Neutral Citation No. [2014] NICA 19

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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **21/02/14**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

MARTINA O'CALLAGHAN

(Claimant/Appellant)

and

WESTERN HEALTH AND SOCIAL CARE TRUST

(Respondent)

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal brought by Martina O'Callaghan ("the appellant") from a decision by an industrial tribunal issued on 14 August 2012, after sitting for some 10 days in November and December 2011 and January and March 2012, as a consequence of which the tribunal dismissed the appellant's claims against the Western Health and Social Care Trust ("the respondent") for unfair dismissal and disability discrimination but upheld her claim for breach of contract in relation to holiday pay awarding her a sum of £1,822.10 in respect thereof. The appellant represented herself while Mr Francis O'Reilly appeared on behalf of the respondent. The court wishes to acknowledge the assistance that it has gained from their industry as well as the clarity and detail with which they presented their oral and written submissions.

The Factual Background

[2] The appellant was employed by the respondent as a Speech and Language Therapist from 2 August 1999 until 14 February 2011 when she was dismissed for failing to return to work, having been on sick leave since August 2004.

[3] In 2004 the appellant brought a complaint alleging that she had been subjected to bullying and harassment at the hands of a co-employee, Mrs Skeffington. An investigation took place and the investigation report confirmed

that bullying and harassment had occurred. As a result Mrs Skeffington was dismissed. As a consequence of the bullying the appellant left work on sick leave.

[4] In June 2005 the appellant made a formal complaint under the respondent's Bullying and Harassment Policy about a Ms McNicholl and a Mr Hargan. The respondent did not initiate separate investigations into these complaints but relied upon information that had emerged in the course of the investigation relating to Mrs Skeffington. On the basis of that information Ms McNicholl and Mr Hargan were formally counselled for their conduct in August 2005 by Sara Groogan.

[5] The appellant had been diagnosed with chronic anxiety and depression in March 2003. During 2008 and 2009 she made applications to the respondent for ill-health retirement. The respondent provided the appellant with the requisite information but, at that time, she did not proceed with her applications. By early 2010 she believed that she was well enough to return to work. In a letter to the respondent dated 9 February 2010 the appellant's GP, Dr Lalsingh wrote:

> "I support Martina in her request to return to work. In my opinion it is essential for her recovery that she start working again and slowly build her self-confidence and self-esteem."

The letter also noted that the appellant had a number of issues that she felt would need to be addressed by the respondent to enable her to return to work and that she was keen to discuss those matters with the respondent.

[6] The appellant's medical condition had been reviewed by the respondent's medical officer, Dr Clive Burgess, Consultant Occupational Physician, upon a number of occasions from 11 December 2002 to 17 June 2010. In March 2003 Dr Burgess had concluded that the appellant had suffered a health breakdown leading to loss of confidence, clinical anxiety and depression. In June 2010 he described her as "clinically well" although he considered that she continued to suffer from "chronic embitterment". In his view, "chronic embitterment" was not a medical condition although it could lead to medical illness. He felt that, in the case of the appellant, the condition arose from a strong feeling of injustice and distrust arising from her treatment by the respondent.

[7] The appellant expressed dissatisfaction with the opinion of Dr Burgess and the respondent arranged for her to be examined by Dr Alan Black, Consultant in Occupational Medicine, on 1 September 2010. Dr Black formed the view that the plaintiff was currently well and not suffering from clinically significant levels of anxiety or depression. However, while he recorded that she was not presently suffering from clinically significant levels of anxiety or depression, Dr Black referred to the appellant's history which suggested a degree of psychological fragility and predicted that an attempted return to work would be promptly followed by a

relapse. He felt that it was highly unlikely that she would be in a position to render regular and effective service. In his view, it was reasonable to comment that any risk of relapse was, in part, determined by the role that the appellant would be offered and a role where she had less contact with individuals previously known to her was bound to lessen the likelihood of a recurrence. He also felt that identification of a suitable post, thereby securing employment, was likely to have a positive effect on the appellant's longer term mental health and might well play an important part in her road to recovery. He recorded the appellant's view that she was not then fit to work as a Speech and Language Therapist for any employer and went on to say:

> "My own view is that whilst I believe she is likely to remain psychologically vulnerable for some considerable time to come, the risk of a recurrence of clinical depression is likely to be significantly reduced if Ms O'Callaghan were to work outside the Trust. I would stress my belief that long-term mental health and mental stability is strongly linked with being in secure employment whether this should be within or outwith the Trust. Irrespective of Ms O'Callaghan's present health situation, it remains unclear whether her strongly held perceptions and views will allow her to return to work under any circumstances."

