THE EMPLOYMENT LAW JURISDICTION OF THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

The Honourable Mr Justice O'Hara
Friday 20 June 2014

---

1. I am delighted to have been invited to address the joint meeting of the Employment Lawyers (NI) Group and the Employment Law Association of Ireland. It would be impossible in this talk to address each aspect of the High Court's employment law jurisdiction. Instead of attempting (and failing) to do so, I have decided to deal first with judicial review in the employment law context before turning in a somewhat random way to identify issues which have emerged from actions begun by writ.

Judicial review

2. In Re Phillip's Application (1995) NI 322 Lord Carswell gave a decision which has effectively been followed ever since about the limitations of judicial review so far as employment law is concerned. The factual background to the case was that the applicant was a civilian employee of the Ministry of Defence who was challenging his dismissal. He contended that the Ministry had acted in breach of its own procedures, had taken into account the wrong considerations, had acted unfairly and with bias and had reached a decision which was unreasonable in Wednesbury sense – classic judicial review propositions. On behalf of the Ministry it was argued that the application should be refused in limine because it was at heart a private law matter which contained an insufficient element of public law to entitle the applicant to seek judicial review. By that time it had been well established that disputes between an employer and employee over the rights of the employee under the terms of his employment are not a matter of public law *without more* even if the employer was a public authority. Things had become complicated however because of an inconsistent approach taken by the Crown as to whether civil servants had contracts of employment. For instance in McClaren v Home Office (1990) ICR 824, the Home

Office had argued that there could be no contractual relationship between a prison officer and a Home Office and that the dispute was not one of private law. By way of contrast in R v Lord Chancellor's Department ex parte Nangle (1992) 1 All ER 897 it was contended by the Lord Chancellor that the applicant was employed by the Crown under contract of employment so that there was an insufficient public element in the dispute to justify judicial review. Lord Carswell was told in the course of the Phillips hearing that it was by then the Crown's approach to accept that civil servants in general have legally enforceable contracts of employment.

3. Lord Carswell reviewed the authorities and reached this conclusion at page 334:

> "For my own part I would regard it as a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus upon the classification of the civil servant's employment or office. ...
>
> When one applies the criteria enunciated ... in McClarnon v Home Office, it is readily apparent that there is not a sufficient public law element in the present case to make the decision subject to judicial review. The disciplinary procedure did not come before a tribunal or similar body .... The decision was not one of general application nor did it involve any matter of public policy or turn on the interpretation of legal powers .... I accordingly hold that the applicant would not be entitled to judicial review of the decision to dismiss him, even if, contrary to the

conclusion which I am about to express, he could establish that it was unlawful in any respect."

4. The law has effectively stood in that position ever since. There is however an additional difficulty about seeking judicial review in an employment's scenario in Northern Ireland – the fact that there is an advanced and coherent employment tribunal system which in the vast majority of cases would be regarded as sufficient to provide an alternative remedy. This is relevant because one of the bases for the High Court declining to accept an application for judicial review is whether the applicant has such an alternative remedy. If he has and particularly if that alternative remedy can explore matters of fact which are unsuitable for trial by judicial review the court will decline to entertain the application. This is what ultimately happened in a series of cases involving the Lough Neagh Fisherman's Co-operative Society. In Kirkpatrick (2004) NIJB 15 Lord Kerr held that the Society was a body whose powers and activities made its decision susceptible to judicial review. He then went on however to hold that since the gist of Mr Fitzpatrick's claim was that he was denied a licence to fish on Lough Neagh by reason of religious discrimination, that complaint would more properly be dealt with by the Fair Employment Tribunal. See also Wylie (2005) NIQB 2 and Mulholland (2010) NIQB 118.

5. An imaginative if ultimately unsuccessful challenge by way of judicial review appears in Allen, a decision of Weatherup J dated 30 June 2004. Mr Allen was employed by the Northern Ireland Fire Authority which had decided to re-advertise a post of Divisional Officer. At the time the decision was taken Mr Allen had an outstanding internal complaint about the inclusion of a residence requirement for the post. That complaint had also been referred by him to the Fair Employment Tribunal and the authority's procedure had been referred to the Equality Commission. Notwithstanding this the authority intended to fill the post in any event without waiting for the outcome of those complaints. At that time the position was that under Section 75 of the Northern Ireland Act 1998 a public authority had an

obligation to have due regard to the need to promote equality of opportunity in respect of various matters including religious belief and political opinion. That duty was enforced through a system under which the public bodies would draw up equality schemes which would then be presented to the Equality Commission for approval. If the Commission received a complaint that the public body had failed to comply with the scheme then the Commission was to investigate that complaint and prepare a report which might recommend remedial action which the public body had to take. The gist of Mr Allen's challenge was that unless and until his complaints and the Equality Commission's investigation were complete it was entirely wrong for the Fire Authority to proceed with the exercise of filling the post.

