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Judgment: approved by the Court for handing down | *Delivered:* **09/01/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

GAVIN McGLINCHEY, BARRY CONAGHAN, JOSEPH CANNING, KEVIN PATRICK DONNELLY, PATRICK ROBINSON, JAMES JOSEPH McMONAGLE, AARON SEAN MARTIN CASSIDY, MARTIN WILLIAM MOORE AND EAMON CONAGHAN

Appellants;

-and-

COLM JOSEPH McGURK AND PATRICK PEARSE MOORE T/A McGURK AND MOORE

AND

OMEGA MECHANICAL SERVICES LTD

Respondents.

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal by nine claimants from a decision of an industrial tribunal given on 28 February 2012. The tribunal concluded in six of the cases that the claim should be dismissed on the basis that the contracts were tainted by illegality. In the remaining cases the appeal concerns the quantum of compensation and the liability of the individual respondents.

Background

[2] McGurk and Moore, the first respondent, entered into a response maintenance contract with North and West Housing Ltd for a five year period

commencing in June 2002. The contract was renewed for a further five year period in June 2007 but was determinable on three months' notice. In 2009 North and West Housing Ltd retendered the contract. Omega Mechanical Services Ltd, the second respondent, was the successful bidder. Notice was duly given to the first respondent by North and West Housing Ltd and the date of the transfer was agreed at 1 October 2010.

[3] The majority of the work performed by the first respondent was in connection with the North and West Housing Ltd contract and it is, for the purpose of these proceedings, common case that the Service Provision Change Regulations (Northern Ireland) 2006 ("the 2006 Regulations") applied. The 2006 Regulations operate in a similar fashion to the TUPE Regulations. Where activities which were carried out by the transferor for a client are instead carried out by the transferee the service provision change will not terminate the contract of employment of a person who was employed by the transferor and assigned to the organised grouping of employees subject to the service provision change. The employee's contract of employment has effect after the transfer as if originally made between the employee and the transferee. The tribunal proceeded on the basis that each of the appellants was assigned to the organised grouping of employees subject to the service provision change.

[4] Kevin Barrett was the first respondent's facilities manager. He set about preparing the necessary documentation in connection with the transfer. None of the employee's had been provided with written terms and conditions of employment nor had any of them received payslips or P60s during the periods of employment. On 1 June 2010 Mr Barrett indicated that new written terms and conditions of employment drafted by him would be implemented. Paragraph 13 of that document dealt with the need to work additional hours from time to time and provided that payment for additional hours worked should be at the rate of single time or taken as equivalent time off in lieu at a mutually acceptable time.

[5] On 5 June 2010 a letter in the following terms addressed to the first respondent was circulated at the first respondent's yard before work commenced signed by five of the appellants, Gavin McGlinchey, Martin William Burke, Barry Conaghan, Aaron Cassidy and Joseph Canning as well as four other employees.

> "Re change in terms and conditions with regard to callout and overtime.
>
> Dear Sir
>
> We have recently been told that our terms and conditions with regard to callout payments and overtime are to change. Below are our current terms which have been custom and practice for at least eight years:
>
> Overtime:

> Overtime is paid at a time and a half over 40 hours and double time on Sunday.
>
> Callout:
>
> When on callout there is a standard weekly allowance of £35 per week. In addition if called out, hours worked are paid at a time and a half and double time after midnight and Sundays.
>
> On June 1 we were told without consultation that both of the above are to change.
>
> This is not acceptable as you are not legally entitled to change our terms without written notice and agreement with ourselves. This has been confirmed to us by the Citizens Advice Bureau.
>
> Yours Etc
>
> PS
>
> We had never received payslips or P60s since joining the company. This is a basic employee entitlement and we would like to receive weekly payslips starting next week and our P60s for at least the tax year ended April 2009."

