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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON AN APPEAL FROM AN INDUSTRIAL TRIBUNAL

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BETWEEN:

DR MALGOZATA STADNIK-BOROWIEC

Appellant;

-and-

SOUTHERN HEALTH AND SOCIAL CARE TRUST, HEALTH AND SOCIAL CARE BOARD AND OTHERS

Respondents.

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Before: Morgan LCJ, Coghlin LJ and Weatherup J

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COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal by Dr Malgozata Stadnik-Borowiec ("the appellant") from decisions to impose deposit orders pursuant to Rules 18 and 20 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 2005 ("the 2005 Regulations"). The orders were made by different chairpersons of the Industrial Tribunal, namely, Mr Buchanan on 8 April 2013 ("the first order") and Ms McCaffrey on 23 July 2013 ("the second order"). For the purposes of the appeal the appellant represented herself with the assistance of Dr J De Havilland as a McKenzie Friend while Mr Potter appeared on behalf of the respondents. The court is grateful for the assistance that it derived from the written and oral submissions of the parties and their representatives.

Factual background

[2] The appellant was originally recruited as a GP by the second respondent ("the Board") via a locum agency in Letterkenny in 2005. The Board arranged with the agency to move a number of doctors on to sessional contracts with the Board. The

appellant was then appointed as a salaried GP on 1 October 2006. This contract was transferred to the first respondent ("the Trust") on 1 April 2007 following the review of public administration and the appellant was employed in the Trust's GP Out of Hours Service ("OHS").

[3] On 4 August 2008 a letter was received by the Trust from the family of a patient, AB, complaining about the alleged failure of the appellant to attend the patient properly and, subsequently, the Trust Emergency Department consultant advised that the appellant had administered a dose of medication to another patient, GK, which amounted to an overdose that would have been fatal if there had been a respiratory arrest. It appears that these incidents were set against the background of previous incidents of concern relating to the appellant's work practices and conduct which had been investigated informally and discussed with the appellant on 24 June 2008.

[4] It was agreed that the matters would be investigated under the remit of a framework for handling concerns about doctors and dentists contained in a document entitled "Maintaining High Professional Standards" ("MHPS") and the Board advised the appellant to refrain from work as a locum GP pending the investigation.

[5] It was decided that the administration of the incorrect dose of medication to GK was a matter of poor clinical judgment which should be dealt with by way of an assessment of the appellant to include an action plan and involvement of the National Clinical Assessment Service ("NCAS"). A formal disciplinary hearing took place on 13 January 2009 in relation to the allegation:

> "On 19/20 July 2008 the claimant displayed serious misconduct and unprofessional behaviour when she refused to visit a terminally ill patient home despite three separate requests from the family. The claimant did not put herself in a position to fully assess the patient, or to give consideration to alternative therapeutic invention."

The decision of the Disciplinary Panel was to dismiss the claimant summarily for gross misconduct and her last day of service was recorded as 20 January 2009.

[6] The appellant appealed the decision to dismiss her summarily by letter dated 28 January 2009. In the period pending the appeal hearing the Board, who retained responsibility for the appellant's performance, met with NCAS on 13 March 2009. On 26 March 2009 the Board placed restrictions on the appellant's practice. In addition, she was required to undergo an NCAS assessment within six months of imposition of the restrictions.

[7] The appeal against the decision to dismiss the appellant summarily took place on 27 April and 18 May 2009. By decision dated 5 June 2009 the Trust's Appeal Panel concluded that the allegation was substantiated and that it was satisfied that the appellant had been guilty of gross misconduct. However, in view of the lack of previous formal disciplinary action against the appellant, the Appeal Panel decided that the sanction of dismissal should be reduced to one of a final written warning. The Panel directed that the appellant should undertake a three months period of retraining organised by NCAS together with a NCAS clinical assessment of her competency for in and out of hours GP cover before returning to work.

[8] Subsequent to the NCAS assessment of the appellant she was referred to the General Medical Council ("GMC") and that reference ultimately culminated in the GMC concluding that her fitness to practice was impaired by reason of deficient professional performance and that her registration would be subject to conditions for 24 months from November 2011. The Trust and the appellant met on 13 December 2011 to discuss the implications of the GMC conditions on her registration and her contract of employment with the Trust as a salaried GP. With effect from 23 January 2012 the Trust terminated the appellant's contract of employment. That decision was appealed by the appellant but the decision to dismiss was upheld on 10 September 2012.

