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Judgment: approved by the Court for handing down | *Delivered:* **05/10/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PACE TELECOM LIMITED

Appellant;

-and-

ANGELA McAULEY

Respondent.

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Before: Coghlin LJ, Hart J and Sir John Sheil

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COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal from an Industrial Tribunal sitting in Belfast between the 1 and 3 September 2010. On 14 December 2010 the Tribunal issued a decision in writing from which the appellant appeals to this court. For the purposes of the appeal the appellant was represented by Mr Michael Potter while Mr Ayoade Elesinnla appeared on behalf of the respondent. The court is grateful to both counsel for their carefully prepared and well argued written and oral submissions.

Background facts

[2] The claimant/respondent ("the respondent") is a 27 year old senior telecoms engineer who commenced employment with Datasharp (UK) on 24 October 2005. Datasharp subsequently merged with Belcom Networks Limited which, in turn, was acquired by the appellant company in or about late 2006. Shortly after this acquisition the appellant recruited Mr Booth, an older male, to work alongside the respondent as the second senior telecoms engineer within the appellant company's Belfast Branch. The appellant also employed a junior telecoms engineer, Chris Moorehead, a nephew of Mr Booth. The respondent was fully trained in both Nortel and Siemens products and was qualified to install and support both systems. Mr Booth had no previous experience of Nortel but did have some 19 years experience of Siemens. The respondent trained Mr Booth in the use of Nortel and both employees used technical manuals to become familiar with and train

themselves in the use of the Panasonic systems which were subsequently introduced.

[3] In November 2008 the appellant instructed its Belfast manager, Mr Burrows, that it would be necessary to severely trim the Belfast operation and, as a consequence, initially, two female and one male member of staff were made redundant from sales and administration teams. The criteria for selection of staff for redundancy were decided by the appellant's management in England. It was also necessary to reduce the size of the telecoms engineering department and Mr Burrows identified the respondent as being "at risk" according to the relevant criteria. The final decision as to identity of those who were to be made redundant was to be the responsibility of a Mr James Hughes and Ms Caroline Wheeler, members of the appellant's management in England, and they made their decisions on 22 December 2008. Those decisions were then communicated to respective Branch Managers.

[4] On 23 December 2008 Mr Burrows contacted the respondent, who was then on leave, and asked her to come in and collect a letter from Caroline Wheeler. That letter informed the respondent that she was one of the employees "at risk" of redundancy and invited her to attend a meeting on 23 December for the purpose of discussing "….. The proposals for Branch restructuring and the potential effect on Branch Staff and in particular your own role." The respondent was notified that she could be accompanied by a work colleague or representative, that the proposals would be explained and that she would be given an opportunity to express her own views.

[5] The respondent attended the appellant's premises on 23 December and, since Ms Wheeler was in England, the meeting proceeded by way of a conference call. Those who participated during that call included Ms Wheeler, a note taker, Mr Burrows, the respondent and her boyfriend, who attended as a witness.

[6] The note taken at the meeting on 23 December 2008 confirms that the respondent was informed of the necessity to reduce the number of engineers at each branch to two and that she had been selected for redundancy. The respondent enquired as to why she had been selected and Ms Wheeler referred to a number of factors including skills, experience, the wages bill and "issues raised with regards to from a motivation point of view on your side, looking for alternative employment elsewhere." The respondent enquired as to the makeup of the proposed package of redundancy and she was informed, inter alia, by Ms Wheeler that the appellant would be happy to pay her "in lieu of notice" which "… means that if you wanted to work you could but we will pay you in lieu of notice which means that you don't have to come into work, you can spend that time looking for alternative employment. But what you can have is that you can have full use of the car during the notice period, there is not an issue there whatsoever." A question arose as to the

respondent's length of service with the company and, in order for that to be further investigated, arrangements were made for a another conference call to take place during the afternoon of 23 December.

[7] By the time of the second conference call the length of service to be taken into account had been resolved and Ms Wheeler again confirmed that the respondent was free to decide for herself whether to work her month's notice. When Mr Burrows enquired as to whether she was going to work her notice the respondent's response was, perhaps understandably, "No, I'm away". The respondent was also informed that the December wages had already been processed and that the payment in lieu of notice would be in her next months' wages.