[6] Mr Barrett forwarded payroll records to the second respondent during September 2010 in relation to the affected employees. Those records disclosed that in July 2010 there were substantial increases in the gross weekly pay of most of those employed the effect of which was to bring the net pay after tax and national insurance deductions in line with what was actually been paid to each of the appellants. The second respondent was dissatisfied with the reliability of the material provided which was in some respects conflicting and retained a chartered accountant, Mr Lavery, who reviewed the papers and attended at the first respondent's premises on 15 November 2011. The person who had responsibility for the payroll in the first respondent's office was not available and the computer system had crashed. Apart from certain payslips no additional material was made available. The information available to the chartered accountant was, therefore, very limited.

[7] Mr Lavery concluded that if the appellants correctly stated the net wage which they received each week then the first respondent's payroll records did not consistently record the payments which were being made in cash. With a few exceptions the payroll records consistently understated the weekly net pay as a result of which the first respondent's liability to the Inland Revenue for PAYE and national insurance was also understated. Mr Lavery concluded that there was a

deliberate attempt to regularise the payroll records in July 2010 by increasing the gross weekly pay for each individual to bring it into line with what was actually being paid. He had no evidence to allow him to reach a conclusion on whether any or all of the appellants had knowledge that the first respondent's payroll records did not reflect their payment arrangements.

[8] The tribunal was satisfied that the correspondence of 5 June 2010 indicated that the arrangements set out in that letter for overtime and callout had operated for the previous eight years both before and after Kevin Barrett's introduction to the first respondent. The absence of any reference to time off in lieu for paid overtime was significant and pointed to the fact that the overtime was being paid for in cash. The tribunal also accepted Mr Barrett's evidence that he met with potentially affected employees on several occasions prior to 1 October 2010 and that those employees were aware that records were prepared by him in relation to work done by individuals for North and West Housing Ltd. The tribunal accepted, however, that those employees did not physically see the documentation in advance. The tribunal concluded that Mr Barrett made a special effort to regularise the tax and national insurance position from 16 July 2010 onwards in order to preserve the status quo for potentially affected employees.

The relevant law on illegality

[9] This court recently reviewed the law on illegality in Delaney v McMahon [2013] NICA 65. That was a case where the employer sought to overturn a decision of an industrial tribunal finding that a dismissal was unfair on the basis that the tribunal had erred in failing to conclude that the employment contract was tainted by illegality. There is no material dispute between the parties in this case on the relevant legal principles and we are happy to repeat what we said in that case.

> "[10] In Enfield Technical Services v Payne [2008] ICR 30 Elias J conducted a comprehensive review of the cases where the contract was lawful when made but had been illegally performed and the issue was whether the party seeking the assistance of the court had knowingly participated in the illegal performance. The concept of participation has given rise to some difficulty. This was addressed in Hall v Woolston Hall Leisure Ltd [2001] ICR 99. In that case the claimant agreed that she would be paid £250 net per week. She was provided with payslips which showed that her tax and national insurance payments were calculated on the basis of a gross wage of £250 per week. She was, therefore, aware of the misrepresentation and raised it with the employer but was told that was the way the employer did business. The court held that these circumstances showed acquiescence in the

employer's conduct but reflected the reality that she could not compel her employer to change his conduct.

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

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

The tribunal's conclusion in the cases of McGlinchey, Barry Conaghan, Canning, Cassidy, Moore and Eamon Conaghan

[10] Gavin McGlinchey is a plumber and joined the first respondent in October 2001. He said that he had been paid for overtime at time and a half and a callout payment of £35 per week before Kevin Barrett's arrival at the first respondent in 2006/7. Although he said Liam Moore performed the majority of overtime work he could not say why he was being paid £35 per week callout payment if Liam Moore was responsible for the majority of callouts. The tribunal did not accept his evidence in relation to Liam Moore because, inter alia, of the geographical spread of the work. He signed the letter of 5 June 2010 and maintained that it referred to overtime payment arrangements preceding Kevin Barrett's introduction to the first respondent. The tribunal rejected that explanation for the correspondence as inconsistent with the terms of the letter. The tribunal concluded that the appellant was an unsatisfactory and unconvincing witness and that he had been receiving overtime payments and callout payments throughout the period of his employment.

