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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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AND IN THE MATTER OF AN APPEAL FROM THE OFFICE OF INDUSTRIAL TRIBUNALS

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BETWEEN:

DAVID LEWIS

Claimant/Appellant;

-and-

McWHINNEY'S SAUSAGES LTD

Respondent/Respondent.

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Before: Morgan LCJ, Coghlin LJ and Sir John Sheil

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MORGAN LCJ (delivering the judgment of the court)

[1] On 7 March 2011 an Industrial Tribunal issued a decision that the appellant had been unfairly dismissed by the respondent. The Tribunal dismissed the appellant's other claims for breach of contract and discrimination by way of victimisation. On 21 September 2011, the Industrial Tribunal awarded the appellant £3,134.37. The award comprised a basic award of £1,050.93 and a compensatory award of £1783.44. This left £300.00 payable to the claimant following recoupment of benefits but the Industrial Tribunal issued a Certificate of Correction dated 17 October 2011 reducing the quantum of benefits deducted from the award. As a result £1350.93 was payable to the appellant. The appellant, a personal litigant, appealed the decision on remedy with the assistance of his friend, Mr Meeks, who lodged detailed written submissions, who had accompanied him during the dismissal process at the workplace and who had represented him before the Tribunal.

Background

[2] The appellant began employment with the respondent on 1 September 2006 as a production worker and was dismissed on 27 May 2010. The respondent is a long established family company with 19 employees and its management were Kevin McWhinney, Managing Director, Elaine McWhinney, Mr. McWhinney's spouse, Human Resources Director, Angela Gibson, Mrs. McWhinney's sister, Office Manager and Stephen Crawford, Factory Manager.

[3] The appellant's employment was uneventful until 21 October 2009 when he received a written warning related to work absence and lateness, expressed to be a final written warning rather than a first written warning. On 18 January 2010 the appellant sustained an accident at work resulting in personal injuries and a brief period of absence. On his return there appears to have been a verbal agreement with management that the appellant would perform light duties, though the Tribunal was not able to ascertain the nature of the duties or any agreed mechanism to monitor or review them. The Tribunal found that the arrangement appeared to have caused resentment on the factory floor, based on the appellant's account of having been bullied by two fellow production workers, who were the sister and brother-in-law of Elaine McWhinney. This allegation was denied by the respondent. The appellant spoke to his Line Supervisor, Alan Cunningham, who told the appellant to make his complainant to Stephen Crawford. The appellant approached Stephen Crawford, probably on 18 May 2010, stating that he wished to make a grievance complaint. Stephen Crawford requested that he put his complaint in writing. The Tribunal noted that management was aware that the appellant was dyslexic and effectively unable to read or write, save to sign his name. The Tribunal found no evidence that Stephen Crawford made any attempt to accommodate the appellant in this respect or to record any details of the grievance complaint of alleged bullying.

[4] Around the same time, 18 May 2010, Stephen Crawford informed Angela Gibson that the appellant was refusing to do work duties. At the Tribunal the appellant was insistent that he had not refused to carry out work tasks but rather that he pointed out to his line management that he was physically incapable of carrying out certain tasks. A meeting was arranged, the exact purpose of which was unclear, and the appellant was asked to attend. The appellant attended believing the purpose of the meeting was to discuss his complaint of bullying but instead the appellant was asked to sign a document to consent to the provision to the respondent of medical information. He refused to do this on the basis that he had been expressly advised by the solicitor instructed in his personal injury claim not to give consent for access to his medical records. The mood became fraught and difficult with the appellant making a comment which inferred family favouritism in the company. The appellant also referred to being on medication for stress. When the appellant referred to the allegations of bullying, he was asked to put any complaint in writing and advised that the meeting would not deal with his grievance. The Tribunal's best assessment as to what transpired was that the mood

of the meeting became more and more fraught on both sides. The appellant indicated he was unable to "stick this any longer", was "sick of this" and was "going out on the sick". Towards the end of the meeting Angela Gibson found the appellant's conduct to be threatening. She left and returned with an absence leave form which she completed, writing that the reason for leaving work was stress and signing it in the space designated for a manger's signature. The appellant signed the form in the appropriate place. There was a dispute as to who had circled 'No' after the words 'Will you be returning' and 'Yes' after the words 'Permission Given', the issue being whether the appellant had been given express permission to leave work early. The Tribunal accepted the appellant's evidence that he had not himself completed those aspects of the form.

