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Judgment: approved by the Court for handing down | *Delivered:* **13/11/13**
*(subject to editorial corrections)**

IN THE COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

NATASHA DELANEY

Appellant

-and-

THOMAS McMAHON

Respondent

_____

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ (delivering judgment of the court)

[1] This is an appeal by the appellant employer against a decision of an Industrial Tribunal finding that the respondent had been unfairly dismissed from his employment as head chef at the appellant's restaurant. At the Tribunal the appellant alleged that the respondent was dismissed for reasons of dishonesty, mismanagement and sexual misconduct. The appellant conceded that the respondent's summary dismissal was prima facie automatically unfair as it was in breach of the dismissal procedures required by Article 130A(1) of the Employment Rights (NI) Order 1996 (the 1996 Order) but she relied upon the statutory defence contained in Article 130A(3) and Regulation 11 of the Employment (NI) Order 2003 (Dispute Resolution) Regulations 2004 on the basis that the use of the proper dismissal procedure would have led to her being further harassed by the respondent. The Tribunal awarded the respondent a 10% uplift to the compensatory award because of the failure by the appellant to follow the statutory dismissal procedure and made an award of £1,000 representing two weeks wages because of a failure by the appellant to provide written reasons for dismissal.

Background as found by the Tribunal

[2] The respondent was employed by the appellant as the head chef in her restaurant. The restaurant had done well for several years but as a result of a poor Christmas trading period in 2010 it was in financial difficulties. The appellant's husband, Mr Lawrence Delaney, was the manager during the period of employment with which this appeal is concerned and he took a close interest in the business. On Saturday 9 April 2011 at 11:30 pm the appellant's husband took the respondent aside and told him that he was being dismissed. Mr Delaney gave no reason for the dismissal and no allegation of misconduct against the respondent was made but he did refer in general terms to the financial and business difficulties of the restaurant. The Tribunal found that the appellant believed that her husband was going to speak to the respondent about his behaviour but not dismiss him. On 20 April 2011 the claimant wrote to Mr Delaney seeking reasons for his dismissal. No reply was ever received.

[3] No evidence of dishonesty was led by the appellant and the Tribunal stated that the respondent should consider himself vindicated in respect of those allegations. Nearly all of the serious allegations relating to mismanagement were based on the premise that by the time of his dismissal and for a considerable period beforehand the respondent had become the general manager, as distinct from being merely the head chef, of the restaurant. The Tribunal rejected that argument. It noted that it was agreed that he had been initially recruited as head chef and paid £500 per week. There was no change to his weekly wage and the appellant was unable to point to any conversation during which it was explicitly agreed that the respondent would carry out the broader role of general manager.

[4] The Tribunal were satisfied that Mr Delaney was significantly involved in the management of the restaurant and that the respondent never had discretion in respect of the numbers of chefs employed. It was not his responsibility to keep proper records in relation to tips. There was a complaint about the arrangements in respect of the Christmas menus but the Tribunal was satisfied that any deficiencies or shortcomings were because Mr Delaney wanted the menus as they were or was content with them as they were. In respect of those management allegations within the claimant's contractual area the Tribunal was satisfied either that the respondent was not guilty of the behaviour alleged or that the conduct occurred with the agreement or acquiescence of Mr Delaney.

[5] There were nine allegations of sexual misconduct alleged against the respondent. The Tribunal concluded that they were not satisfied that three of these had occurred. The first related to an allegation by a woman who was closely related to an associate of the appellant and Mr Delaney who alleged that the respondent told her that he did not know whether to smack her or fuck her. The witness changed the terms of the allegation in her evidence, was vague and imprecise as to

the date on which it had occurred and had never reported the matter to the appellant at the time. The Tribunal concluded that the allegation was untruthful.

[6] There were two further allegations about which the Tribunal was not satisfied. The first was the suggestion that he told the appellant in October 2010 when she started to work in the restaurant that he did not want any of "Lawrence's pets". The respondent knew that the appellant was Mr Delaney's wife and the Tribunal was satisfied that he would not have used such language to her. That also applied to the allegation that in December 2010 he said to the appellant "did you see W's tits?". The respondent was well aware of the socially conservative nature of the appellant and would not have made such a remark to her.