The proceedings

[9] The appellant lodged initial proceedings against the Trust and the Board with the Industrial Tribunal on 23 April 2012 claiming unlawful dismissal, unlawful deduction of wages, breach of contract, race, sex and disability discrimination. The claim of disability discrimination was subsequently withdrawn. At a case management discussion held on 18 January 2013 the respondents requested a pre-hearing review for the purpose of deciding whether a deposit order should be made in relation to the claims of sex and race discrimination and such a hearing took place on 28 March 2013 before Chairman Buchanan. Chairman Buchanan decided to impose a deposit order of £500 as a condition of the appellant being permitted to take part in the proceedings "the Tribunal having taken reasonable steps to ascertain the ability of the claimant to comply with such an Order and having taken into account the information so ascertained in determining the amount of the deposit". Chairman Buchanan concluded that the appellants' contentions with regard to race and sex discrimination had little reasonable prospect of success giving as his reasons:

> "(*i*) The claimant, in her claim form, has made a bald statement that she was discriminated against on the grounds of her race and sex. No detail was given, and these matters have not been taken any further forward in an extensive interlocutory process. There is insufficient factual material to shift the burden of

> proof to the respondent under Article 63A of the Sex Discrimination (Northern Ireland) Order 1976 or Article 52A of the Race Relations (Northern Ireland) Order 1997.
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> (*ii*) The events leading to the claimant's dismissal by the respondent arise out of a factual situation involving interaction with, and decisions by, various independent medical and regulatory bodies which are not part of the respondent Trust. The respondent has put forward detailed and compelling evidence in rebuttal of the claimant's claims which relate to her conduct and concerns about her clinical practice and performance."

[10] The appellant subsequently paid the deposit of £500 by taking out a loan with the Employment and Benefits Agency in respect of which she is under an obligation to repay £7.17 per week.

[11] On 8 January 2013 the appellant lodged further proceedings with the Industrial Tribunal grounded upon the same allegations of unfair dismissal, arrears of pay, race and sex discrimination but, on this occasion, adding 15 additional respondents. Ms McCaffrey chaired a hearing of the Tribunal which took place on 23 July 2013 and she decided to impose deposits of £200 as a condition of permitting the appellant to continue the proceedings against the 15 additional respondents amounting, in total, to a payment of £3,000.

[12] In giving her reasons for imposing the deposit order Ms McCaffrey noted that, apart from an assertion that she was being treated differently to a white or male British/Irish doctor the appellant had not stated or pleaded any fact in support of her claims of race and sex discrimination. Accordingly, she had formed the view that the appellant had not demonstrated that she had an arguable case of unlawful discrimination and she considered that her claim had little reasonable prospect of success. With regard to the means of the appellant Ms McCaffrey recorded the following observations at paragraph 21 of her decision:

> "I have considered the evidence which has been adduced on the claimant's behalf, indicating that she is currently in receipt of Social Security Benefits, that she is in severe financial difficulties because of her inability to work as a doctor and that she is in imminent danger of having her house repossessed. In the light of this it is my view that the amount of the deposit in each case should be £200."

Grounds of appeal

[13] In relation to the first deposit order the appellant argues:

(*i*) That the reasons given to apply a deposit order are not correct in law.

(*ii*) That the level of deposit ordered is not proportionate to the appellant's ability to pay.

(*iii*) That the scope of the deposit order is not sufficiently defined.

[14] In relation to the second deposit order the appellant argues:

(*i*) That the Tribunal lacked the power to make multiple deposit orders in single proceedings;

(*ii*) That the Tribunal did not have power in single proceedings to make deposit orders that cumulatively totalled greater than £500.

(*iii*) That the Tribunal was aware that the appellant could not comply with such an order due to financial distress induced by acts of the respondents.

(*iv*) That the reasons given for making multiple deposit orders did not take into account that factual and legal disputes had yet to be resolved.

