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NORTHERN IRELAND EMPLOYMENT CASE REVIEW 2021

Wahab v Four Seasons (No.7) Limited (unfair dismissal; unlawful deductions from wages; race discrimination)

1. Tell us about the case and some background

- Claimant was employed by Respondent as healthcare worker.
- She commenced employed on 22nd October 2018 and employment came to an end on 22nd September 2019
- Went through disciplinary process
- Dismissed with effect from 22nd September 2019 due to failure to adhere to policy & procedures relating to notifying the home of absence
- Claimant appealed against her dismissal
- The dismissal decision was overturned on appeal and she was given the opportunity of reengagement
- Claimant then contacted respondent to say that she had received the appeal letter but she would not be returning because she had secured alternative employment
- An interesting legal point in the case was the impact of a successful appeal upon a dismissal.
- It was argued on behalf of the Respondent that a successful appeal against dismissal led to an automatic reinstatement of the contract. As a result, if an employee refused to take up the offer of reinstatement, they could not subsequently bring an unfair dismissal as there was no dismissal.

2. What was the outcome and why?

Unfair dismissal complaint was dismissed. Para 31 of decision is relevant:

> In aid of the claimant, in order that she might clearly understand the submissions which were to be made on the part of the respondent, it was agreed that the respondent's submissions would be made first, by the legal representative. These were succinct and encompassed three areas. Firstly, the contention advanced was that legal authority supported the proposition that once a dismissal had been overturned upon an appeal under a disciplinary process, the contract of employment was automatically reinstated. Accordingly, if a dismissed employee who was so reinstated on appeal then, of their own volition, decided not to return to the employment, there was no dismissal by the employer. The cited authority for this proposition was derived from the case of ***Ramesh Patel v Folkestone Nursing Home Limited [2018] EWCA Civ 1689 and [2018] EWCA Civ 1843.*** That English Court of Appeal case makes reference to the Northern Ireland Court of Appeal case (which is binding upon this tribunal) of ***David McMaster v Antrim Borough Council [2010] NICA 45.*** In effect, the respondent did not terminate the contract which subsisted up to the date of the successful appeal. The claimant's conduct after that date effected the termination of the contract and accordingly there was no dismissal. For this reason, there could be no successful unfair dismissal claim. They corollary of this position, as conceded by the respondent's representative, was that no argument could be effectively advanced that the claimant had failed to attain the necessary period of one year, provided for in Article 140 of the 1996 Order. That being the case, the further concession made in submissions was that the respondent was indeed obliged to pay the claimant the equivalent of two months' pay. It was explained to the tribunal, without objection from the claimant, that a figure had been quantified in respect of this latter which amounted to the sum of £1,896.00. The respondent was agreeable to this figure being made the subject of an Order by the tribunal for unpaid wages in the matter. The claimant raised no objection to that.

3. What should listeners now do in the light of this case? Be aware of the impact that reinstatement has upon a dismissal

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Campbell v Lisburn & Castlereagh City Council (Religious belief/political opinion discrimination; agency worker)

1. Tell us about the case and some background

- The Claimant was a Roman Catholic and contented that by virtue of her name she would be perceived as a nationalist
- The Claimant worked for the Respondent as an agency worker via a placement arranged by her employer, Grafton Recruitment
- Claimant was a receptionist in Castlereagh Hills Golf Club
- Claimant alleged that she was harassed contrary to FETO as a result of the conduct of a member of the Respondent's golf course (referred to as Mr A)
- Two incidents
    - Verbal comments made by Mr A to the Claimant which were delivered in aggressive manner
        - Incident with union flag
        - Second incident concerned claimant's complaint about first incident and the remedial action directed by the Respondent i.e. that Mr A apologise
- Mr A was neither an employee nor worker of the Respondent (case looked at issue of third party harassment)
- The Claimant reported both incidents to the Respondent but alleged the Respondent failed to effectively deal with her complaint
- Respondent conceded that conduct met the legal definition of harassment but argued that the Respondent should not be held liable under FETO for the conduct of a third party

2. What was the outcome and why?

Claimant claims of harassment, direct discrimination and victimisation on grounds of religious belief and/or political opinion were dismissed. However, Tribunal found that claimant's complaints against the Respondent in relation to handling of her complaint were well founded.

