Neutral Citation No. [2011] NICA 27 | *Ref:* **HAR8207**

Judgment: approved by the Court for handing down | *Delivered:* **27/6/2011**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

JOHN EDWARD SPENCE

Appellant/Claimant;

and

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

Respondent.

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Higgins LJ, Hart J and Sir John Sheil

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HART J (delivering the judgment of the court)

[1] Mr Spence, the appellant/claimant, had been employed by the Northern Ireland Civil Service (NICS) since 1985, and at the time of his dismissal in 2010 was a Grade II Senior Business Technologist (Crops and Horticulture) in the Department of Agriculture and Rural Development (DARD) based at Greenmount College.

[2] The NICS had an electronic filing system called TRIM (Tower Records Information Management), and different members of staff throughout the DARD had different levels of access to TRIM. At the time the person filing a document set the security control for that document, and that security control then governed the extent of access to that document by others. One of these settings was "Everyone", which meant that anyone in the entire NICS, and not just in DARD, could access the file. It transpired that a technical flaw in the system at the time meant that someone such as Mr Spence who was an "end user" could alter the security control setting which had been chosen by the person who entered the file by changing the setting to "Everyone", and by doing so could thereby give himself (and anyone else who wished to view that file) access to the file.

[3] This defect in the computer system was discovered by Mr Spence who was concerned about the extent to which personal information relating to him could be viewed by others on the TRIM system, and on 6 March 2009 he raised a grievance with Gerry McPeake, who was the Human Resources Manager for the TRIM system in DARD. Mr Spence complained that documents concerning personal information about him were accessible to all TRIM users, and therefore this amounted to an infringement of the Data Protection Act. It is not disputed that by raising a grievance in this fashion this was a "protected disclosure" within the provisions of Article 70B of the Employment Rights (Northern Ireland) Order 1996.

[4] As the result of the complaint made by Mr Spence, the DARD proceeded to carry out immediate and extensive investigations into the manner in which this alleged defect was capable of being used. TRIM contains within it a system which creates an audit trail showing who has accessed each document held on TRIM. The investigation revealed that between 4 March 2009 and 30 March 2009 Mr Spence accessed and changed the security control setting on 113 documents, of which he viewed the contents of 108. Of the 113 documents –

- 81 contained information about him.
- 11 related to other individuals and, we were told without objection, he viewed a number of occupational health records belonging to other employees of DARD.
- 21 related to management and work force issues unconnected to Mr Spence.
- 23 were accessed by Mr Spence after he raised his grievance with Mr McPeake on 6 March 2009.

[5] Mr Spence was first told that he would be the subject of a disciplinary investigation on 31 March 2009, and he was told that this would be carried out by HR Connect, the human resources department of the NICS. A report running to over 800 pages was submitted to Mr McPeake by HR Connect on 14 November 2009. He requested an addendum and this was submitted on 1 December 2009.

[6] A disciplinary meeting was held with Mr Spence by Mr McPeake on 8 January 2010, and by letter dated 28 February 2010 Mr Spence was informed that he was being dismissed for gross misconduct with effect from 26 March 2010. In accordance with the NICS internal appeals procedure he launched an appeal which was heard by Mr David Trelford, the DARD Human Resources Manager, on 18 March 2010, and Mr Spence was notified by letter dated 24 March 2010 that his appeal had been rejected. A further appeal to the Civil Service Appeal Board was rejected after a hearing on 4 June 2010.

[7] Mr Spence then brought a claim for unfair dismissal to the Industrial Tribunals, and after a hearing extending over several days between 31 August and 4 November 2010 a tribunal rejected his claim for unfair dismissal, and Mr Spence now appeals against the decision of the industrial tribunal. Mr Brian McKee of counsel (who appears on behalf of Mr Spence) contends that the decision of the Industrial Tribunal was "perverse". Mr McKee does not dispute that the bar is set very high for an appellant who seeks to show that the decision appealed from was perverse. In Crofton v. Yeboah [2002] IRLR 634 at paragraph 92 Mummery LJ said that an appeal can only succeed on the grounds of perversity:-

> "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".

[8] The case made on behalf of Mr Spence is that there were a number of breaches of the Labour Relations Agency Code of Practice (the Code) and that the tribunal either did not make findings, or the findings that it did make were findings which no tribunal could properly make in the light of what was asserted to be the uncontroverted evidence.

[9] Article 90(16) of the Industrial Relations (Northern Ireland) Order 1992 (the 1992 Order) provides:-

> "A failure on the part of any person to observe any provision of a Code of Practice issued under this Article shall not of itself render him liable to any proceedings; but in any proceedings before an industrial tribunal or the Industrial Court –
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> a. any such Code shall be admissible in evidence; and
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> b. any provision of the Code which appears to the tribunal or Industrial Court to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

[10] The Code which applied at the time of the events which are the subject of the present appeal came into effect on 3 April 2005. In Devis & Sons v. Atkins [1977] AC 931 at 955 Viscount Dilhorne observed in relation to the ACAS Code in force at that time in England and Wales that:-

> "it does not follow that non-compliance with the Code necessarily renders a dismissal unfair but . . . a failure to follow a procedure prescribed in the Code may lead to the conclusion that a dismissal was unfair, which, if that procedure had been followed, would have been held to have been fair."

