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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **8/06/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE FAIR EMPLOYMENT TRIBUNAL

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BETWEEN:

THOMAS MCCANN MBE

Appellant;

-and-

EXTERN ORGANISATION LIMITED

(No 2)

Respondent.

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Before: Morgan LCJ, Gillen LJ and Weatherup LJ

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MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal against a decision by a Fair Employment Tribunal ("the Tribunal") dismissing the appellant's claim for discrimination on the grounds of political opinion under the Fair Employment and Treatment (NI) Order 1998 ("FETO"). This is the second occasion on which this case has come before this court, an earlier appeal against a dismissal of the claim for discrimination on the grounds of political opinion having been allowed and the matter remitted to a fresh Tribunal. Mr Potter BL appeared on behalf of the appellant. The respondent had been represented during the first appeal and before the Tribunal but was not represented in this appeal apparently because of funding issues.

The statutory scheme

[2] The relevant statutory provisions are set out in FETO:

> *"'Discrimination" and "unlawful discrimination'*
>
> 3. - (1) In this Order "discrimination" means-
>
> (a) discrimination on the ground of religious belief or political opinion; or
>
> (b) discrimination by way of victimisation;
>
> and "discriminate" shall be construed accordingly.
>
> (2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order, other than a provision to which paragraph (2A) applies, if-
>
> (a) on either of those grounds he treats that other less favourably than he treats or would treat other persons…
>
> *Applicants and employees*
>
> 19. - (1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland,-
>
> … (b) where that person is employed by him-
>
> (i) in the terms of employment which he affords him; or
>
> (ii) in the way he affords him access to benefits or by refusing or deliberately omitting to afford him access to them; or
>
> (iii) by dismissing him or by subjecting him to any other detriment…

Burden of proof: Tribunal

38A. Where, on the hearing of a complaint under Article 38, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent-

(a) has committed an act of unlawful discrimination or unlawful harassment against the complainant, or

(b) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment against the complainant,

the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

Background

[3] We take the background from that set out in the previous appeal. The appellant had commenced employment with the respondent on 1 November 1978. He was a Programme Manager and one of his responsibilities included the Ormeau Centre. His work focussed on providing services to the adult homeless. In 2000 he had been awarded an MBE for his services to disadvantaged homeless people in Belfast. He enjoyed an exemplary disciplinary record.

[4] An incident at a staff Christmas dinner in December 2006 led eventually to the appellant bringing a claim for sexual discrimination when he was suspended by the respondent's Chief Executive, Ms Liz Cuddy. This claim was resolved by the end of 2007. The same year Mr Paul Rooney was appointed as Director of Adult Services and thus became the appellant's line manager. The relationship was tense. When Ms Melaugh, an employee at the Ormeau Centre, resigned from the respondent's employment, the appellant was directed to sign a letter, prepared by Mr Rooney and by Ms Stevenson, an HR manager. He refused to do so because he did not agree with the contents of the letter. He offered his own draft which was not acknowledged by Mr Rooney or Ms Stevenson. When disciplinary proceedings were initiated he went off sick and issued a grievance against Mr Rooney and Ms Stevenson. At the grievance hearing held by Ms Cuddy on 26 November 2009 he was refused permission to return to work despite being declared fit for work. It was

only after he had seen the Occupational Health Doctor on 8 January 2010 that he was permitted to return to work.

[5] When the respondent received a complaint of bullying and harassment at the Ormeau Centre under its whistleblowing policy, the appellant was placed on precautionary suspension in January 2010. An independent report was commissioned. Only three people, including the complainant, were interviewed. Its conclusion in March 2010 was that there was an oppressive culture and management style at the Ormeau Centre. However the complaint against the appellant was not substantiated.

[6] This outcome in turn led to a further independent report being commissioned. This was flawed by, inter alia, references to findings in percentage terms of all the staff, yet only nine members out of thirty were interviewed. They found again that there was an unhealthy management culture. The appellant had no input into this report which was completed in April 2010.