[7] The appellant alleged that in December 2010 the respondent asked what type of man she liked. The Tribunal found that this was a question in relation to actors in films and had no sexual connotation. Similarly in December 2010 the respondent showed the appellant a photograph of a dog lying on the ground. The appellant maintained that the dog was in the sexual position and that the respondent said that he could do this as well. The Tribunal found that this was a nonsexual photograph of the dog which was contained within a number of family photographs that the respondent showing to the appellant and other staff. The appellant alleged that the respondent put his arms around lots of female staff. The Tribunal accepted that the respondent was more tactile than other men but found that there was nothing objectionable in the conduct. The Tribunal accepted that a male employee said to the appellant "are you busy with sex?" The appellant alleged that the respondent laughed but the Tribunal rejected this and accepted the respondent's evidence that he had rebuked the member of staff.

[8] Although the Tribunal found that most of the allegations of sexual misconduct were concocted by the appellant as a basis for defending the claim it accepted that two of the allegations were probably well founded. On one occasion the respondent referred to a restaurant blender as a vibrator when the appellant asked what it was and in March 2011 on an occasion when the appellant said that a sandwich was too big for her the respondent said within the hearing of the appellant "that's what my wife said to me last night!". The respondent and another male employee who was standing close to him laughed. The Tribunal accepted that the respondent was careless as to who heard the remark.

Illegality

[9] In his evidence the respondent asserted that he had agreed with Mr Delaney when he took up his position that he would receive £500 net per week with the restaurant being responsible for his tax and national insurance payments. The Tribunal considered that evidence untruthful. It noted that the respondent never made any enquiries to check that tax was being deducted from his wages, that he never knew precisely what his gross salary was and never enquired about it and that

the tax was not in fact being paid. The Tribunal concluded that the respondent knew or must have known that appropriate tax deductions from his income were not being made and appropriate payments were not being paid over to HMRC.

[10] In Enfield Technical Services v Payne [2008] ICR 30 Elias J conducted a comprehensive review of the cases where the contract was lawful when made but had been illegally performed and the issue was whether the party seeking the assistance of the court had knowingly participated in the illegal performance. The concept of participation has given rise to some difficulty. This was addressed in Hall v Woolston Hall Leisure Ltd [2001] ICR 99. In that case the claimant agreed that she would be paid £250 net per week. She was provided with payslips which showed that her tax and national insurance payments were calculated on the basis of a gross wage of £250 per week. She was, therefore, aware of the misrepresentation and raised it with the employer but was told that was the way the employer did business. The court held that these circumstances showed acquiescence in the employer's conduct but reflected the reality that she could not compel her employer to change his conduct.

[11] The appellant submitted that the cases of Newland v Simons and Willer (Hairdressers) Ltd [1981] IRLR 359 EAT, Hewcastle Catering Ltd v Ahmed [1991] IRLR 473 and Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant) [2005] ICR 265 showed that the contract in the present case was illegal. Hewcastle is of no assistance to the appellant as the VAT fraud was ancillary to the employees' employment and not a direct consequence of their contracts of employment. Wheeler was a case in which Hall was applied. The Court of Appeal allowed the appeal because it concluded that although the employee and her husband must have known that something was wrong and they chose to acquiesce in the employer's illegal activities, that was not sufficient to establish participation.

[12] Newland was a case in which the employee was a hairdresser who was paid a weekly cash wage. The employer falsely recorded a lower amount in the wages book in order to defraud the revenue. The employee initially believed that tax and national insurance were being properly deducted but as a result of receiving her P60 the Tribunal found that she knew of or ought to have known of the failure to pay the appropriate tax and dismissed the claim. The EAT allowed the appeal on the basis that the Tribunal could only dismiss the claim if the employee knew of the fraud. The case does not mention the concept of participation and the majority considered it sufficient to debar the claimant that she knew of the illegality but continued to accept payment. This case is not consistent with the clear line of authority set out by Peter Gibson LJ in Hall requiring participation and Mance LJ doubted the reasoning and the outcome in Newland in his concurring judgment in Hall. We consider that the correct legal principles were set out in Hall, that Newland is inconsistent with those principles and that its reasoning should not be followed.