[5] The Tribunal found that, while Angela Gibson and Stephen Crawford had composed a note of the meeting, no written statements were obtained from any person. There was no evidence of specific steps taken to investigate what had transpired or allegations of misconduct against the appellant. A letter dated 20 May 2010 from Stephen Crawford to the appellant invited the appellant to attend a disciplinary meeting on 27 May 2010 and outlined five areas of conduct to be discussed. The letter advised that if management concluded that the allegations were well-founded they would be capable of amounting to gross misconduct with a possible outcome being the appellant's dismissal. The evidential basis on which the disciplinary charges were framed was unclear to the Tribunal and the appellant was not provided with any documentation of any evidence available to management. The disciplinary meeting was conducted by Elaine McWhinney. The appellant was accompanied by Mr Meeks. Although the appellant wished to stop the process to make a formal grievance complaint, he was advised that this would have to be handled separately. The outcome of the meeting was that the claimant's employment was terminated.

[6] By letter dated 27 May 2010, the appellant appealed the decision to dismiss him and asked for the documents relied on by management. The Tribunal found this request to have been ignored save for provision to the appellant of minutes of the disciplinary hearing. An appeal meeting was held on 22 June 2010, conducted by Kevin McWhinney, following which Kevin McWhinney caused a number of written statements to be obtained from the respondent's employees. Kevin McWhinney advised the appellant of the outcome of the appeal a considerable time later in an undated letter indicating that the original decision to dismiss the appellant had been upheld.

[7] Elaine McWhinney's evidence was that the appellant had been dismissed on the basis of the first, third, fourth and fifth areas of conduct. These were, respectively, refusing a work instruction, not following company procedures by being absent for two days after the meeting of 18 May 2010 without phoning the respondent, gross insubordination by behaviour at the meeting of 18 May 2010, and walking out of work on 18 May 2010 without permission. Elaine McWhinney also

took into account the previous written warning on the appellant's personnel record. The second area raised in the disciplinary procedure, causing unrest with staff, did not form part of the reason for dismissal. As regards the appeal, the evidence of Kevin McWhinney to the Tribunal was that the dismissal was upheld on the single ground of gross insubordination. This had not been stated in the letter to the appellant.

[8] The Tribunal concluded that Elaine McWhinney had not arranged to carry out as much investigation into the matter as was reasonable in all the circumstances given the facts and the potential resources available to the respondent. There was inadequate application of fair and proper procedure and the absence of a proper and fair investigation into the allegations of misconduct. The disciplinary hearing was conducted in a way which did not afford to the appellant and his representative any material resulting from any investigation to enable them to properly prepare for the hearing. The decision to dismiss did not, therefore, fall within the band of reasonable responses and was not cured by the appeal process.

[9] Having dealt with the liability issue the Tribunal then considered the question of remedy. One of the issues in the case was the extent to which the appellant was incapable of engaging in remunerative employment and the reasons for that. The Tribunal adjourned the issue of remedy for the reasons given at the end of paragraph 22 of its liability decision.

> "It is expected that in reaching its further determination, the tribunal will have the benefit of full, proper and detailed evidence and argument regarding the cause of the claimant's stated incapacity to work up to the date of hearing and any continuing incapacity that might be claimed thereafter, or alternatively any capacity to regain full remunerative employment and fully to mitigate any loss claimed."

[10] At the resumed hearing Mr Meeks indicated that he was seeking reinstatement. The chairman records that after further discussion during the hearing it became clear that reinstatement was not practicable as it was apparent that mutual trust and confidence had broken down between the appellant and the respondent and the application proceeded on the basis that compensation was the only remedy available. The Tribunal found that the effective date of termination of the appellant's contract was 27 May 2010. At the date of dismissal his gross weekly pay was £233.54 and his net weekly pay was £198.16. He had completed three full years of service and was aged 44. From 28 May 2010 to 1 December 2010 he received Employment and Support Allowance (income related) totalling £2108.08. During this period he was certified by a doctor as unfit for work.

[11] The Tribunal found that the appellant was fit to work from 1 December 2010. It appears that he did not apply for state benefits but rather relied on monies loaned to him. The appellant subsequently applied for Jobseekers Allowance which he received from 8 February 2011 at £65.45 per week and from 12 April 2011 at £67.50 per week. He was in receipt of Jobseekers' Allowance at the date of hearing. The Tribunal noted that, while the appellant had complied with the requirements for claiming Jobseekers' Allowance, there was no evidence that he had applied for work after 1 December 2010. The appellant indicated to the Tribunal that his prospects of securing any job were very limited and it was contended that the employment prospects in the locality were extremely poor. The appellant made available to the Tribunal a letter from Dr Logan dated 8 August 2011 which vouched for his attendance at the surgery following an accident at work and his treatment for pain, stress and depression and stated that his treatment was on-going. No other medical evidence dealing with the cause of the appellant's incapacity to work was provided.