[8] The respondent's contract provided for a period of one month's notice which, by agreement between the employer and employee might be waived. The contract also provided for payment in lieu of notice. The formal Notice of Redundancy was dated 23 December 2008 and provided that:

> "The redundancy will take effect from 23 December 2008 and you will receive a Statutory Redundancy Payment from the Company totalling £660 calculated in accordance with the attached Payment Statement. In addition as you will be leaving the Company with effect from today you will receive a payment in respect of your notice entitlement being one month pay totalling £1,750. Additionally, you will receive the balance of any untaken holiday entitlement and this will be included in your final salary payment. The redundancy payment is not taxable, however other payments will be subject to statutory deductions for Tax and NI."

[9] On 9 March 2009 the respondent wrote to the appellant indicating that she wished to raise a statutory grievance. In that letter she expressed the belief that her redundancy had been unfair, that she had been the subject of sex discrimination and she referred to a conversation in the office about starting a family. The respondent, being unaware of the separate jurisdiction in Northern Ireland, initiated proceedings in the Employment Tribunal in England. She subsequently withdrew those proceedings and initiated proceedings before the Northern Ireland Tribunal on 22 April 2009 claiming unfair dismissal, sex discrimination and age discrimination. The Tribunal ultimately found that it had no jurisdiction to consider the claim for age discrimination because the grievance letter of 9 March 2009 had not stipulated that as a ground, as required by Article 19 of the Employment Rights (Northern Ireland) Order 2003 ("the 2003 Order").

The Tribunal decision

[10] The Tribunal noted that a number of legal and factual issues for determination had been agreed between the parties. These included three main factual issues to be considered, namely:

(*i*) The date of the claimant's dismissal.

(*ii*) The reason for the claimant's dismissal.

(*iii*) Whether the claimant was subjected to unlawful detrimental treatment in her employment.

[11] The Tribunal recorded that, as frequently occurs, the evidence given on behalf of the respective parties conflicted in many respects. In such circumstances, the Tribunal looked for supporting documentary evidence and took into account the evidence of Mr Booth who, while still an employee of the appellant, had given evidence without any prior knowledge of the content of the proceedings or the evidence of the other witnesses. Overall, the Tribunal recorded that it preferred the evidence of the respondent, which was generally consistent with the content of her claim form and grievance letter, to that of Mr Burrows whose evidence was more in the "nature of a defence of his actions" and differed significantly from the version of events set out in the appellant's documentation in response.

[12] In relation to the date of the respondent's dismissal the Tribunal noted that the redundancy notice and the payment were both dated 23 December 2008 and that was given as her leaving date. The Tribunal also recorded that the respondent had received the final payment on or about 27 January 2009 and that she returned the company car on the same date. The Tribunal took into account Article 180(2)(*a*) of the Employment Rights (Northern Ireland) Order 1996 (the "1996 Order") which provides that, in relation to an employee whose contract of employment is terminated by notice, the date of dismissal is the date upon which the notice expires and, since the respondent was entitled to one month's notice and was paid her notice pay in January the Tribunal concluded that the effective date of the redundancy dismissal was 30 January 2009, the last working day of that month. She had been given the option of coming in to work her notice if she wished to do so but the final payment was made on her January pay day. In addition she had been permitted to use the company car during the notice period. In the circumstances the Tribunal concluded that the claim received on 22 April 2009 had been made in time. The Tribunal also noted that, since a grievance letter had been received on 9 March 2009, within three months of 23 December 2008, an additional three months would have been added to the initial statutory time limit.

[13] The Tribunal accepted that, as a consequence of sales falling so badly across the group, the appellant's requirement for engineering staff had diminished and, as a result, a genuine redundancy situation had developed consistent with Article 174(1)(b)(i) of the 1996 Order. In such circumstances the task of the Tribunal was to consider whether selection for redundancy had been fairly carried out in accordance with the requirements of Article 130. The Tribunal approached that exercise bearing in mind the principles laid down for the guidance of reasonable employers by the EAT in Williams and Others v Compar Maxam Limited [1982] IRLR 83. The Tribunal recognised that those principles were essentially similar to those set out in the Labour Relations Agency's Code of Practice on Redundancy Selection and, while that Code was not statutory, tribunals were entitled to take departures from its recommendations into account when considering the reasonableness of an employer's practices and procedures. The Tribunal also noted the statutory dismissal and disciplinary procedures incorporated into the 1996 Order at Article 130A by the Employment (Northern Ireland) Order 2003 (the "2003 Order").