[7] On 17 May 2010 Ms Cuddy wrote to the appellant telling him he remained suspended although bullying and harassment charges had not been substantiated. However further investigations were planned. Ms Cuddy did not consider permitting the appellant to return to those other duties which did not involve working at the Ormeau Centre or with its staff.

[8] On 27 July 2010 there was a lunchtime protest in favour of the appellant. This was organised by Ms Kerr as a trade union representative. It involved a leaflet which amongst other things, calculated that the cost of the protest involving the appellant and his suspension exceeded £80,000. The appellant was charged with making a contribution to the leaflet by providing information about his salary. He denied this. Ms Brown found him guilty but her investigation report was found by the Tribunal to be flawed in a number of important aspects. Mr Crossan said in evidence that he "could not conceive that the claimant was not involved throughout the preparation of the lunchtime campaign." However, this belief, the Tribunal found, was based on Mr Crossan's perception of the claimant's relationship with Mr Boomer and Ms Kerr, and not on the evidence. Both Mr Boomer and Ms Kerr were trade union representatives although the union, NIPSA, dissociated itself from the ongoing campaign in support of the appellant.

[9] The third and final report was commissioned by Ms Cuddy from Ms Brown to investigate the allegations against the appellant. There were now two further grounds:

(a) The appellant had breached his suspension by giving a reference to another employee of the respondent (this allegation was not upheld by Ms Brown).

(b) The appellant had endorsed and supported the publication of misleading and inaccurate information concerning the respondent.

Ms Brown reported in December 2010 and recommended disciplinary proceedings in respect of three charges. The disciplinary process was thereafter headed by Mr Crossan who had joined the respondent as the Director of Resources in September 2010. He added two further charges arising from the report, namely that the appellant had made wilful misrepresentations and defamatory statements to Ms Brown. These included a claim by the appellant and his trade union representative, Mr Boomer, that Ms Cuddy had victimised the appellant. Mr Crossan gave the appellant no opportunity to contribute to the investigation.

[10] Meanwhile, in a separate matter, Mr Crossan considered that Mr Boomer had behaved inappropriately and he was barred from the respondent's premises on 3 February 2011. Coincidentally, the following Monday Mr Boomer was due to represent the appellant and was thus unable to do so (subsequently NIPSA carried out its own investigation and acquitted Mr Boomer of any misconduct). The appellant obtained another NIPSA representative, Mr Graham, to act on his behalf and the hearing was rescheduled for 7 March 2011. The hearing did not conclude and a further date was fixed for 11 April 2011. Meanwhile the applicant's health had deteriorated and he was declared unfit for work because of work-related stress, anxiety and depression. His GP thought he would be unfit for a further eight weeks. On 7 May 2011 the GP wrote stating a diagnosis of "severe clinical depression and anxiety" had been made and asked for a rescheduling of the hearing. He advised that he could be contacted for further information if this was required.

[11] Mr Crossan refused to adjourn the hearing and it went ahead without the appellant. He was found guilty of each of the five charges including those aimed at the lunchtime protest in which there was an absence of any evidence. They were considered to constitute gross misconduct and the sanction was summary dismissal. The appellant's appeal was set for 14 June 2011. The appellant asked for an adjournment on the basis of further medical evidence from his GP. This was refused. A decision to dismiss was affirmed. The Appeal Panel did not see the medical evidence and was unaware of the nature of the details of the appellant's illness.