[8] On 23 September 2010 Ms McConnell, the respondent's Assistant Director of Human Resources, wrote to the appellant proposing that she should return to work on 18 October 2010 and scheduling a meeting for 11 October 2010. In the letter Ms McConnell stated that, on foot of the medical reports from Dr Black and Dr Burgess, it was the respondent's view that the claimant was fit to return to work. The letter also indicated that if she was unable to accept one of three posts in different locations at the appellant's desired grade, which had been offered to her, the respondent would have no choice other than to terminate her employment contract. The appellant replied by letter of 30 September 2010 indicating that she would not be able to return to work until she was satisfied that the workplace was safe.

[9] On 11 October 2010 the appellant met Ms McConnell and Mrs Gamble, who was employed in the respondent's Human Resources Department. The respondent offered the appellant a post at the grade that she wanted in the location that she preferred but the appellant expressed concerns about meeting people who had been involved in the bullying or knew of it in the past. The appellant also sought a statement which protected her reputation and professionalism, made it clear that her absence from work arose from the actions of others and which declared that lies had been told about her in the past. She also wanted the statement to clear up her professional and personal relationships with colleagues. The respondent was

willing to make a statement to staff about the appellant's return to work but none of the possibilities proposed by the respondent was acceptable to the appellant. The respondent felt constrained by a confidentiality agreement which had been executed as a result of a claim initiated by Mrs Skeffington in relation to her dismissal. Despite her belief that the form of words proposed by the respondent was inadequate, the claimant did not herself propose any specific alternative wording for the statement despite being invited to do so. The respondent did not carry out a formal risk assessment in relation to the appellant's return to work.

[10] After her failure to return to work on 18 October 2010 the appellant was invited to attend a further meeting on 24 November 2010 to consider the possible termination of her employment. She duly attended and made her case. The appellant was informed by letter dated 2 December 2010 that her employment had been terminated since there was no prospect of her returning to work for the respondent in the position identified or any other post in the foreseeable future. The appellant appealed that decision and the appeal took the form of a rehearing on 20 December 2010. The appellant was notified by letter of 14 February 2011 that the termination of her employment had been confirmed and was effective from the date of the letter.

The Legislation

[11] Part XI of the Employment Rights (Northern Ireland) Order 1996 (the "1996 Order") deals with unfair dismissal and Chapter 1 thereof with the right not to be unfairly dismissed. Article 132 applies to "health and safety cases" and the relevant provision is as follows:

> "**Health and Safety Cases**
>
> 132-(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –
>
> > (*d*) In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work."

The Grounds of Appeal

[12] The grounds of appeal are:

(i) That the tribunal has not correctly applied Article 132(1)(*d*) of the 1996 Order with particular regard to the concept of "reasonable belief".

(ii) The judgment of the tribunal is not adequately reasoned.

(iii) The findings of fact and conclusions reached by the tribunal are perverse and could not have been arrived at by any reasonable tribunal.

The Parties' Submissions

[13] The appellant claims that, in applying the concept of "reasonable belief" the tribunal had little or no regard for what the appellant believed or for the body of information that informed her belief and, instead, concerned itself with its own understanding of the dangers in the appellant's workplace. In adopting such an approach the appellant submits that the tribunal failed to have any or adequate regard to authorities such as Babula v Waltham Forest College [2007] EWCA Civ 174 and Oudahar v Esporta Group Ltd (UKEAT/0566/10/DA). The appellant further argues that, in the course of drafting its judgment, the tribunal failed to provide sufficient factual findings and reasoning to allow the parties to understand why they had won or lost in accordance with Meek v City of Birmingham District Council [1987] EWCA Civ 9 and that it had also failed to explain why the evidence of one party was preferred to another in accordance with Roberts v Carlin [2010] UKEAT/0183/09/DA). In support of the submission that the conclusions and findings of fact reached by the tribunal were perverse and such that they could not have been reached by any reasonable tribunal the appellant relied upon Carlson Wagonlit Travel Ltd v Connor [2007] NICA 55.

[14] By way of response the respondent argued that the tribunal correctly applied the law to the facts found by it in reaching its decision to reject the appellant's belief as reasonable in the circumstances. The respondent has further argued that considerations of credibility did not arise since there was little factual dispute between the parties to be resolved by the tribunal. The respondent rejected any suggestion that the findings or conclusions reached by the tribunal could properly be regarded as perverse.