[14] The Tribunal noted that not a single document, note or record had been produced to the Tribunal relating to the evolution or implementation of the selection procedure in this case. The Tribunal accepted that at the meeting on 23 December the respondent had been informed by Mr Burrows that she had been selected using criteria of cost and skills/experience. However, it noted that Mr Burrows, with no technical knowledge or experience, had made no attempt to consult his former partner, Mr Nixon, who, he acknowledged, did have such knowledge and experience, for advice and guidance. It appears that Mr Burrows told the Tribunal that he believed that Mr Nixon had carried out appraisals of the work of the engineers but conceded that he had not seen any such appraisals before or during the redundancy selection process. While the ultimate decision was apparently made by Mr Hughes and Ms Wheeler , neither of whom gave evidence, it is difficult to understand the basis upon which Mr Burrows felt able to identify the respondent as "at risk" in such circumstances. The Tribunal found that, in doing so, Mr Burrows appeared to have relied on the fact that Mr Booth had been an engineer longer than the respondent and that the respondent was paid £1000.00 more per annum with a more expensive company vehicle. No evidence was called on behalf of the appellant to explain the basis for these differences. The Tribunal did not accept that a fair and reasonable selection process would equate skill simply with length of service or that costs could simply be related to salary.

[15] In reaching its conclusion that the respondent had established discrimination on the basis of sex the Tribunal found that she had been unfavourably treated in a number of respects. These findings were:

(*a*) That she had been treated less favourably than Mr Booth who had been given an opportunity for residential training in England by Samsung in the use of their telecom equipment and, upon another occasion, with PACE Engineers who needed extra engineering assistance for one week. The respondent's evidence was that she had informed her employer that, because of domestic commitments, she needed at least 24 hours notice before she could go away and that she had not been asked whether she wished to be considered for either of those training opportunities. The Tribunal found, on the balance of probabilities, that the respondent had been treated less favourably than Mr Booth.

(*b*) The respondent also claimed that she had been treated less favourably than Mr Booth in that Mr Burrows was inclined to take Mr Booth to site meetings with customers rather than her and that he would defer to Mr Booth rather than her for the response to technical questions from customers. The respondent said that she found this demeaning. There was a conflict between the evidence of Mr Burrows, who denied that he had ever brought any engineering staff with him to face to face meetings with customers, and Mr Booth, who was unable to recall any occasion when both engineers had attended customer meetings together. Again, on the balance of probabilities, the Tribunal found that the respondent had been treated less favourably than Mr Booth.

(*c*) The respondent also claimed that she had felt excluded when the staff went to a gym for recreational sport on Fridays at lunchtime but the Tribunal formed the view that both she and Mr Booth had voluntarily chosen not to attend such outings.

(d) The Tribunal also took into account a remark alleged to have been made by Mr Burrows that Mr Booth "looked more like a telecoms engineer."

[16] Having made the findings referred to at paragraphs [14] and [15] hereof, the Tribunal proceeded to apply the reverse burden of proof in accordance with Article 63A(2) of the Sex Discrimination (Northern Ireland) Order 1976 ("the 1976 Order") and enquire whether the appellant had presented any evidence to establish that the treatment of the respondent had not been based in any way upon the ground of her sex. At paragraph [84] of its judgment the Tribunal stated:

> "The explanation given was that the claimant had been offered the opportunity to avail of the training and experience opportunities but no supporting evidence was presented. Similarly, the redundancy selection was explained by saying that Mr Booth cost

> less and was more skilled/experienced. The facts that the claimant earned more, her car lease cost more or that Mr Booth had longer experience because of his age were factors for inclusion in such a consideration but no evidence was presented as to how these matters were assessed or weighted or compared or whether other criteria were used as the respondent's response indicated."

Discussion

(a) The date of the respondent's dismissal

[17] At paragraph [63] of the judgment the Tribunal concluded that the "effective date of the redundancy dismissal" was 30 January 2009, the last working day of that month. However, the basis for fixing upon that particular date is not entirely clear. The Tribunal referred to the respondent being paid "per calendar month" and that the 30 was the "last working day of the month." However it also noted that the final payment was made to the claimant on her "January pay day", 27 January 2009. The claimant's contract of employment, dated 7 June 2006, entitled her to one months' notice to terminate and provided that payment in lieu of notice might be given. The formal Notice of Redundancy and the annexed Payment Statement referred to the leaving date as 23 December 2008. Thus, assuming notice of one month, the respondent's leaving date would have been 23 January 2009 which would still have meant that the notice was in time. However, it is clear that those documents could not be read in isolation from the conversations that took place on 23 December 2008. For example, the Payment Statement referred to the obligation to return all company property on or before 24 December 2008 while it is common case that the respondent was to be permitted to enjoy possession and use of the company car for the notice period. During the second conference call Ms Wheeler referred to the notice period as "…a month or 4 weeks whichever works out best." It is also clear that Ms Wheeler informed the respondent that she was welcome to work the month's notice if she wished to do so and that it was her choice to leave. The Tribunal was entitled to conclude that, as a matter of fact, this did not amount to immediate dismissal by the appellant. As an alternative the Tribunal recorded at paragraph [69] that the grievance letter sent by the respondent on 9 March 2009 added three months to the statutory time limit. While it was not specifically challenged by the appellant, it is to be noted that paragraph [69] does not provide any legislative or other authority for that proposition.