6. The judge said the following at paragraph [24]:

> "There is no provision in the legislation or the scheme for post holding pending the recommendation of the Equality Commission or the directions of the Secretary of State. That is not the end of the matter because, where statutory procedures have been devised, the court may add to the statutory scheme such procedures as fairness demands and may require the procedures to be applied so as not to defeat the purpose of the statutory scheme. The court may require compliance with the statutory scheme by those whose statutory duty it is to comply. Whether that would have the effect in a particular case of requiring a post to be held open pending compliance with statutory duties would depend on the demands of the statutory scheme. I would make such an order in the present case if two conditions were satisfied – first of all, a disregarding of the statutory scheme and

secondly with the effect of undermining the purpose of the statutory scheme."

7. However the judge went on to hold that while the first point had been established i.e. that the scheme had been disregarded, the second matter was not established. As a result the procedural failings of the Fire Authority had not put Mr Allen in a position in which he would not otherwise have been in. That being so the application for judicial review was dismissed. The case does however serve as a reminder of the possibility of engaging a court in judicial review in such circumstances.

8. Turning to another area in which judicial review has been deployed, the case of AB (2010) NIQB 19 involved an employee of a District Council challenging his employer's refusal to allow him legal representation at a disciplinary hearing into allegations misconduct. The contention advanced on his behalf was that Article 6(1) ECHR was engaged because the disciplinary proceedings involved a determination of his civil rights and obligations with the effect that legal representation was required as a commensurate measure of procedural protection. At paragraph [26] of his judgment Treacy J stated:

> "The ECHR has more than once emphasised that Article 6 rights are **not** usually engaged in disciplinary proceedings when all that could be at stake was the loss of a specific job. The loss of a job (particularly in the present climate) will, in many cases, have profound consequences for the person concerned and his or her family. In many cases people are dismissed from their employment following allegations of what may well amount to suspicion or allegations of criminal misconduct e.g. dishonesty, assault, criminal damage, harassment etc.

> The intellectual capacity of those subject to disciplinary proceedings will inevitably vary - in some working contexts more so than others. These considerations of themselves do not however lead to the conclusion that Article 6 is engaged."

He continued at paragraph [25]:

> "If it were the case that the seriousness of the consequences and an implication of criminal misconduct were sufficient to engage Article 6 creating a potential entitlement to legal representation this would have plainly far reaching and undesirable consequences, inter alia, for employers. It is therefore not surprising that the circumstances in which the ECHR has held Article 6 to be engaged in a disciplinary context have been very circumscribed. It appears that the line has been drawn where what was at issue was not solely the loss of a job (no matter how serious that might be) but cases where the person could be deprived of his *civil right to practice* his or her profession. A feature of such professional disciplinary hearings is that they are frequently regulated by statute or other provisions giving them a distinctly public law flavour."

9. There was an additional argument raised on behalf of AB which was to the effect that he had limited intellectual capacity. The judge held at paragraph [28] that:

> "A personal characteristic of an individual cannot have a transpositional effect in terms of what

constitutes a civil right. However it may engage other specific protections enjoyed by members of a vulnerable group, for example, under the provisions of the Disability Discrimination (NI) Order 2006."

10. An appeal by AB to the Court of Appeal was unsuccessful. So also was the appellant before the Court of Appeal in Brown v Department for Regional Development (2013) NICA 17. In that case Mr Brown was a civil servant who had been employed for more than 30 years. He was alleged to have failed to disclose a conflict of interest which breached the Northern Ireland Civil Service Code of Ethics and the terms of his employment. When the Department instituted disciplinary proceedings he sought leave to apply for judicial review on the basis that his Article 6 ECHR rights were engaged, principally on the basis that he was not permitted to have legal representation during the internal hearing process. Leave was refused and the appeal against that decision was unsuccessful. At paragraph [10] of its decision the Court of Appeal stated:

"Article 6 ECHR provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This case is not concerned with a criminal charge and the first issue, therefore, is to determine the civil right in play. The relevant right is that provided by the substantive law and in this case is the right not to be unfairly dismissed. The appellant relies on Eskelinen v Finland (ECHR 19 April 2007) to support the existence of such a right for those employed in the public service. There appears to be no dispute between the parties about this and we consider that

the existence of such a civil right has been established."