The relevant legislation

[15] Rules 18 and 20 of the 2005 Regulations provide as follows:

> "18(1) Pre-hearing reviews are interim hearings and shall be conducted by a Chairman unless the circumstances in paragraph (3) are applicable. Subject to rule 16, they shall take place in public.
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> (2) At a pre-hearing review the Chairman may carry out a preliminary consideration of the proceedings and he may –
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> (*a*) Determine any interim or preliminary matter relating to the proceedings;
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> (*b*) Issue any order in accordance with rule 10 or do anything else which may be done at a case management discussion;

(*c*) Order that a deposit be paid in accordance with rule 20 without hearing evidence;

(*d*) Consider any oral or written representations or evidence;

(*e*) Deal with an application for interim relief made under Article 163 of the Employment Rights Order.

(3) Pre-hearing reviews shall be conducted by a Tribunal composed in accordance with Article 6(1) and (2) of the Industrial Tribunals Order if –

(*a*) A party has made a request in writing not less than ten days before the date on which the pre-hearing review is due to take place. That the pre-hearing review be conducted by a Tribunal instead of a Chairman; and

(*b*) The Chairman considers that one or more substantive issues of fact are likely to be determined at the pre-hearing review, that it would be desirable for the pre-hearing review to be conducted by a Tribunal and he has issued an order that the pre-hearing review be conducted by a Tribunal.

(4) If an order is made under paragraph (3), any reference to a Chairman in relation to prehearing review shall be read as a reference to a Tribunal.

(5) Notwithstanding the preliminary or interim nature of a pre-hearing review, at a pre-hearing review the Chairman may make a decision on any preliminary issue of substance relating to the proceedings. Orders made at a pre-hearing review may result in the proceedings being struck out or dismissed or otherwise determined with a result that a hearing under rule 26 is no longer necessary in those proceedings.

(6) Before an order listed in paragraph (7) is made, notice must be given in accordance with rule 19. The orders list in paragraph (7) may be made at a pre-hearing review or a hearing under rule 26 if one of the

parties has so requested. If no such request has been made such orders may be made in the absence of the parties.

(7) Subject to paragraph (6), a Chairman or Tribunal may make an order –

(*a*) As to the entitlement of any party to bring to contest particular proceedings;

(*b*) Striking out or amending all or part of any claim or response on the grounds that it is scandalous, vexatious or misconceived;

(*c*) Striking out any claim or response (or part of one) on the grounds that manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(*d*) Striking out a claim which has not been actively pursued;

(*e*) Striking out a claim or response (or part of one) for non-compliance with an order or practice direction;

(*f*) Striking out a claim where the Chairman or Tribunal considers that it is no longer possible to have a fair hearing under rule 26 in those proceedings;

(*g*) Making a restricted reporting order (in accordance with rule 50).

(8) A claim or response or any part of one may be struck out under these rules only on the grounds stated in paragraph (7)(*b*) to (*f*).

(9) If at a pre-hearing review a requirement to pay a deposit under rule 20 has been considered, the Chairman who conducted that pre-hearing review shall not be a member of the tribunal at the hearing under rule 26 in relation to these proceedings.

……

20(1) At a Pre-hearing Review if the Chairman considers that the contentions put forward by any party in relation to a matter required to be determined by a Tribunal have little reasonable prospect of success, the Chairman may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500 as a condition of being permitted to continue to take part in the proceedings relating to that matter.

(2) No order shall be made under this rule unless the Chairman has taken reasonable steps to ascertain the ability of the party against whom it is proposed to make the order to comply with such an order, and has taken account of any information so ascertained in determining the amount of the deposit.

(3) An order made under this rule, and the Chairman's grounds for making such an order, shall be recorded in a document signed by the Chairman. A copy of that document shall be sent to each of the parties and shall be accompanied by a note explaining that if the party against whom the order is made persists in making those contentions relating to the matter to which the order relates, he may have an award of costs or preparation time made against him and could lose his deposit.

(4) If a party against whom an order under this rule has been made does not pay the amount specified in that order to the Secretary either –

(*a*) within the period of 21 days of the day on which the document recording the making of the order is sent to him; or

(*b*) within such further period, not exceeding 14 days, as the Chairman may allow in the light of representations made by that party within the period of 21 days,

A Chairman shall strike out the claim or response of that party or, as the case may be, the part of it to which the order relates."