[18] In Adams v G K N Sankey Limited (1980) IRLR 416 the EAT pointed out that dismissal may take one of two forms. It may mean either that the employee is dismissed with notice but is given a payment in lieu of working out that notice, or that the employee is dismissed immediately with the payment being made in lieu of notice. If the dismissal falls into the former

category the date of dismissal is the date when the notice expires; if it falls within the latter category then the dismissal will be when the employment terminates. The decision into which of these two categories to place any particular dismissal is essentially one of fact for the Tribunal. In the course of his skeleton argument and oral submissions Mr Potter castigated the decision of the Tribunal upon this issue as "flawed, erroneous and perverse". However, that is a threshold which is notoriously difficult to pass and in Yeboah v Bernard Crofton [2002] IRLR 634 Mummery LJ delivering his judgment in the Court of Appeal said, 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', British Telecommunications PLC –v- Sheridan [1990] IRLR 27 at para 34."

Applying this approach to the circumstances of this case, after careful consideration, we are not prepared to overturn the finding of the Tribunal as to the effective date of termination.

(b) The allegation of sex discrimination

[19] Mr Potter's second ground of appeal was based upon his submission that the Tribunal had erred in law in its application of Article 63A of the 1976 Regulations and, consequently, its finding that the appellant had discriminated against the respondent upon the ground of sex should be overturned. At paragraphs [31] to [34] of his skeleton argument he set out in some detail the evidence that he claimed had been put before the Tribunal by the respondent, Mr Booth and Mr Burrows. He described the reasoning of the Tribunal at paragraphs [84] and [85] as "thin, vague, convoluted and flawed" and condemned the finding of sex discrimination as perverse.

[20] Mr Potter sought to refute the findings of unfavourable treatment made by the Tribunal by referring to specific evidence that he alleged to have been given to the Tribunal in relation thereto. With regard to the opportunities for training courses in England he maintained that Mr Booth had given evidence that he had gone to England because the respondent had refused to do so, a refusal that he, Mr Booth, had heard when they were all in the same room. That did not accord with the findings of the Tribunal recorded at paragraph [23] of the judgment when, after referring to the claimant's evidence that she had told her employer she needed at least 24 hours notice, the Tribunal stated:

> "She (the respondent) gave evidence that she was not asked to go to either of these events while Mr Booth said that he was told he was going because no one else could go. He had been informed that the claimant had been asked if she wanted to go by Chris Featherstone, the manager at the time, but acknowledged that he had not seen or heard the claimant being asked and relied on what he was told."

[21] Mr Potter also submitted that the Tribunal had preferred the appellant's explanation that the dismissal was premised on cost and skill/experience. While the Tribunal did find that Mr Burrows had referred to criteria of cost and experience at the initial meeting on 23 December 2008, it is clear from paragraph [78] of the judgment that the Tribunal did not accept that a fair and reasonable selection process would simply equate skill with length of service and costs with salary. No evidence was presented by the appellant to explain how those factors had been assessed and weighted. The Tribunal recorded that the respondent had given unchallenged evidence that she had been provided with the use of a Land Rover as a company vehicle during the course of her employment with Belcom in recognition of her good performance. As noted above, despite his belief that the appellant's acknowledged technical expert, Mr Nixon, had carried out appraisals of the work of the engineers, Mr Burrows, who had no relevant technical knowledge or experience, had taken no steps whatever to consult with Mr Nixon or gain access to the appraisals at any stage during the redundancy selection process.