[11] Mr McKee identified a number of areas where he submitted that the NICS rules were unclear and did not comply with the provisions of the Code.

Rules should be clear as should the consequences of their breach

[12] He pointed out that the Code provides that:-

(a) disciplinary rules should be specific, clear, in writing, that they should be readily available to employees, and

(b) employers should inform employees of the likely consequences of breaking disciplinary rules.

He went on to argue that in the present case the notice of investigation was vague, the disciplinary charge remained vague and was lacking specificity, and:-

(c) the likely consequences of any breach were not specified.

We shall deal with these in turn.

[13] -

(1) On 31 March 2009 Mr McKendry, who was Head of the Crops and Horticulture Development Branch, held a meeting with Mr Spence, and wrote to him on the same day setting out a number of matters, and saying:-

- "The audit indicates that you changed access controls on records of which you were the subject, and in documents relating to other officers and work areas, which had no relevance to you or your work;

- You should be aware that this will now be the subject to a disciplinary investigation which will be carried out by HR Connect.

- This is viewed as a serious matter and you must immediately stop changing access controls without proper permission or accessing records held within TRIM which are not relevant to your work."

(2) On 17 December 2009 Mr McPeake wrote a long letter to Mr Spence in which he clearly set out the nature of the allegation against Mr Spence and referred specifically to five rules of conduct. Following the disciplinary hearing on 8 January 2010 Mr McPeake wrote to Mr Spence setting out in very considerable detail the nature of the allegations against him, his conclusions and the breaches which he found were proved, together with his consideration of the circumstances, and concluding that the gravity and nature of his offences as outlined in the letter was such that Mr Spence's behaviour warrants dismissal.

[14] Although the tribunal expressed itself as being satisfied that "the disciplinary hearing and the subsequent review hearing on appeal were carried out in accordance with the (sic) that procedure, and that the Labour Relations Agency Code of Practice was not breached in the respects alleged" it did not give its reason(s) for reaching this conclusion. We shall return to this later in this judgment, but we are satisfied that there is no substance in the assertion that the NICS rules were not clear. On the contrary, the various documents referred to in Mr McPeake's letter of 17 December 2009, which was set out in full in the tribunal's written decision, make it abundantly clear that conduct of the nature admitted by Mr Spence may result in disciplinary action. See for example AEC 84/08 dated 15 December 2008 at page 84 of the appeal bundle. It is not necessary in our view that it should be spelt out that disciplinary action may involve dismissal because some forms of misconduct, such as fighting at work, so obviously amount to misconduct that may merit dismissal that they do not need to be spelt out. We are satisfied that serious computer misuse is one such form of misconduct.

[15] We are also satisfied that the assertion that the disciplinary charge was vague is without substance. The letter of 17 December 2009 very clearly identified the allegations against Mr Spence.

The raising of a grievance during a disciplinary procedure

[16] Mr Spence made it clear that he considered that his employers were not justified in putting his grievance in relation to the ready access to the TRIM system to one side whilst the disciplinary proceedings against him proceeded and were brought to a conclusion. At 5(vi) of the findings of fact the tribunal concluded that the decision by Mr McPeake to suspend Mr Spence's grievance on the basis that it could not be dealt with without straying into the disciplinary matter was appropriate. Given that the grievance was the matter which sparked off the investigation which resulted in the discovery of Mr Spence's conduct we consider that the tribunal was entitled to reach the

conclusion on this matter which it did, and the reason it gave for its conclusion was adequately expressed.

An employee should be informed of the allegations against him together with the supporting evidence in advance of the disciplinary meeting

[17] Mr McKee's argument under this heading was that Mr Spence had been refused access to the 800 page report produced by HR Connect, a report which was not merely available to, but clearly considered by, Mr McPeake, and therefore this was unfair and a breach of the relevant provision of the Code. It is clear from Hussein v. Elonex [1999] IRLR 420 at [25] that there is a failure of natural justice if the essence of the case about the employee's conduct is contained in statements which have not been disclosed to him, and where he has not otherwise been informed of the nature of the case against him. In the present case Mr Spence knew perfectly well what the nature of the case was against him from the various letters and meetings which preceded the final disciplinary hearing, and in any event he admitted that he had changed the access controls and viewed other material. This was stated by Mr McPeake at paragraph 8 of the disciplinary decision letter, and was not challenged by Mr Spence.