The relevant case law

[16] In Van Rensburg v The Royal Borough of Kingston Upon Thames and Others (UKEAT/0096/07/MAA: UKEAT/0095/07/MAA) the judgment of the Employment Appeal Tribunal was delivered by the President, Elias J, who accepted that the word "contentions" in Rule 20 was naturally broad enough to embrace both factual and legal matters which the Tribunal had to determine and he went on to say:

> "24. I am reinforced in this view by the fact that there is a more draconian rule under Rule 18(7)(*b*) which empowers a Tribunal to strike out a claim, or any part of it, on the grounds that it is 'scandalous or vexatious, or has no reasonable prospect of success'. In the recent decision of the Court of Appeal North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 Lord Justice Morris Kay, with whose judgment Ward and Moore-Bick LJJs concurred, recognised that in principle – albeit that the cases will be very exceptional – it would be possible for a claim to be struck pursuant to this rule, even where the facts were in dispute.
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> 25. Morris Kay LJ gave as an example a case where the facts as asserted by the applicant were totally inconsistent with the undisputed contemporaneous documentation. It is also to be noted that in that case the Employment Tribunal had, prior to making the strike out order, indicated that subject to the question of means, the case would be an appropriate one for a deposit to be made. No such order was in the event made because the strike out order disposed of the case altogether. However, the Court of Appeal noted that the possibility of a deposit under Rule 20 remained open and they made it plain that that would have to be considered afresh by a Tribunal, but that they were not 'indicating any view of the ultimate merits of this case one way or the other'. The Court was clearly acting on the assumption that the power to order a deposit could in principle be exercised where the Tribunal had doubts about the inherent likelihood of the claim succeeding.
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> 26. Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of

> credibility, can in an exceptional case be taken into consideration even where a strike out is considered pursuant to Rule 18(7). It would be very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the Tribunal is assessing the prospects of success, albeit to different standards.
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> 27. Moreover, the test of little prospect of success in Rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in Rule 18(7). It follows that a Tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

[17] We also bear in mind Rule 30 of the IT Rules of Procedure which deals with the obligation on the part of a Tribunal or Chairman to give reasons, either oral or written for any decision or order. Rule 30(6) provides as follows:

> "(6) Written reasons for a decision shall include the following information –
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> (*a*) The issues which the Tribunal or Chairman has identified as being relevant to the claim;
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> (*b*) If some identified issues were not determined, what those issues were and why they were not determined;
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> (*c*) Findings of fact relevant to the issues which have been determined;
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> (*d*) A concise statement of the applicable law;
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> (*e*) How the relevant findings of fact and applicable law have been applied in order to determine the issues;
>
> (*f*) Where the decision includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been

> calculated or a description of the manner in which it has been calculated."

[18] Quite apart from the statutory obligation to provide reasons in accordance with paragraph 30 of Schedule 1 to the 2005 Regulations, there is a general obligation to provide adequate reasons for judicial decisions since, if it is not apparent to the parties why one has won and the other has lost, justice will not have been seen to have been done. As Lord Phillips MR observed in English v Emery Reimbold and Strick Ltd [2002] EWCA Civ 605:

> "The essential requirement is that the terms of the judgment should enable the parties and an Appellate Tribunal readily to analyse the reasoning that was essential to the judge's decision."

We also note the observations of Morgan LCJ delivering the judgment of this court in Jason Ferris and Grant Gould v Regency Carpet Manufacturing Limited [2013] NICA 26.

Discussion

[19] In the course of delivering his decision to order the appellant to pay the maximum deposit of £500 as a condition of being permitted to pursue her claims of discrimination on the grounds of race and sex Mr Buchanan simply recorded that the Tribunal had "… taken reasonable steps to ascertain the ability of the claimant to comply with such an Order." The decision itself does not refer to the specific details of the appellant's financial resources or explain the manner in which they were taken into account. It is possible that the intention was to divide the £500 equally between the claims for race discrimination and sex discrimination, although an alternative view might be that the relevant "matter" was a single claim of compensation for discrimination whether that was based upon race or sex or both. Again, such detail was not included in the decision.

[20] Ms McCaffrey did record the evidence relating to the appellant's means at paragraph 21 of her decision issued on 23 July 2013 noting that she was currently in receipt of Society Security Benefits, that she was in "severe financial difficulties" because of her inability to work as a doctor and that she was in "imminent danger of having her house repossessed". However, she then proceeded to impose a deposit of £200 in respect of each of the claims against the additional 15 respondents totaling, in all, some £3,000. Such a figure is six times the amount of the maximum deposit payable in respect of "a matter" in accordance with Rule 20(1). In addition, there is no reference in the decision to the earlier order made by Mr Buchanan requiring a maximum deposit of £500 or that, in order to discharge that obligation, the appellant had been compelled to apply for a loan from the Employment and Benefits Agency which she was then repaying at a rate of £7.17 per week. It appears

that, unfortunately, the existence of the earlier deposit order and consequent loan were not drawn to Ms McCaffrey's attention.