[22] Mr Potter asserted that the comment that Mr Booth "looked more like a telecom engineer" than the respondent, alleged to have been made by Mr Burrows, was clearly related to age rather than sex. After dealing with the conflict of evidence relating to whether meetings with customers were attended by any of the engineers and, if so, what took place at such meetings, the first reference to this remark is contained at paragraph [25] of the decision which reads:

> "The claimant claimed that this element of her treatment by the respondent was on the grounds of her age as well as her gender. The claimant is aged 27 while Mr Booth is aged 43. She claimed that Robert Burrows had told her during their meeting in connection with the redundancy selection that Mr Booth 'looked more like a telecom engineer' that she did. The Tribunal will return to this element of the claim below."

At paragraph [68] of the judgment the Tribunal then proceeded to hold that it had no jurisdiction to deal with any allegation of discrimination on grounds of age but returned to that remark at paragraph [85] in the course of considering the claim grounded upon sex discrimination. At that point the Tribunal recorded:

> "The claimant maintained that the reason Mr Burrows preferred Mr Booth was that he looked more like a telecom engineer than she did. Mr Burrows denied saying it, but the Tribunal preferred the claimant's evidence to that of Mr Burrows on this point and find on the balance of probabilities that the claimant was unlawfully discriminated against on ground of sex by the respondent during her employment and in her selection for redundancy."

While, with hindsight, the reasoning might have been more clearly expressed, it is important to view the decision as a whole. When that is done it seems clear that the Tribunal considered the remark to have implications of both sex and age discrimination, and, once the latter had been excluded, we consider that the tribunal was entitled to take the remark into account as evidence of the former.

[23] Mr Potter referred to the finding by the Tribunal at paragraph 49 of the decision that the respondent's account was not "entirely accurate" and sought to persuade us that, as a consequence, the Tribunal should have rejected all of the evidence given by the respondent. In our view such an approach would not accord with the difficult task performed by Tribunals charged with the obligation to fairly and reasonably resolve conflicting evidence of fact. There may well be examples of factual assertions made by a particular witness that are so lacking in credibility as to seriously call into question all of the evidence given by that person but experience indicates such examples to be rare – in R v G [1998] Crim LR 483 Buxton LJ observed that "A person's credibility, any more than their liability, is not necessarily a seamless robe." The situation that will be far more familiar to most judicial tribunals will be that of attempting to reconcile those apparent contradictions that appear in the evidence of witnesses who seem to be doing their best to provide accounts that accord with their understanding and recollection of particular events. It is in such circumstances that it becomes essential to have careful regard to the performance of the witnesses under examination and cross-examination in the context of all the available evidence. That said, it is also important that any decision should clearly provide a reasoned basis for both legal and factual determinations. Paragraph 30 of Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) SR 2005/150 provides a statutory basis for such a requirement. We recognise that such reasons are not intended to include a comprehensive and detailed analysis of the case and should not be subjected to a detailed analysis on

appeal – see Johansson v Fountain Street Development Association [2007] NICA 15. However the decision should clearly explain how the findings of fact and applicable law have been applied to determine the issues. In that context we consider that the reasoning process supporting the Tribunal's conclusion at paragraph 24 of the decision could have been explained with greater clarity. In addition whilst, having heard the witnesses examined and cross-examined, the Tribunal may well have been entitled to prefer the evidence given by the respondent to that of Mr Burrows with regard to the alleged remark referred to at paragraphs 25 and 85 of the decision, we consider that there was also some substance in the complaint made by Mr Potter of the fact that no mention was made of the omission of any reference to any such remark in the respondent's documentation. It would have been preferable if the Tribunal had expressly addressed the respondent's failure to refer to this remark in her documentation, particularly, since, as we have noted at paragraph [11] above, the Tribunal legitimately had regard to the available documentation when considering its approach to the credibility of the principal witnesses.

[24] The Tribunal clearly rejected the explanation put forward by the appellant that the redundancy decision was grounded solely on the basis of cost and skills and experience and having done so, we consider that there was evidence upon the basis of which a reasonable tribunal could properly conclude that the respondent's gender had been an factor in her selection for redundancy. In the circumstances, after carefully considering all of the evidence and the helpful submissions of counsel, bearing in mind the approach outlined earlier in this judgment that an appellate court should have to a Tribunal which has had the benefit of hearing at first hand witnesses examined and cross-examined, we have reached the firm conclusion that the Tribunal was entitled to rely upon Article 63A(2) in accordance with the principles set out by this court in Curley v Chief Constable [2009] NICA 8 and Nelson v Newry and Mourne District Council [2009] NICA 24. Having done so, we are satisfied that the Tribunal was entitled to reach the conclusion that it did with regard to sex discrimination. Accordingly, this appeal must be dismissed.