[13] It is apparent from the Tribunal's decision at paragraph 100 that it clearly understood the legal principles and set them out correctly. In light of the finding that the respondent knew that appropriate tax deductions from his income were not being made and appropriate payments were not being paid over to HMRC the issue for the Tribunal was whether this was a case of participation or merely a case of acquiescence. The Tribunal's conclusion suggests that it was persuaded that this was an acquiescence case but we accepted the submission on behalf of the appellant that the reasoning supporting that conclusion was not sufficiently set out in the decision. Accordingly we remitted the case on this single issue to the Tribunal.

Other matters

[14] The appellant argued that the Tribunal erred in not finding that the two matters established in evidence about the claimant's conduct amounted to sexual harassment so as to justify a reduction in his compensatory award by virtue of blameworthy conduct. We accept the submission that a single act of sexual misconduct could justify a reduction in compensation. The two matters which the Tribunal found established related to the making of vulgar jokes and the Tribunal considered that they did constitute culpable or blameworthy conduct. It concluded, however, that the conduct could easily have been addressed by telling the respondent to watch his language in future and was not sufficiently serious to justify the imposition of any disciplinary sanction. In those circumstances it was not just and equitable to reduce the compensation in respect of the basic award under Article 156 (2) of the 1996 Order.

[15] Article 157 (6) of the 1996 Order allows tribunals to make conduct related reductions from compensatory awards only where the tribunal finds that the dismissal was to any extent caused or contributed to by any relevant action of the claimant. The Tribunal was satisfied that the respondent's dismissal was not caused or contributed to by any of the alleged conduct which constituted the subject matter of the various allegations and accordingly considered that there was no power in the circumstances of this case to reduce the amount of the compensatory award under this Article.

[16] The Tribunal also considered whether it should make a reduction under Article 157 (1) of the 1996 Order (a Polkey reduction). In considering what was just and equitable it took into account whether there was evidence that the respondent could or would have been fairly dismissed in any event. The Tribunal was satisfied that the respondent was not dismissed for the reasons which had been put forward on behalf of the employer but could not come to a view as to the true reasons for the dismissal. It was contended on behalf of the appellant that the dismissal was for financial reasons but the Tribunal noted that there was no substantial evidence by way of documentation or otherwise to support that case. No criticism could be made of the manner in which the Tribunal dealt with this issue.

[17] The respondent wrote to his employer on 20 April 2011 asking for a written statement of reasons for his dismissal. No reasons were given within the 14 day period which is stipulated in Article 24 (2) of the 1996 Order. In his claim form he said that he wished to know the reasons for his dismissal and why he was not given any notice. He applied at the beginning of the main hearing to amend his claim form to include a claim under Article 125 of the 1996 Order on the basis that the employer unreasonably failed to provide the said written statement. The appellant objects that the application was allowed at the beginning of the main hearing rather than in the pre-hearing review but accepts that she has not been prejudiced because she has no answer to this claim. The Tribunal was entitled to exercise its power to amend. The appellant at one stage sought to argue that the reason for dismissal was related to financial circumstances and had been communicated to the respondent. This, of course, directly contradicted the appellant's case at the hearing but in any event the Tribunal found itself unable to come to any conclusion about what the true reason for the dismissal actually was.

[18] The appellant argued that the Tribunal erred in finding that the statutory defence for non-compliance with the statutory dismissal procedure was not available to her on the basis that she feared further harassment if those procedures were followed. At paragraph 82 of its decision the Tribunal considered this question and was satisfied that no exceptional circumstances existed. This was a finding which the Tribunal made on the basis of all of the evidence called before it. It had the benefit of seeing the witnesses as a result of which it found the evidence of the appellant and Mr Delaney in some respects untruthful. The Tribunal carefully examined the harassment case but rejected the submission that the appellant had been sexually harassed as set out in paragraphs 5-8 above.

[19] Finally we do not see any merit in the submission that the findings of the Tribunal were perverse or that the reasoning was insufficient on any of these matters apart from the illegality issue. An application was made to adduce evidence of a business lease dated November 2010 to support the credibility of the appellant and Mr Delaney but this material was plainly available at the time of the hearing and in any event would have been of little or no assistance.

Conclusion

[20] For the reasons given we remitted the case to the Tribunal solely on the illegality issue.