Disposal

[21] In the circumstances we propose to order the following:

(*i*) The deposit order made by Mr Buchanan will be quashed and we shall substitute therefore an order to pay a deposit of £200 in respect of the allegations of discrimination made by the appellant.

(*ii*) The order made by Ms McCaffrey did not take into account the previous order made by Mr Buchanan and the consequent loan arranged by the appellant to meet her obligation. That was an important factor that ought to have been drawn to the attention of Ms McCaffrey and, having regard to that omission and the amount imposed, we also propose to quash that order.

[22] We consider that these cases should now be remitted to a new Tribunal for the purposes of case management. That Tribunal should be free to give consideration to the most practically effective means of dealing with these cases consistent with the interests of justice. In so doing, the Tribunal should have regard to the overriding objectives contained in Regulation 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 and to the following observations made by Girvan LJ when delivering the judgment in Jason Veitch v Red Sky Group Limited [2010] NICA 39 at paragraph [21]:

> "Faced with the need for a rehearing of the remitted issues the respondent expressed concern at the length of the proceedings to date and the likelihood of a further protracted hearing on the disability issues. Counsel stated that the proceedings had lasted 16 days in the Tribunal. In Peifer v Castlederg High School and Western Education & Library Board [2008] NICA 49 this court has drawn attention to the undesirable length that some Tribunal hearings appear to take. In SCA Packaging v Boyle [2009] UKHL 37 the House of Lords similarly expressed concerns at the protracted length of proceedings. There may be many reasons why this happens, for example, a lack of focus on relevancy, a desire by a Tribunal to give parties, particularly unrepresented parties, a full opportunity to make all their points, or a fear that a robust approach to the management of the case might draw criticism or complaint from the parties. The duty of the Tribunal is to ensure

> reasonable expedition and due diligence on the part of the parties to identify and properly pursue relevant points only and to exercise leadership in the proper management of the case. In Peifer it was pointed out that tribunals should not be discouraged from exercising proper control of proceedings to secure the overriding objectives in Regulation 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 through a fear of being criticised by a higher court which must give proper respect to the tribunal's margin of appreciation in the exercise of its powers in respect of proper management of the proceedings to ensure justice, expedition and the saving of cost."

[23] The joining of 15 additional defendants clearly has the potential to generate an enormous increase in the complexity, timing and expense of these proceedings. Apart from any other orders and/or directions the Tribunal may wish to give consideration to a strike out application/s in accordance with Order 18. In so doing the Tribunal might wish to take into account the need to stand back and focus on the issue of discrimination taking account of the relevant factual matrix relied upon by the appellant, including any evidence relating to relevant comparators and the reason for any differential treatment – see Curley v Chief Constable [2009] NICA 8 and Nelson v Newry and Mourne District Council [2009] NICA 24. The Tribunal might ask itself whether, apart from mere assertion, a prima facie factual case of discrimination has been made out by the appellant. As the Court of Appeal in England and Wales made clear in Madrassy v Nomoure International plc [2007] IRLR 246 the burden of proof will only shift to an employer when a Tribunal "could conclude" that on the balance of probabilities the respondent had been guilty of discrimination and "could conclude" should not be read as equivalent to "might possibly conclude" – the facts must lead to an inference of discrimination. Should the Tribunal determine that the Order 18 threshold has been passed, the question of a fair and appropriate deposit order in accordance with Order 20 may arise. Alternatively, since the respondent in the first case has accepted that it was vicariously responsible for the relevant actions on the part of the additional 15 defendants, the Tribunal might adopt the practical course of "parking" any case against the additional defendants pending the outcome of any case of discrimination being made out by the appellant against the original respondents. Such courses of action are put forward simply as suggestions in the hope that they might be helpful in the circumstances and the Tribunal to which the matter is remitted should feel free to adopt whatever approach it considers to be most consistent with the interests of justice in the circumstances.