At paragraph [11] the court continued:

> "It is common case that the internal proceedings of the Department cannot satisfy the requirements of Article 6 since those internal bodies cannot constitute an independent and impartial tribunal established by law. The appellant is entitled, however, to pursue his claim before the industrial tribunal before which he will have the right to be represented, the right to have contested matters of fact determined, the opportunity to call witnesses, the right to seek discovery and the entitlement to avail of the procedural rights and protections set out in Schedule 1 of the Industrial Tribunal (Constitution and Rules of Procedure) (NI) Rules 2005."

11. The inevitable conclusion reached by the court was that Mr Brown was not entitled to legal representation for the purposes for the internal disciplinary hearing. It also held that there would be no breach of natural justice arising from any of the events which could potentially arise. Finally it was noted that insofar as Mr Brown raised the issue of unlawful dismissal by reason of breach of contract, that claim could be brought separately to a tribunal or to a court where he would have Article 6 protections.

Other High Court proceedings

12. The first in this somewhat random series of decisions of the High Court is that of Khan v Western Health and Social Services Trust (2010) NIQB 92. The

plaintiff was a consultant general surgeon who sought an interim declaration and injunction which would have in effect have compelled his employer to support him by "re-skilling" him as a surgeon. This came about because between 2004 and 2007 he had been subject to restrictions following suggestions that his performance was inadequate. By the time the investigation into those allegations was complete he had become "de-skilled" as a surgeon. Through his own efforts he established that a professor at University College Dublin would supervise him and support an action plan to re-skill him. The factual ins and outs of the case need not be explored for the purposes of today's paper. Rather the decision of Gillen J highlights the difficulties which plaintiffs sometimes face in obtaining interim injunctions which involve some onus being placed on an employer to take positive action to remedy a situation. It was agreed between the parties that there was a triable issue, partly because the investigatory process had taken so long, but the judge was not satisfied that damages would be an inadequate remedy for the plaintiff. That in itself precluded an injunction being granted. The judge then went on to conclude that on the balance of convenience the refusal of an injunction carried the least risk of injustice.

13. In Lamey v Belfast Health and Social Care Trust (2013) NIQB 91, the plaintiff held a joint appointment as a Professor of Queen's University Belfast and as the Senior Oral Medicine Consultant in the Regional Specialist Dental Hospital in this jurisdiction. The professor faced a hearing before the Professional Conduct Committee of the General Dental Council as a result of issues which had arisen about the treatment of patients in Belfast. While that hearing was pending the defendant employer decided to hold a meeting in order to determine whether Professor Lamey's employment should be terminated. The professor issued a writ seeking a declaration that the holding of such a meeting amounted to a breach of contract on the part of the defendant and an injunction to restrain the defendant from holding any meeting to determine his employment in advance of the conclusions of the Professional Conduct Committee. The court accepted that the professor had raised a triable issue because of the type of meeting which the defendant had arranged in order to decide his future employment. However it went

on to uphold that he had not established that damages would not be an adequate remedy on that basis the interlocutory injunction which he sought was refused. The court further held that the balance of convenience would not lie in continuing to employ the professor because the defendant, as a public body discharging important public duties, had an obligation to reach a decision about his employment provided it did so in a fair way. (The court was further influenced by the fact that the proceedings to date had taken 2 years and 8 months during which time the professor had been suspended on full pay). The upshot of the application therefore was that it was unsuccessful though the professor at least established that the way in which it had been intended to conduct a hearing was inadequate.

14. The Lord Chief Justice gave a decision which is relevant to procedural issues in Reid v Newtownabbey Borough Council (2007) NIQB 106. In that case the plaintiff held a senior position with the Council but had been in dispute with another senior officer between 1995 and 2003. Disciplinary proceedings were commenced against the plaintiff who was also suspended. The plaintiff then complained about the Chief Executive of the Council but the Council rejected the plaintiff's application that his complaint be investigated. In the High Court proceedings the plaintiff sought a mandatory injunction requiring the defendant to investigate that complaint, an injunction restraining the defendant from proceeding with the disciplinary procedure in the meantime and damages for loss and damage sustained by him as a result of negligence and breach of contract.

15. Relevant to the claim were a number of documents which were prepared in 2002 and 2003 about the working relationships between the plaintiff and the person with whom he was originally in dispute and others who worked in the same area i.e. the Environmental Health Department. The Council had obtained a "stress audit report" from a management consultant in December 2002. That report was critical of the plaintiff and suggested that when he and the senior officer with whom he was in dispute was absent relationships within the department improved. The plaintiff questioned the authenticity of the report and relied on a letter which he had

obtained through freedom of information in which the consultant indicated that the content of the report had been entirely agreed with the Chief Executive at each stage. Accordingly it was part of the plaintiff's case that the report was not the independent work of the consultant. He sought leave to issue a Khanna subpoena directed to the consultant requiring him to produce his original audit report, all drafts of that report, all notes of interviews with staff, all notes of meetings with the Chief Executive, copy e-mails etc.