[12] In its judgment the Tribunal considered the evidence of the respondent's witnesses to have been "less than impressive". Ms Cuddy and Mr Crossan "had significant passages where answers were evasive and at times contradictory…". The Tribunal concluded that the appellant had been unfairly dismissed because of flaws in the disciplinary process which were not cured by the appeal procedure. In fact the appeal process "only made matters worse". The Tribunal was satisfied that neither "the findings of gross misconduct against the appellant nor the sanction applied of dismissal were reasonable in all the circumstances of the case". However the Tribunal also concluded that the claim of victimisation arising from the initiation

of industrial tribunal proceedings in 2007 was not made out. They concluded that there was no causative link between the "protected act" and the detriment claimed and gave five reasons. The appeal against that finding was dismissed. Further, in determining the claim for discrimination because of his political opinion, the Tribunal concluded that it had heard "no credible evidence" of discrimination of the appellant because of his political opinion. This court concluded in relation to the latter finding that it was not clear what facts were found by the Tribunal and what were rejected as not being credible and if such facts were rejected as being not credible the basis for the Tribunal so concluding.

The approach of the new Tribunal

[13] In addition to the background facts set out above it was agreed by the parties that the new Tribunal should also take into account the facts found by the original Tribunal in relation to the unfair dismissal at paragraphs [36]-[46] of its original decision. The original Tribunal concluded that it was unreasonable to continue with the disciplinary process and the appeal process in the appellant's absence. The disciplinary panel ignored the medical evidence and conflated the grievance issues with the disciplinary issues. The failings in the disciplinary hearing could have been cured by the appeal process but Mr Crossan decided that the appeal would proceed in spite of further medical evidence. The appeal panel was not involved in that decision and although they were aware that there were medical issues the panel did not attempt to clarify or ascertain the medical position. There were no satisfactory reasons for the appeal panel's decisions.

[14] The original Tribunal found that the appellant had not made the comments upon which the first charge against him was based. There were comments about the outcome of the previous industrial dispute made by Mr Boomer, his representative. There had been defamatory comments about senior staff members in Extern again made by Mr Boomer but those had not been adopted by the appellant so the second ground of justification for the unfair dismissal was not made out. The original Tribunal accepted, however, that in light of what had been said by the appellant's union representative Mr Crossan was very angry and deeply affected. The third charge related to the provision of a reference to a colleague during the appellants period of suspension. The original Tribunal concluded that the charge with a sanction of summary dismissal fell outside the range of reasonable responses for such conduct. The fourth charge related to the allegation that the appellant had provided his salary details in order to support a leaflet which was distributed by union representatives in his support. Mr Crossan indicated that he could not conceive that the appellant was not involved throughout the preparation of the leaflet and the lunchtime campaign. The original Tribunal considered that he did not have a sufficient evidential base for that conclusion. The fifth charge was that the appellant had improperly and inappropriately taken steps to promote an employee to a senior practitioner post and done so without clearance from senior management. The Tribunal felt that the decision to make a disciplinary finding against the

appellant could just be considered to be within the band of reasonable responses of a reasonable employer but concluded that it did not justify a finding of gross misconduct and certainly not the sanction of summary dismissal. The original Tribunal concluded that Mr Crossan's approach was overzealous and his objectivity was clouded.

[15] At paragraph [16]-[26] the new Tribunal reviewed the legal basis upon which they should analyse the claim. In particular they looked at the "but for" test and concluded that it was not appropriate in the present case. No issue has been raised about that conclusion in this appeal. The Tribunal also rejected the suggestion that the respondent's acts were inherently discriminatory. The Tribunal noted that simply because the context for the disciplinary action was the trade union activities it did not follow that any disciplinary action was as a result discriminatory. The issue was one of causation and the appropriate test was the "reason why" test.

[16] In the course of its review of the earlier Tribunal hearing the Tribunal erred in concluding at paragraph [51] that the first Tribunal found established the charge relating to defamatory and unsubstantiated remarks as constituting misconduct on the part of the appellant. Although that was undoubtedly an error the question will be whether it leads onto any error of law on the part of the Tribunal in its decision. The Tribunal noted at paragraph [52] that counsel for the appellant accepted in oral submissions that it was for the Tribunal to determine whether the appellant had established less favourable treatment and that the findings of the first Tribunal do not of themselves establish less favourable treatment. It was also agreed that it was for the Tribunal to assess the demeanour and credibility of witnesses, in particular that of Mr Crossan.