Paragraph 112 summarises key failings re handling of complaint:

1. Its initial abdication of responsibility to CH golf club to handle the complaint.
2. This caused unnecessary delay in the respondent's handling of the complaint.
3. Its failure to recognise and apply its lone working policy.
4. Its informal handling of the claimant's complaint.
5. Its failure to fully or properly investigate the claimant's complaint before informing the claimant of the outcome.

Not sufficient to succeed. Claimant could not poor handling of harassment complaints to protected ground (para 128)

<u>Key takeaways</u>

Agency workers have protection under FETO: See paragraph 41:

> The claimant was not an employee of the respondent but an agency worker. Article 20 of FETO extends protection to individuals like the claimant (referred to in FETO as "contract worker") employed by a person/entity (in this case Grafton Recruitment) but supplied to work for another, in this case the respondent (referred to in FETO as "principal") under a contract between the employer and the principal. It is common case that the claimant's working arrangement with the respondent fell within the scope of Article 20 and specifically Article 20(2) of FETO which provides that it is unlawful for a principal to discriminate against a contract worker and Article 20(2A) which provides that is unlawful for a principal to subject a contract worker to harassment.

Liability for Third Party Harassment: Good summary of authorities at paragraph 51- 65.

> Therefore the only scope by which an employer or a principal can be liable for the discriminatory conduct of others under FETO is if that other person was at the material time an employee of the respondent acting in the course of their employment or was a contract worker acting as an agent for the principal with the

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principal's express or implied authority given before or after the discriminatory conduct in question was carried out. (paragraph 45)

In summary therefore, to establish liability of the respondent for the alleged conduct of Mr A, the claimant would need to show that either the respondent directly discriminated against her in its treatment of her relating to Mr A and/or that the respondent's action/failure to act to address her complaints against Mr A of itself amounted to harassment of her falling within the definition of Article 3A of FETO. The claimant did not advance either argument and reiterated this fact to the tribunal on a number of occasions during the hearing (para 63)

In this jurisdiction employers can be held liable for the sexual harassment of its employees by a third party in specified circumstances (set out in Article 82C of the Sex Discrimination (NI) Order 1976). The fact that this protection is expressly provided for in this Order but not in the other anti-discrimination legislation in this jurisdiction supports the conclusion reached by the judiciary in the cases outlined herein that it is for the legislators to plug any perceived gap in the law, not the courts (para 65)

Anonymity: Also note discussion regarding anonymity issue. Tribunal decided not to name harasser and he was therefore referred to as Mr A. Key factors which appear to have been taken into consideration- Mr A was not a party to proceedings nor was he called to give evidence, Mr A's Article 8 rights were engaged, possibility that Mr A was unaware of the proceedings, impact on Mr A's reputation, fact that the principle of open justice was not absolute, claimant's concern for her safety should Mr A be named (see paragraphs 17-24, in particular 24)

3. What should listeners now do in the light of this case?

Note criticism of how Respondent handled the matter. Tribunal acknowledged that Claimant had every reason to feel let down by the Respondent in terms of how it handled both complaints. Practical things to consider if faced with this situation:

Any relevant policy?

"the wholesale failure of management to recognise that the claimant's complaint engaged the lone working policy is a serious procedural failing" (paragraph 99)

Consider approach adopted

The tribunal finds that these procedural failings exhibit an overly casual approach by the respondent to a serious matter and fatally undermine the respondent's assertions that they handled the matter appropriately and took it seriously (paragraph 101)

Good practice to report outcome of decided action to employee

The tribunal finds that Mr Skillen's failure to follow this matter up with Mr A, report the matter to his line manager and report back to the claimant was another procedural failing (paragraph 102)

Importance of process for investigation

The tribunal also concludes that by way of good procedure and indeed common sense, the claimant and Mr A should have been spoken to at an early stage in the investigation to gather both accounts and all relevant facts at the outset. The respondent's failure to do so was a further procedural flaw which had the understandable effect of making the claimant feel that her complaint was not being progressed or treated with the gravity it deserved (para 118)