16. A Khanna subpoena derives its name from Khanna v Lovell White Durant (1994) 4 All ER 269. In that case it was held that the High Court has a wide measure of control over the manner in which a trial is to be conducted. It approved the practice of calling for the production of documents specified in a subpoena on a day prior to the date of the intended trial so as to promote earlier disclosure of evidential material in order that the parties may know the strengths and weakness of each other's cases as soon as possible. This of course relates to documentation which is in the possession of a non-party to the litigation, in this case the consultant. In the course of his judgment the Chief Justice referred to the report of the Law Reform Advisory Committee for Northern Ireland on what information should be contained in a ground affidavit for a Khanna subpoena. On the facts he accepted that the plaintiff had made out a case for the disclosure at that stage of the original stress audit report and all drafts of that report together with all exchanges between the consultant and the Chief Executive. However he was not satisfied that at that stage the plaintiff had demonstrated that he needed access to the individual statements of the employees who had been invited on a confidential basis to give their views of what was going on in the relevant department.

17. Those of you who are familiar with European law will be aware of the decision of the European Court of Justice in Francovich v Italy (1992) IRLR 84 in which the court held that a Member State was obliged to make good any damage suffered by individuals as a result of the failure to implement a directive provided that certain conditions were met. In Porter v Her Majesty's Attorney General for

Northern Ireland, the plaintiff was a woman who had been employed by a private company until her 60th birthday at which point she had been dismissed on the basis that she had reached the compulsory retirement age for a woman within that company. She brought a claim against her employer for discrimination on the ground of sex in requiring her to retire at an earlier age than would have been the case if she had been a man. The Tribunal found in her favour on the facts but held that her claim was barred by reason of the provisions of the Sex Discrimination (NI) Order 1976 as it then stood. At that point the Order had not been amended to take account of the requirements of the Equal Treatment Directive. Relying on Francovich, Mrs Porter then sued the State for failing to implement the provisions of the Directive after failing to amend the Sex Discrimination Order promptly after the decision of the ECJ in Marshall v Southampton and South West Hampshire Area Health Authority. The only record of these proceedings is a decision of Lord Carswell dated 16 December 1994 in which he held that the case should be stayed pending the outcome of other references to the ECJ. That staying order was appealed to the Court of Appeal which quashed it following which the case was resolved. It does however serve as a reminder of how the State can be sued in the High Court if it has failed to meet its responsibilities under European law.

18. I will finish this talk by referring to the decision of Deeny J in Murdock v South Eastern Education and Library Board (2010) NICH 18. The plaintiff was a classroom assistant whose job was one of many which were evaluated in order to achieve greater fairness in terms of pay. She contended that the evaluation process was the subject of a binding collective agreement in 1994 and 1995 as a result of which it was accepted that since job evaluation would take some time those whose pay grades were raised after such job evaluation would have any resulting increase in pay back dated to 1 January 1995. In the event the process took far longer than was anticipated. It took until 2007 for her job to be evaluated. The assessment was favourable to her to the extent that she was put into a higher pay grade but this was made conditional on her agreeing a reduced measure of back pay below that which she contended was appropriate. Accordingly she claimed in her writ that her

contract of employment had been breached by the defendant limiting the back pay which she was entitled to and damages for the difference between what she actually received and what she claimed to be entitled to receive.

19. The judge concluded that there was a collective agreement between management side and staff side. He accepted that the collective agreement was incorporated into the plaintiff's contract of employment but, against the plaintiff, he held that there was no intention to create a legally binding contract and that there was no consideration for such a contract in any event. On that basis he held that the plaintiff did not have an accrued right to back pay and the case was dismissed.

20. This case illustrates perhaps the difficulties in presenting to a court a series of meetings and discussions between Trade Unions and management with a view to establishing that there has been any definitive legally binding contract entered into between them. The claim was brought before the court as a test case by the plaintiff's union which absorbed lessons about how things might be done differently or better in the future to ensure that the rights of their members which were understood to be protected were in fact protected.

Conclusion

21. I hope that this run through of some of the cases which have been dealt with in our High Court in recent years has been helpful and informative both to local practitioners and to visitors from the Republic who must inevitably deal with similar types of cases in the course of their practice.