[17] The appellant's case was that he was perceived to have been involved in trade union activities. It was agreed by the parties that the appellant was not actually involved in the agreed trade union activity which was the lunchtime protest. In addition to that protest there was also a leaflet circulated and Facebook activity and the Tribunal found that Mr Crossan perceived that the appellant had been involved in them and in the content of the leaflet in particular. The focus of the case was, therefore, on whether the appellant suffered detriment and whether an effective cause of any detrimental treatment was the appellant's trade union beliefs.

[18] The alleged acts of detriment were as follows:

(A) The claimant's dismissal which was unfair and substantive ground;

(B) The claimant's dismissal which was procedurally unfair as he was not given the opportunity to appear and make submissions on the second day of the disciplinary hearing or at the appeal notwithstanding his being unfit to attend and seeking an adjournment;

(C) That similarly he was not afforded the opportunity to attend this grievance hearing and make submissions as it had been rolled up into the disciplinary hearing;

(D) That he was subjected to discrimination by reason of Ms Stevenson advising Ms Brown not to interview Ms Kerr (his trade union representative) because she was not likely to be objective. It is the appellant's case that this act disadvantaged him and was not trivial because if Ms Brown had spoken to Ms Kerr she might have said that the appellant was not involved in contributing to the leaflet and this might have had an impact on whether the claimant was charged with the fifth disciplinary charge.

[19] Having identified the submissions made by each of the parties the Tribunal identified the essence of their decision as being whether the perceived trade union activities comprised the context of any adverse treatment or whether the perception that the appellant was involved in them was an effective cause of such treatment and the treatment was thus discriminatory. The new Tribunal formed a better impression of Mr Crossan and found him to be genuine and honest in his evidence. They considered that Mr Crossan had a genuine belief that the claimant was guilty of misconduct while recognising that this conclusion was found to have been unfair by the first Tribunal. They considered that Mr Crossan's focus was on the claimant's behaviour and his grievances. He himself had been a NIPSA official for a period.

[20] The appellant in his evidence was very clear that the respondent in the form of several senior managers was "out to get him" by treating him unfairly in breach of natural justice for a long period before the lunchtime protest. The appellant had not attributed any of his adverse treatment to his trade union beliefs in his grievances and his NIPSA representatives had not made any such allegation throughout the internal processes. The appellant only alleged political discrimination following the Keenan decision in August 2011. The failure to raise the matter earlier was not determinative of the "reason why" issue but it was one factor for the Tribunal to weigh in the balance.

[21] The appellant contended that Mr Crossan's report amounted to primary fact evidence of discrimination and that the Tribunal could conclude that discrimination had occurred. The Tribunal found that there was an issue about Mr Boomer's behaviour as an individual and there was a valid perception on the part of Mr Crossan that the appellant made unacceptable comments and was involved in unacceptable comments made by Mr Boomer. That led to his reasonable perception that the appellant was engaged in comments which undermined the relationship between him and senior managers. Mr Crossan's report made clear that the problems the appellant had with management and the respondent reached back over many years and the difficulties in that relationship had developed and gained momentum during the long period before the lunchtime protest took place.

[22] The Tribunal did not consider it necessary to construct a hypothetical comparator but suggested that if one was to be constructed the circumstances were that he was a manager with a clear record who had a history of conflict with a number of his managers over several years to the extent that he raised six grievances against various managers. The hypothetical comparator would have been unhappy in the organisation, would have felt unwanted over a long period and would have believed that his employer wanted them out of the organisation. He would have been guilty of misconduct short of gross misconduct and would initially have been represented by an individual in respect of whom a serious complaint had been made in an unrelated matter. The Tribunal declined to draw the inference that the treatment could have been on prohibited grounds given their assessment of Mr Crossan and their factual findings.