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Anonymised Claimant v Anonymised Respondent (Sexual harassment and assault in the workplace)

1. Tell us about the case and some background
    - Claimant worked for the respondent as an assistant in an ice cream shop
    - Claimant became part time employee of Respondent when she was 15 years old
    - Claimant complained that Respondent had made lewd & suggestive remarks. Also allegations re touching/fondling during course of employment- see paragraph 15 of decision
    - Claimant complained to PSNI about various incidents
    - Respondent charged with several counts of sexual offences- ultimately pleaded guilty to two charges of common assault and agreed to imposition of Risk of Sexual Harm Order
    - Key challenge in this case was the fact that the Respondent was unrepresented

2. What was the outcome and why?

    The unanimous judgement of the Tribunal is that the Respondent unlawfully harassed the claimant on grounds of sex and unlawfully discriminated against the clamant on grounds of sex. The claimant was awarded compensation and interest comprising of £41,500 in respect of injury to feelings, £20,000 in respect of psychiatric injury and £6,000 in respect of aggravated damages, together with interest of £4,360.00. Total award was £71,860.00.

3. What should listeners now do in the light of this case?

    Impact of criminal proceedings on tribunal claims- initial delays in listing this claim until criminal proceedings against respondent were completed (para 11). Offender management unit of PSNI had given clear permission for Respondent to attend and participate in tribunal hearing (para 19)

    Note the change in rules re anonymisation of cases involving sexual offences: Anonymisation of such cases used to be automatic. This has changed as a result of Rule 44 of new 2020 Rules of Procedure- there is now a. discretion/decision making function on part of Tribunal. Tribunal decided to lift anonymisation order. Appears to be currently under appeal (para 12 & 13 and para 26-29, para 120-130)

    Special measures put in place for Claimant:

    1. The tribunal panel, the claimant & respondent were all in separate rooms with a video link between the three rooms (hearing took place in Killymeal)

    2. Staggered arrival & departure times for claimant and respondent to ensure separation at all times

    3. Respondent was required to provide cross examination questions in advance. Questions were put to the Claimant by the Employment Judge hearing the case

    4. Respondent would not speak to claimant directly at any point

    Schedule of Loss in sexual harassment/discrimination cases: consider whether aggravated damages (especially where subsequent oppressive/improper conduct) or element for PI arising from discrimination is appropriate. Also don't forget interest!

    Reference to guidelines by the Judicial College in relation to Assessment of General Damages in PI cases (see para 44-50)

    Factors such as:

    Ability to cope with life, education, work
    Effect on relationships with family/friends
    Extent to which treatment successful
    Future vulnerability
    Prognosis
    Extent and/or nature of any associated physical injuries
    Whether medical help has been sought

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McNicholl v Bank of Ireland & Cummins (Sexual harassment and joint and several liability)

1. Tell us about the case and some background

Sexual harassment case backed by Equality Commission.

Case summary here- https://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2021/McNicholl-v-BankofIreland-Decision.pdf

2. What was the outcome and why?

   The claimant was sexually harassed by the respondents and each of them and the tribunal orders the respondents, jointly and severally to pay to the claimant the sum of £18,483.07, by way of compensation.

3. What should listeners now do in the light of this case?

Key case to consider re anonymisation

Rule 44 of 2020 Rules of Procedure:

> The Tribunal is satisfied that, when considering whether it is appropriate to make any anonymity orders, pursuant to the said rule, it is necessary to have regard to the basis under which any such order should be made and, in particular, the importance of the principles of open justice, giving full weight to it and the right to freedom of expression. It is clear, under the said rule, **the restriction on public disclosure can only be imposed in so far as the Tribunal considers it necessary, (1) in the interests of justice or (2) to protect the convention rights of any person. Such an Order is not restricted to parties or witnesses. A tribunal is therefore required, when determining this issue, to consider the competing rights and balance one against the other before reaching a decision**. (see Fallows and others v News Group Newspapers (2016) ICR 801 applying Rule 50 of the Employment Tribunal Rules of Procedure 2013, which apply in Great Britain, and which is in similar terms to Rule 44 of the 2020 Rules of Procedure). (para 1.10)