> "8. As you admitted that it was you that changed the access controls and viewed the documents I have therefore focused my deliberations on whether or not your actions were a breach of conduct and whether they were justified and acceptable. During your meetings with HR Connect on 11 June 2009 and with me on 8 January 2010 you stated that you discovered that documents containing personal information about you did not have appropriate controls in place. You went on to say that you carried out a thorough audit through extensive searches to establish the extent of the problem and that you also carried out further audits through other subject area searches. These other subject area searches led you to modify the access controls and view documents that related to personal information about other individuals and management issues that were not relevant to you."

[18] In any event, on 29 December 2009 Mr McPeake sent Mr Spence a memorandum in answer to a request by Mr Spence for copies of a range of information in advance of the disciplinary hearing, and various documents accompanied the memorandum, including the audit trails showing which documents were viewed and when the access controls were changed. Mr Spence therefore had all of the documents he needed to check whether the allegations against him were factually correct, and it is apparent from para. 8

of Mr McPeake's letter quoted above that Mr Spence accepted the factual accuracy of the figures relied upon by DARD.

[19] The entire 800 page human resources report was disclosed at the industrial tribunal, and it is noteworthy that Mr McKee was only able to point to one document which he relied upon as in some way supporting Mr Spence's case. This was prepared by a Mr Maxwell in the course of the investigation in which he accepted that Mr Spence was technically authorised to view material on the TRIM system. However, it cannot be said that this gave Mr Spence authority to behave in an improper fashion, which he clearly did by accessing documents which he was not entitled to access, including the occupational health records of other employees. That being the case, we are satisfied in the circumstances of the present case that the non-disclosure of the entire report to Mr Spence during the disciplinary procedures did not affect the fairness of the proceedings in any material way.

[20] Mr McKee emphasised that the tribunal did not consider, but merely noted, that the refusal of DARD to disclose these documents was taken in accordance with departmental policy. At (x) of its findings of fact the tribunal stated:-

> "The Tribunal is satisfied that it is not the respondent's procedure to disclose its investigation report to a disciplinee until after the disciplinary process is completed."

We have concluded that the tribunal should have considered whether or not the failure to disclose the investigation report rendered the decision to dismiss Mr Spence unfair, and that its failure to do so was an error of law. We consider that a tribunal is obliged to consider, and make clear its reasoning in relation to, each of the points which is advanced by the parties in the course of a hearing. If it does not do so, or if it does not express its reasoning, neither the affected party nor an appellate court has the benefit of knowing how the tribunal reached its decision. We are alert to the risk that to require tribunals to provide reasons for decisions on each point may be seen as adding further complexity to a procedure which is meant to be straightforward. Nevertheless, we consider that where a tribunal fails to address an issue, or having done so, fails to express its reasons for its conclusions, that failure may, depending upon the circumstances of each case and the importance of the issue, render an otherwise appropriate decision subject to challenge. A tribunal should therefore make it clear that it has considered each of the issues raised by the parties, and express its conclusion thereon. We do not consider that this requires a tribunal to engage in a lengthy or detailed analysis of each of the points, because, to adopt the observations of Kerr LCJ in a different context in Re Lara Waide's application [2008] NICA 1:

> "Many cases will require no elucidation and can be disposed of summarily in a few terse sentences which convey the conclusions in a readily comprehensible way."

[21] We recognise that the employer may be justified in withholding a report such as this, particularly where it may disclose sensitive information such as the existence or identity of an informer, or as in the Civil Service, sensitive material being developed for submission to ministers and which is not yet in the public domain. These are merely some examples of circumstances where an employer may withhold information from an employee during disciplinary proceedings, and there may be other situations where some or all of a report may be legitimately withheld from an employee. Nevertheless, subject to constraints such as these, we feel that a fair procedure requires that normally an employer should consider disclosing anything in its possession which may be of assistance to an employee who is contesting the disciplinary charge, or wishes to make submissions in relation to penalty.

[22] Here the tribunal merely noted that it was departmental policy not to disclose such reports. We consider that the tribunal should have considered whether that failure made the disciplinary process unfair. In the circumstances of the present case we are quite satisfied that the failure to disclose the report did not inhibit Mr Spence's ability to present his case to his employers and was not sufficient to render an otherwise fair procedure unfair. We suggest that the DARD reconsider its blanket policy of not disclosing such reports to employees facing disciplinary proceedings.

[23] Finally, Mr McKee urged on us the severity of the penalty imposed by DARD in dismissing Mr Spence despite his clear disciplinary record and more than 24 years service. However, Mr Spence admitted improper access to a wide range of documents which he had no right whatever to examine in any way, and this was undoubtedly a very serious matter. In his letter to Mr Spence informing him of the decision to dismiss him Mr McPeake identified all the relevant factors which should be taken into account prior to making a decision of this nature. We consider that the penalty, whilst a very severe one (which following this judgment the employer now has the opportunity to reconsider in the light of the Appellant's length of service and good record), was within the band of reasonable decisions which an employer could make in the circumstances of the present case. We cannot describe such a conclusion as perverse, and the tribunal was therefore justified in its conclusion.

[24] For these reasons the appellant/claimant has failed to establish any of the grounds of appeal and the appeal is accordingly dismissed.