The Law

[15] In this case the fundamental question for the tribunal to determine was whether or not the belief that was undoubtedly genuinely held by the appellant was so objectively based as to be reasonable in the circumstances. The principal failures upon which the appellant based her belief were clearly true, namely, that

Ms McNicholl and Mr Hargan had not been made the subject of separate investigations and no formal risk assessment had been carried out. However, those failures had to be considered in the context of the other specific findings of fact made by the tribunal. On appeal this court does not conduct a re-hearing and, unless such findings were plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court (McConnell v Police Authority for Northern Ireland [1997] NI 244, at 253 per Carswell LCJ; Carlson Wagonlit Travel Ltd v Connor [2007] NICA 55, at paragraph 25 per Girvan LJ). This court is in as good a position as the first instance tribunal to draw inferences from facts found although it is required to respect the first instance decision unless it is one which no reasonable tribunal, on a proper appreciation of the evidence, could have reached (Crofton v Yeboah [2002] IRLR 634).

[16] The tribunal referred to a number of factual findings which it considered provided an objectively reasonable basis for justifying an attempt by the appellant to resume employment. It reached a similar conclusion with regard to the failure to carry out individual investigations of the allegations against Ms McNicholl and Mr Hargan. After giving the matter careful consideration we are not persuaded that either of these conclusions were plainly wrong or such that no reasonable tribunal could have reached.

[16] The appellant also criticised the tribunal decision for failing to provide adequate reasons. By virtue of paragraph 30 of Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 a tribunal must give reasons for any decision. Paragraph 30(6) requires written reasons to include the following information:

> "(*a*) The issues which the Tribunal or Chairman has identified as being relevant to the claim;
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> (*b*) if identified issues were not determined, what those issues were and why they were not determined;
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> (*c*) findings of fact relevant to the issues which have been determined;
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> (*d*) a concise statement of the applicable law;
>
> (*e*) how the relevant findings of fact and applicable law have been applied in order to determine the issues;"

[17] The leading authority on the adequacy of reasons for judicial decisions is English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605. Lord Phillips MR

stated that justice will not be done if it is not apparent to the parties why one has won and the other has lost and gave the following guidance:

> "If the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues, the resolution of which were vital to the judge's conclusion, should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon …
>
> When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."

[18] In Johansson v Fountain Street Community Development Association [2007] NICA 15 Girvan LJ quoted with approval a passage in the judgment of Donaldson LJ in UCATT v Brain [1981] ICR 542:

> "Industrial Tribunals reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. … Their purpose remains what it has always been, which is to tell the parties in broad terms why they lose, or as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to brought based

> on any such analysis. This, to my mind, is to misuse the purpose for which reasons are given."

[19] In Brent LBC v Fuller [2011] ICR 806 Mummery LJ dealt with the way in which the tribunal judgment should be approached in the following terms at paragraph 31:

> "The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over analysis of the reasoning process; being hyper critical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: these are all appellate weaknesses to avoid."

[20] We have carefully reviewed the reasoning of the tribunal in the light of the above authorities but, having done so, we do not consider it to have been inadequate in any significant respect.

The Appellant's "reasonable belief"

[21] The tribunal noted that the respondent had not challenged the proposition that the appellant believed that a return to work would place her in circumstances of danger which were serious and imminent but correctly observed that subjective belief was not decisive and that any such belief had to be reasonable. The tribunal recorded the appellant's belief as grounded on the respondent's failure to separately investigate Monica McNicholl and Liam Hargan in accordance with the respondent's policy in relation to bullying and the possible failure of other persons with whom she had worked to appreciate that her absence had been caused by reason of the bullying and not as a consequence of any fault upon her part. At paragraph 6(17) of the judgment the tribunal identified a number of matters which it considered to be inconsistent with the belief held by the appellant being reasonable. In particular, it recorded that the staffing and structure in the Speech and Therapy Department had changed, that the respondent was committed to minimising contact with anyone who might have been associated with bullying the appellant some years in the past and that, of the three alleged principal perpetrators of such bullying, one had been dismissed, one had retired and a third was working in a quite different department.

[22] It is important to keep the specific statutory wording clearly in mind. It was accepted by the tribunal that the appellant did believe that her return to work would result in her encountering circumstances of serious and imminent danger and the fundamental question was whether it was reasonable to hold such a belief having

regard to the objective facts. A subjectively held belief may be reasonable even though that belief, ultimately, turns out to have been wrong – see Babula v Waltham Forest College 2007 I.C.R. 1026.

[23] The appellant herself identified two principal facts upon which she maintains that her belief was reasonable. These were that the Trust refused to carry out separate formal investigations of Ms McNicholl and Mr Hargan, in accordance with their Bullying and Harassment Policy, and that the Trust did not complete a risk assessment exercise before inviting the appellant to return to work.