[12] In relation to the period from 27 May 2010 to 1 December 2010, the Tribunal did not have clear and cogent medical evidence and had difficulty in identifying the extent of the appellant's unfitness to work that was attributable to his dismissal, to his injury at work, for which he had already received compensation, and other factors, such as matrimonial difficulties that he described in evidence. The letter provided by Dr. Logan did little to assist in establishing any causal connection between the appellant's difficulties and his dismissal. There was evidence of the medication prescribed to the appellant prior to his dismissal but the dismissal could not be causally connected to such medication or the condition underlying it. When asked to apportion his unfitness to work between his personal injury and the anxiety and depression stemming from dismissal, the appellant had estimated an apportionment of 50/50 and so himself had not sought to attribute the entirety of his incapacity to his dismissal.

[13] In relation to the period from 1 December 2010 to the hearing date, there was no evidence that the appellant had applied for a job and the Tribunal was of the view that it was entitled to receive more evidence of proper and reasonable mitigation than simply confirmation that the appellant registered for and received Jobseekers Allowance. The Tribunal determined the appropriate period of loss as being from the start of February 2011, when the appellant began to claim Jobseekers' allowance, until 1 April 2011. The Tribunal found that the appellant had failed to mitigate his loss after 1 April 2011.

[14] The Tribunal noted that it had made it entirely clear to the parties in the concluding part of its liability decision what it required to prove a causal connection between the dismissal and any incapacity for work. It considered the evidence produced extremely limited and was not prepared to engage in mere speculation. Accordingly it made a basic award of £1050.93 and a compensatory award for the 9 week period from 1 February 2011 until 1 April 2011 in the sum of £1783.44. After recoupment of benefits the appellant was entitled to receive £1350.93.

The appeal

[15] There were essentially four points made on behalf of the appellant in the appeal. First, it was submitted that this was a case in which reinstatement was the proper remedy. Mr Meeks accepted that in the course of the remedy hearing the tribunal chairman had suggested to him that reinstatement was not practicable and that he had acquiesced in this. He submitted, however, that he did so because he understood that an enhanced compensatory award would then be appropriate although he could not point to any statement by the chairman as a proper basis for such a belief.

[16] Secondly, it was submitted that this was a case in which there ought to have been a statutory uplift pursuant to Article 17 and Schedule 1 of the Employment (Northern Ireland) Order 2003 (the 2003 Order) as a result of the alleged failure of the respondent to comply with the statutory procedure in relation to dismissal. Thirdly, it was submitted that the manner of dismissal was such as to entitle the appellant to aggravated damages in the sum of £9000 and damages for injury to feelings. Fourthly, it was contended that the decision of the Tribunal on remedy was in any event perverse. In particular it was submitted that the Tribunal had unfairly penalised the appellant for not making any applications for employment or fully mitigating his loss. In addition it was submitted that the Tribunal ought not to have placed any reliance upon the appellant's own determination of the extent to which depression and pain were implicated in his incapacity for work. The appellant also sought leave to introduce further medical evidence on the incapacity issue.

Consideration

[17] The circumstances in which an order for reinstatement can be made are set out in Article 150(1) of the Employment Rights (Northern Ireland) Order 1996.

> "150. - (1) In exercising its discretion under Article 147 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account-
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> (a) whether the complainant wishes to be reinstated,
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."

In this case the appellant had indicated a wish to be reinstated and there was no finding that he had caused or contributed to his dismissal. The only issue, therefore, was that of practicability.

[18] Both parties relied on Central and North West London NHS Foundation Trust v Abimbola UKEAT/0542/08/LA for the guiding principles on this issue. That was a case where a psychiatric nurse had been dismissed for gross misconduct for allegedly holding a patient in a headlock. The tribunal found that there was not sufficient evidence to support a reasonable belief in the alleged misconduct. The tribunal ordered reinstatement. On appeal against the remedy the EAT overturned the order for reinstatement on the facts of the case. These included the fact that the claimant had lied in the remedy hearing about his earnings during the period of his dismissal and the fact that the employer genuinely believed that he was guilty of the headlock incident.

[19] The important issue of principle, however, of which this case is an example, is that re-employment may be rendered impracticable because of the loss of the necessary mutual trust and confidence between employer and employee. In this case at paragraph 7 of its remedies judgment the Tribunal expressly found that mutual trust and confidence had entirely broken down as a result of which reinstatement was not practicable. The Tribunal noted that the appellant realistically accepted that to be the case. The evidence indicated that the mood of the meeting of 18 May 2010 became fraught and difficult. The appellant asserted that there was favouritism to family. Angela Gibson felt threatened by the appellant's conduct. Even the appellant in his submissions to this court acknowledged that he "knew that things might be difficult for a short period of adjustment".

[20] The issue for this court is whether there was any error of law in the approach of the Tribunal to the reinstatement issue. The basis of the decision not to make a reinstatement order was the breakdown of trust and confidence in the employment relationship. The circumstances in which an appeal court will interfere with a reinstatement decision on perversity are very limited (see Clancy v Cannock Chase Technical College [2001] IRLR 331). The matters set out at paragraph 19 were sufficient to sustain the Tribunal's finding on this issue. There was no error of law.