Lessons for Respondents

> **Importance of proper training for staff:** "complete failure to train F in relation to the Harassment Policy or even to provide him with a copy, despite the events of June-November 2015 and the warning given, until at the time he was suspended in July 2016" (para 7.5)
>
> **Slight concern re use of Facebook material:** Although the tribunal had some concerns about the trawling through Natasha McNicholl's Facebook account.. for the purposes of these proceedings (para 7.6)- did not justify award of aggravated damages

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Nevin McEldowney v Randox Farming Limited trading as Cherryvalley Farms (Unfair dismissal; Reasonable Adjustments; Registered Intermediary)

1. Tell us about the case and some background

The Claimant presented a claim for unfair dismissal and failure to pay notice pay in November 2018

On the third day of the substantive hearing, during the claimant's cross examination, the claimant's representative raised concerns regarding whether the claimant was effectively participating in the hearing. Until this point, no application for reasonable adjustments or special adjustments had been made.

Following enquiries by the Tribunal, an application was made to adjourn the hearing to allow further enquiries to be made.

A report was subsequently obtained from Dr John Eakin, Educational Psychologist. On the basis of his recommendations, the Claimant's representatives requested the following adjustments:

(a) written cross examination questions to be provided to the claimant in advance of giving evidence;

(b) the claimant should be provided with a registered intermediary;

(c) the hearing to proceed at a slower pace to allow the claimant to fairly answer the questions;

(d) question should be short and simple;

(e) new topic should be signposted;

(f) the following should be avoided:-

(i) idiomatic language,

(ii) tag questions

(iii) hypothetical or abstract questions

(g) the tribunal should intermittently check the claimant's understanding by asking the claimant to repeat back what he thinks he has been asked/said;

(h) the tribunal should intervene if there is a potential for misunderstanding or rephrase questions for the witness if necessary; and

(i) the claimant should be given regular breaks during the hearing.

2. What was the outcome and why?

The Respondent's representative initially objected to providing written cross examination questions to the claimant in advance.

Following a case management hearing, the parties agreed that the President of the Industrial Tribunal should appoint a registered intermediatory and that the intermediary should meet with the claimant in order to further assess his needs when giving evidence.

The Claimant accordingly met with the intermediatory, Ms Suzanne Smith who prepared a report to assist the Tribunal. The report confirmed the intermediary's role was to assist communication with the claimant

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and to assist the claimant to communicate with others. This report further confirmed that it was important that a ground rules hearing should take place before the claimant gave his evidence.

Both parties also had the opportunity to lodge written submissions on whether the evidence should be restarted. The Claimant's representative relied upon relevant authorities from the Advocate's Gateway, to which she believed parallels could be drawn on judicial control of questioning and vetting of advocates' questions before trial. In response, the Respondent's representative argued that the issues were "to a large extent, uncharted territory in the context of tribunal hearings and employment law context".

The Respondent's representative ultimately confirmed that he accepted the content of both Dr Eakin's and Ms Smith's reports and accepted the recommendations, save for the provision of written questions to the claimant. He did however agree to provide his written cross examination questions. He further agreed to provide his written cross examination questions in advance to the intermediary.

In his closing submission, the Respondent's representative characterised the steps taken by the Tribunal as "extra-ordinary", whilst noting that they had been taken with the full co-operation of the respondent. The Tribunal on the other hand, characterised the steps taken by it as necessary in light of the reports which were placed before it, in light of the agreed position of the representatives and in light of the overriding objective and the principles set forth in the case Galo.

The Claimant ultimately won his case for unfair dismissal.

3. What should listeners now do in the light of this case?

This case provides an interesting insight into what adjustments can be made for employment hearings following on from the decision in **Galo v Bombardier Aerospace [2016] NICA 25.** It is likely that this case will be relied upon at further ground rules hearings in Northern Ireland and potentially beyond.

When representing vulnerable claimants, it is essential to be mindful of the **Equal Treatment Bench Book** (https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf), which provides helpful guidance on ground rules hearings and adjustments which can be made to cross-examination.