[24] In the "Findings of Fact" the tribunal recorded that the appellant had made a formal complaint under the Bullying and Harassment Policy about the behaviour of Monica McNicholl and Liam Hargan. It also noted that, rather than follow its policy and conduct separate investigations into the appellant's complaints about each individual, the respondent had relied upon information that had emerged in connection with the Joan Skeffington disciplinary process as constituting an investigation of the appellant's complaints against Ms McNicholl and Mr Hargan. However, the tribunal found that there was no evidence that separate formal investigations were essential or that the chosen course of action was unreasonable in the circumstances. As noted earlier, both individuals were counselled with regard to their conduct in relation to the appellant by Sarah Groogan in August 2005. The tribunal noted that Liam Hargan had subsequently retired and that Monica McNicholl was working elsewhere in the respondent Trust. In such circumstances, the tribunal recorded that the person responsible for the bullying had been dismissed and that there was very little realistic prospect of the appellant returning to work with either of the other two individuals associated with the bullying.

[25] It was common case that the respondent did not carry out a formal risk assessment procedure in preparation for the anticipated return to work by the appellant. However, in considering whether such failure constituted a reasonable ground for the appellant's belief the following findings of fact by the tribunal are of relevance:

(i) As a consequence of the dismissal of Ms Skeffington, the retirement of Mr Hargan and the transfer of Ms McNicholl, it was highly unlikely that the appellant would come into contact with any of the individuals about whom she had been principally concerned.

(ii) The respondent had conducted a series of detailed meetings with the appellant in the course of which she had received an opportunity to ventilate any anxieties and concerns. The respondent was in possession of detailed medical evidence from Dr Black and Dr Burgess suggesting how any risks anticipated by the appellant might be minimised. The respondent was committed to minimising any such risks and had offered support, supervised

practice, and formal and private study together with liaison with the Health Professional Council ("HPC").

(iii) The respondent had offered the appellant a choice of three posts in different locations, at the appellant's desired grade. One of these was at a location that the appellant preferred.

(iv) The respondent had entered into a confidentiality agreement with Ms Skeffington with regard to the circumstances of her dismissal but, nevertheless, was willing to make a statement to staff about the appellant's return to work, confirming that her absence had not been attributable to any misconduct or default upon her part. Unfortunately, the appellant was unable to agree any form of wording suggested by the tribunal and was unable to provide a draft statement with which she would have been satisfied. We further note that, in the course of her oral submissions before this court, the appellant conceded that the probability was that "everyone in the Trust" would have known why Ms Skeffington had been sacked.

[26] In the course of her helpful written and oral submissions to this court the appellant drew the attention of the court to paragraph 6(9)(i) of the decision in which the tribunal referred to a number of the claimant's fears being theoretically possible but that "the respondent believed it had minimised these". The appellant quite rightly pointed out that the respondent's belief was not relevant in reaching a conclusion as to whether the appellant's belief was objectively reasonable. However, in the same paragraph, the tribunal went on to record that:

> "The tribunal considers that the approach proposed by the respondent; of issuing an agreed statement; liaising with HPC in support of her if necessary; allowing her to choose her place of work; and by offering support, help, supervision and study when she returned to work, was a reasonable approach and the claimant should have attended at work. Had the claimant's fears been realised it would have become obvious and with the supervision and support it could have been dealt with quickly."

[27] The appellant also drew the court's attention to evidence that she said she had produced to the tribunal which she claimed ought to have undermined the tribunal's confidence in the ability and/or willingness of the respondent to effectively carry out its proposals. The appellant referred to the Trust managers having given false information to outside agencies, to a Health Professional by whom she was being treated within the Trust passing her mental health notes to the Trust's OH Department, to the cross-examination of Ms Young in relation to whether the

appellant had made a complaint about the treatment of Ms McNicholl and Mr Hargan at the meeting of 9 March 2005 and to her concerns about management dishonesty. This court must bear in mind that it does not have the benefit available to the tribunal of hearing and seeing the witnesses examined and cross-examined as a basis for the assessment of credibility. It is clear from the findings made by the tribunal that, despite such evidence, they were able to reach clear conclusions of fact as to whether or not the appellant's belief was reasonable in the circumstances.

[28] We accept that the appellant is a sensitive individual for whom the term "psychologically fragile" remains appropriate and that conducting her case before this court was an added ordeal. There is no doubt that she was badly treated in the course of her employment a number of years ago and that her experience has since been the cause of anxiety, depression and, in addition, a sense of deep injustice. There is also no doubt that she genuinely held the belief that is the subject of this litigation. However, the findings of fact made by the tribunal do not establish a reasonably objective basis for a belief that a return to work in October 2010 would have led to the appellant encountering circumstances of serious and imminent danger that she would have been unable to avert. We have not been persuaded that those findings were plainly wrong or such that no reasonable tribunal could have reached, and accordingly, the appeal must be dismissed.