The issues in the appeal

[23] The appellant submitted that there was a fundamental problem with the decision of the Tribunal in that it left out of account the original Tribunal's findings that spoke to Mr Crossan's lack of integrity and credibility in relation to the comments about senior management. In examining this issue it is important to recognise that the task for the original Tribunal assessing the unfair dismissal claim was whether or not it was satisfied that there was an evidential base for the proposition that the appellant had made or approved the comments which it appears Mr Boomer made. The original Tribunal was not so satisfied and it considered that the Mr Crossan had been overzealous and lacked objectivity. The question for the new Tribunal was whether involvement in trade union activity was an effective cause of the decision to dismiss or the conduct of the disciplinary and grievance hearings. That required the Tribunal to examine what Mr Crossan believed about the appellant rather than what he could prove about the appellant. The appellant relied upon the proposition that there was issue estoppel in respect of the unfair dismissal but that did not determine that trade union activities were an effective cause of the dismissal. We consider that the new Tribunal's analysis rejecting the "inherently discriminatory" test in favour of the "reason why" test cannot be faulted and the fact that there was a trade union context to some of the activities was not decisive of the direct discrimination claim. The focus of the appellant's argument on this point was the finding in Mr Crossan's report that it was highly unlikely that the appellant had not provided information in preparation for the distribution of the leaflet. In the context of a long history of dispute preceding the trade union activity the Tribunal was correct to find that an allegation that there had been disclosure of confidential information could not have given rise to a direct discrimination claim on the basis of trade union activity.

[24] The appellant contended that the hypothetical comparator would not have been dismissed in all the circumstances and that political opinion was at least part of the reason for the dismissal. It is notable, however, that in the appellant's submissions in respect of the hypothetical comparator there was no reference to the

fact that the appellant had instituted six different grievance procedures preceding the alleged trade union activity and had been the subject of three reports which had been initiated prior to that activity.

[25] The appellant sought to draw an inference from the treatment of Ms Kerr and Mr Keenan who had both participated in the lunchtime protest. Regrettably Ms Kerr had died by the time of the original Tribunal hearing. It was common case that she had been suspended shortly after the protest but this appears to have been in respect of an email distributed by her a few days earlier. Mr Keenan had given notice of his intention to leave the organisation and had been refused permission to leave early. After the protest he was dismissed and claimed under employment rights law for damages for detriment on the basis of his trade union activities. He succeeded but the Tribunal correctly concluded that a claim arising in different circumstances under different legislation was of little help.

[26] The final issue concerned the indication from Ms Stevenson to Ms Brown, who was preparing the third report, that she should not interview Ms Kerr as she was not likely to be objective. It was argued that if she had been interviewed she might have confirmed that the appellant was not involved in contributing to the leaflet as a result of which that charge would not have been pursued. The Tribunal concluded that there was no evidence that Ms Stevenson did this because of the appellant's trade union involvement and recognised that Mr Crossan was of the view that all of the actors were connected so that he might have proceeded with the charge in any event. There was no evidence that Mr Crossan knew that Ms Stevenson had approached Ms Brown. This does not provide any support for a political opinion claim on its own or cumulatively.

[27] We have already acknowledged that the new Tribunal had made an error in identifying the misconduct which the original Tribunal found the respondent could properly take into account. That error in our view did not go to the issue which the Tribunal had to address which was the state of mind of Mr Crossan in relation to the disciplinary and grievance hearings. Since these tribunals were examining different issues we do not accept that the conclusions of the new Tribunal can be said to fly in the face of the findings of the original Tribunal.

Conclusion

[28] The new Tribunal properly recognised that it had to examine whether trade union activities and political opinion were an effective cause of the appellant's treatment. That was a different task from that of the original Tribunal in examining the issue of unfair dismissal. We consider that the new Tribunal properly directed itself in the law and its findings were well within the band of reasonableness. Accordingly the appeal is dismissed.