[11] The tribunal did not accept the appellant's evidence that he did overtime on a very limited basis and took time off in lieu. That was inconsistent with his participation in signing the letter of 5 June 2010. The tribunal noted that it was unusual for an entire workforce to receive cash payments without receiving or requesting payslips of P60s over a protracted period of time. It concluded that he knew of the facts which rendered performance of the contract illegal as a fraud on the revenue. He agreed to work overtime both before and after 16 July 2010 for payments in cash on that basis. That was sufficient to constitute participation in the illegal performance of the contract.

[12] The tribunal reached the same conclusion for the same broad reasons in the cases of Barry Conaghan, Joseph Canning, Aaron Cassidy and Martin Moore. Eamon Conaghan did not sign the letter of 5 June 2010 but was aware that the proposal was to cut overtime from time and a half to "single payment in lieu". He had 2 meetings with Kevin Barrett before signing the revised terms. The records prepared by Kevin Barrett showed that he had worked overtime in August 2010 and the tribunal was satisfied that he was paid cash for that work. It did not find him a credible witness and concluded that he was aware of the illegality and participated by his agreement to do overtime for cash payments like the others.

Consideration in the cases of McGlinchey, Barry Conaghan, Canning, Cassidy, Moore and Eamon Conaghan

[13] It is clear from the findings of the tribunal in the other cases before it that it concluded that all of those employed by the first respondent had knowledge of the facts which rendered the performance of the contract illegal as a result of the payment of cash wages without properly accounting for tax and national insurance. It is also clear that the tribunal drew a distinction in terms of participation between those who were paid their basic wage in cash and those who were paid cash for overtime and callout.

[14] The appellants complained that the tribunal paid particular attention to the proposed terms and conditions drawn up by Kevin Barrett on 1 June 2010. The tribunal concluded that these terms allowed the first respondent to represent that overtime had been paid as time off in lieu thereby avoiding the consequence of admitting that cash payments for overtime were made which were not recorded. We consider that it was perfectly open to the tribunal to draw that inference in the context of an attempt being made to regularise the books of the first respondent and enable it to resist any claim by the revenue against it for unpaid tax or national insurance. The appellants did not accept those terms as is evident from the letter of 5 June 2010 and the subsequent overtime worked by each of them on the illegal basis that they would be paid cash at the established rate tended to show participation on the part of those employees rather than acquiescence.

[15] We accept that none of the appellants had access to the payroll system operated by the first respondent and none of them had knowledge of the returns made by the first respondent to HMRC. Mr Lavery did not have access to the payroll system but he concluded that some of the computerised records had been changed deliberately. That did not, however, prevent the tribunal giving the weight that it thought appropriate to those aspects of the payroll records which were available. The tribunal also had available the evidence of each of the appellants on the issue of overtime worked and was entitled to take into account the lack of credibility of each of the appellants in coming to its conclusion as to whether overtime was worked and how each appellant was compensated for it.

[16] The appellants criticised the tribunal's reliance on Mr Lavery's comment that it was unusual in the current working environment to find a workforce which in its entirety was content to receive wages every week and never insisted that they receive the payslips to which they were entitled. In our view that was part of the context which informed the tribunal's approach to the evidence given by each of the appellants. It was entitled to take that into account in reaching its conclusion that each of the appellants was aware of the fraud in respect of tax and national insurance. The tribunal also noted that Mr Lavery stated that if the appellants had compared the information disclosed on those records with the cash wages they were receiving the discrepancy would have been obvious. That is simply a statement of fact but does not indicate that the tribunal placed particular weight upon it in coming to its conclusion.

[17] All of these matters were advanced on the basis that they demonstrated that the tribunal reached a decision which no reasonable tribunal on a proper direction of the evidence and law could have reached. We accept that this test is consistent with Croft v Yeboah [2002] IRLR 634 which is the leading case on the test for perversity of a tribunal decision. For the reasons given we do not, however, accept that the criticisms made of the tribunal's reasoning sustained the argument on perversity. We are satisfied that the tribunal was entitled to conclude in respect of these appellants that they participated in an illegal contract of which they had knowledge throughout

their employment. In those circumstances the tribunal was bound to dismiss their claims.