[21] Article 17(3) of the 2003 Order imposes an obligation to increase an award in certain circumstances where a statutory procedure set out in Schedule 1 of the 2003 Order has not been completed.

> "17 (3) If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal that-
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> (a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,

(b) the statutory procedure was not completed before the proceedings were begun, and

(c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,

it shall, subject to paragraph (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50 per cent."

The statutory procedure at issue in this case was the dismissal procedure.

"STANDARD PROCEDURE

Step 1: statement of grounds for action and invitation to meeting

1. - (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. - (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3. - (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision."

[22] Schedule 1 imposes an obligation on the employer contemplating dismissal to set out the conduct upon which he is relying in contemplation of dismissal and the basis for that conduct. The letter of 20 May 2010 set out the allegations in the following manner.

"1. Refusing a work instruction. (Pack cocktail sausages/10lb weight on several occasions).

2. Causing unrest with staff. (Making petty accusations to the staff i.e. they are emptying the kettle and you have to boil it each time, there is never any milk for you, but milk is not supplied by the company, it is your responsibility, accusing staff of holding their backs and grimacing).

3. Not following company procedure. (Absent without a phone call on Wednesday 18 and Thursday 19 May).

4. Gross insubordination (Verbal abuse at informal meeting on Tuesday 18 May).

5. Walking out of work without permission."

[23] The requirements of these provisions were considered by the EAT in Alexander v Bridgen Enterprises Ltd [2006] ICR 1277. In step 1 the employer merely had to set out in writing the grounds which led him to contemplate dismissing the employee. Under the second step the basis for the grounds was simply the matters which had led the employer to contemplate dismissing for the stated grounds. The objective is to ensure that the employee is not taken by surprise and is in a position to deal with the allegations. The letter of 20 May 2010 identified the occasion on which the alleged insubordination occurred and identified verbal abuse as the nature of the insubordination. The letter was sent 2 days after the meeting of which complaint was made so the appellant was in a good position to contradict any alleged statement or explain anything said by him. In those circumstances the letter satisfied both of these tests so that no failure to comply with the statutory procedures arose in this case. The statutory procedures do not require the employer to set out the evidence in respect of the matters in issue although it can be helpful if the employer chooses to do so.

[24] The issue of damages for non-economic loss in unfair dismissal claims was considered by the English Court of Appeal in Norton Tool Co Ltd v Tewson [1972] ICR 501. The court concluded that just and equitable compensation did not include injury to pride and feelings. That remained the settled position until Lord Hoffmann observed obiter in Johnson v Unisys Ltd [2003] 1 AC 518 that loss should not be so narrowly construed. The appellant has relied on those observations in this case. The issue was revisited by the House of Lords in Dunnachie v Kingston-upon-Hull City Council [2004] UKHL 36 where the leading judgment was given by Lord Steyn with whom all of the other law lords, including Lord Hoffmann, agreed.

[25] Lord Steyn noted that the word "loss" had a plain meaning which excludes non-economic loss. It does not cover *injury* to feelings. At paragraph 19 he explicitly stated that it could not be seriously suggested that aggravated or exemplary compensation should be included in "loss". That decision represents the existing law and is binding on us. The claim for non-economic losses must fail.

[26] The remaining issue is the submission that the decision was perverse. The legal test in a perversity appeal has been stated in many different forms but we are content to rely on the formulation in Crofton v Yeboah [2002] IRLR 634 at paragraph 93.

> "Such an appeal 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. Even in cases where the Appeal Tribunal has grave doubts about the decision of the Employment Tribunal, it must proceed with great care."

[27] In support of this submission the appellant contended that he had been heavily penalised for not making any applications for employment or fully mitigating his loss. It was, however, accepted that he should have applied for Jobseeker's Allowance as soon as he was eligible. We accept that a different tribunal may have taken another view about the appellant's failures but that is not sufficient to render the decision reached perverse.

[28] The appellant also complained about the reliance by the Tribunal on the appellant's evidence at the hearing that he attributed his incapacity for work on a 50/50 basis between his physical and depressive symptoms. We do not accept that there is any criticism to be made of the Tribunal for relying on this evidence particularly in circumstances where the appellant was clearly advised of the need to produce full proper and detailed evidence dealing with incapacity and had plainly chosen not to do so. The medical evidence which the appellant seeks to introduce in this appeal does not help his submission. The medical shows that he was suffering from physical and depressive symptoms prior to his decision to come out of work on 18 May 2010 and that these continued. He had a requirement for urgent mental health assessment on 10 November 2010 but this was related to personal problems not connected with his work. This was a difficult exercise for the Tribunal and their approach was one which was well within the area of judgment open to them.

Conclusion

[29] For the reasons given we do not consider that any of the grounds of appeal have been made out. The appeal is dismissed.