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Byrne v Aware Defeat Depression Ltd (Disability Discrimination; Constructive Dismissal)

1. Tell us about the case and some background

- The Claimant was employed by Respondent as a Communications Officer
- Claimant suffered from colitis. Respondent accepted that she was disabled for the purposes of DDA 1995
- Claimant sought a variation of her working pattern. Respondent maintained that this was granted on temporary basis only.
- Under this temporary variation, claimant worked for 4 days a week with one of those four days working from home (pre Covid pandemic)
- Respondent subsequently informed Claimant that it viewed her role as full time role which required five day working week based in the office.
- Claimant was then invited to apply for a variation of full time office working under an intenal flexible working policy
- Claimant resigned and claimed constructive dismissal

2. What was the outcome and why?

The unanimous judgment of the tribunal is that:

(i) The claimant was constructively and unfairly dismissed contrary to the Employment Rights (Northern Ireland) Order 1996.

(ii) The respondent had unlawfully discriminated against the claimant by failing to put in place a reasonable adjustment in respect of the claimant contrary to Section 3A(2) of the Disability Discrimination Act 1995.

(iii) The respondent had unlawfully discriminated against the claimant on the ground of her disability by treating her less favourably than it treated or would have treated others, contrary to Section 3A(5) of the Disability Discrimination Act 1995.

(iv) The respondent had unlawfully discriminated against the claimant for a reason which relates to a person's disability, by treating her less favourably that it treated or would have treated others, without objective justification, contrary to Section 3A(1) of the Disability Discrimination Act 1995.

(v) The claimant is awarded a basic award of £2,420.30 with £500.00 for loss of statutory rights and no compensatory award for loss of earnings in respect of constructive unfair dismissal. The claimant is also awarded £7,000.00 for injury to feelings in respect of the unlawful discrimination.

(vi) The total amount of compensation awarded to the claimant is £9,920.30.

3. What should listeners now do in the light of this case?

Contains useful overview of law on disability discrimination in NI including direct * discrimination for a disability related reason (paragraph 96-111): The tribunal concluded that the respondent discriminated against the claimant both directly on the ground of her disability and for disability related reasons.

The importance of good records: Yet, as indicated above, no notes were taken, no record kept and no outcome written down and issued to the claimant. This amateurish approach to a serious issue is regrettable and clearly started the process of destroying the necessary level of trust and confidence between an employer and employee (para 45)

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As with much of the rest of this case, documentation is incomplete and/or missing. The variation, was clearly renewed and remained in place thereafter until July 2019. However no record apparently exists of all of the relevant extensions. Similarly no record exists of any "trial" or of any supervision of "phasing back to work". (para 53).

The absence of any contemporaneous note or record of the meeting further adds to the confusion (para 91)

Importance of dealing with difficulties as they arise:

> When Ms McDaid and Ms Collins were asked to explain why these matters had not been raised with the claimant when they had allegedly occurred, Ms Collins in particular stated that she had trying to be "positive". If the respondent organisation had been trying to be "positive", it would have identified any difficulties, as they had emerged, to seek a resolution at the time. The tribunal can only conclude that these alleged difficulties were at best an exaggeration on the part of the respondent in an exercise in ex-post facto rationalisation (para 60)

Caution against confusing reasonable adjustments under 1995 Act & applications for flexible working

> It is regrettable that the respondent chose to confuse these two separate and distinct legal codes and to misdirect both itself and the claimant in so doing. It is even more regrettable that the respondent was apparently following Equality Commission advice in doing so. The tribunal was referred to a Model Policy and Procedure for Handling Requests for Flexible Working which had been published by that organisation and which appeared to amalgamate without clear distinction, applications under Article 112F of the 1996 Order and the consideration of reasonable adjustments under the 1995 Act (para 65)

The importance of considering the need for reasonable adjustments within the workplace

> The respondent failed to address its statutory responsibility to put in place a reasonable adjustment from the start of this saga on 2 August 2018 and persisted in that failure even after the OH report and even after the claimant had specifically raised the question of reasonable adjustments and the 1995 Act on 4 October 2019. An adjustment could clearly have been made; it had been in operation for almost a year and adjustments were put in place after the claimant's resignation. The onus of proof has shifted to the respondent (see Tarbuck above) and it has not been rebutted by the respondent (para 95)

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9 February 2022

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