The claims of Robinson, Donnelly and McMonagle

[18] Robinson was employed as a stores manager. He claimed that he received £135 per week in cash for a 25 hour week and that he rarely did any overtime. If he did overtime he stated that he took time off in lieu and denied receiving any monetary payment. He was unable to explain how Mr Lavery found a payslip showing a weekly wage of £300. The tribunal did not consider him a credible witness. It was satisfied that he performed overtime more often than he claimed and was paid in cash. It was satisfied that he had participated in the illegality up to 16 July 2010 but not thereafter. That was consistent with the view taken in the earlier cases. It concluded that after 16 July 2010 there was insufficient evidence of participation. He was therefore compensated on the basis of the employment period from 16 July 2010 until his dismissal on 4 October 2010. He had insufficient service for an unfair dismissal claim. We consider that the decision in his case reflected the principles applied by the tribunal in the other cases.

[19] In the cases of Donnelly and McMonagle the tribunal found insufficient evidence of payment for overtime working. Donnelly was the only appellant in respect of whose evidence the tribunal was not critical. The tribunal proceeded on the basis that the payment of basic wages in cash in circumstances where there was fraud on the revenue only amounted to acquiescence rather than participation. That distinction was justifiable. The tribunal rejected the evidence in relation to those who did overtime that they opted for time off in lieu rather than monetary payment. That was the evidence of participation in those cases.

[20] The tribunal did not award future loss to either Donnelly or McMonagle. Each had been employed for approximately 2 years and by the time of the hearing had obtained alternative work. In those circumstances it was entirely open to the tribunal to conclude that it was not just and equitable to award compensation for future loss.

[21] Regulations 13 and 14 of the 2006 Regulations impose duties on the transferor to provide information to the affected employees and in particular to provide for the election of employee representatives. The first respondent told the appellants that their employment would continue with the second respondent but did not make any arrangements for the election of employee representatives. Those whose contracts were not tainted by illegality were therefore entitled to an order for compensation against the first respondent by virtue of Regulation 15(8)(a) of the 2006 Regulations which the tribunal correctly calculated at 13 weeks wages.

[22] The tribunal asserted that the award should be made against the first respondent only. That reflected the fact that this was a complaint of non-compliance by the transferor rather than the transferee. Regulation 15(9) of the 2006 Regulations provides, however, that the transferee shall be jointly and severally liable with the transferor in respect of compensation payable under Regulation 15(8)(a) of the 2006

Regulations. The enforcement mechanism for that liability is separately established under Regulation 15(11) of the 2006 Regulations. We accept, therefore, that the tribunal properly confined their finding to the first respondent. We should note that throughout these proceedings the second respondent accepted it was liable for these amounts.

[23] The final issue concerns the entitlement of Donnelly and McMonagle to a statutory uplift pursuant to Article 17 of the Employment (Northern Ireland) Order 2003.

> "(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.
>
> (4) The duty under paragraph (2) or (3) to make a reduction or increase of 10 per cent does not apply if there are exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances."

[24] The tribunal was satisfied that the statutory procedure applied to the unfair dismissal claim in both cases, that it was not completed before the claim was presented to the tribunal and that the non-completion of the statutory procedure was wholly or mainly attributable to failure by the first respondent to comply with the requirement of the procedure. The second respondent did not take any issue with that finding.

[25] In each case the tribunal stated that it did not consider it just and equitable to award an uplift in the compensatory award. As appears from the statutory provisions such a conclusion was only open to the tribunal if there were exceptional circumstances which would make a reduction unjust or inequitable. We accept the appellant's submission that the test of exceptional circumstances making a reduction unjust or inequitable does not give rise to a general just and equitable jurisdiction. To that extent, therefore, we accept that the tribunal applied the wrong test when dealing with the question of the uplift. In any event the tribunal has not set out any basis for the conclusion that there were exceptional circumstances in this case justifying a reduction in the statutory uplift (see Lawless v Print Plus [2010] UKEAT 033-09-2704).

Conclusion

[26] For the reasons given we consider that the appeals should be dismissed except that in the cases of McMonagle and Donnelly the cases should be remitted to the tribunal for submissions on the issue of the statutory uplift and the giving of reasons for any decision.