, that the breach of contract issue should be remitted to the tribunal to establish whether there was any breach of contract as alleged by the appellant, whether the appellant suffered any loss if there was any such breach and if so what if any compensation should be paid. To this extent only the appeal is allowed.