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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BOGDAN SZCZESNY-BURY

Appellant:

-and-

ROBINSON SERVICES LIMITED

Respondent:

_____

Before: Morgan LCJ and Stephens LJ

_____

STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of an Industrial Tribunal ("the Tribunal") issued to the parties on 20 April 2018. The case was listed before the Tribunal on 18 December 2017 and 12 - 16 February 2018. The Tribunal having heard evidence dismissed the claim of Bogdan Szczesny-Bury ("the Appellant") against Robinson Services Limited ("the Respondent") of unfair dismissal. The Tribunal also dismissed the Appellant's claims that he was discriminated against on grounds of his religion because of his treatment by his supervisor, that his dismissal was an act of discrimination on grounds of religion and that he was subject to less favourable treatment on the grounds of being a part time worker.

[2] The Appellant represented himself both before the Tribunal and in this court. The Respondent was represented by Mr Mulqueen instructed by Mr M Reid before the Tribunal but by letter dated 19 June 2018 Sinead Sharpe, the Human Resource Director of the Respondent wrote to the Appeals and Lists Office stating that the Respondent would not be represented in this matter and effectively that it did not

wish to take part in the appeal though it believed that the decision of the Tribunal was correct.

Procedure in relation to this appeal

[3] At a call over on 26 October 2018 the appeal was listed for an oral hearing on 28 January 2019. The Appellant appeared in person so a direction was given for a review to take place on 29 November 2018.

[4] The review took place on that date. The purpose of it was to explain to the Appellant various aspects of the appeal process including that an issue for this court would be to decide whether the Tribunal erred in law in arriving at its decision and that it was for the Appellant to demonstrate what error of law he considered had been made by the Tribunal. It was explained to the Appellant that this court has a very limited role in relation to an appeal against any factual finding made by the Tribunal and that generally new evidence will not be allowed to be introduced. The option was given to the Appellant, which he accepted, to have the appeal determined on written submissions alone. The previous direction that there should be an oral hearing on 28 January 2019 was set aside.

[5] Another issue that arose at the review on 29 November 2018 was that as the Appellant is a Polish national who asserted that he had difficulties with understanding and speaking English he wished that an interpreter should be provided to him for the purposes of the appeal. An order was made that a translator should be provided by court service to translate the Appellant's written submissions and that an interpreter should be available in court when judgment was given.

[6] The Appellant's further written submissions were to be lodged by 7 January 2019.

[7] On 4 January 2019 the Appellant lodged his further written submissions in Polish. The translator found the text confused with a lot of the sentences and paragraphs not making sense so that they were difficult to translate. On that basis the translation took more time than expected.

[8] On 21 January 2019 this court directed that the translation when available should be forwarded to the Appellant and to the Respondent.

[9] On 4 February 2019 the English translation of the documents lodged by the Appellant were delivered to this court. The English translation had been given to the Appellant. The Respondent was invited to make written comments in relation to the contents of the Appellant's submissions.

[10] On 12 February 2019 various documents attached to an e mail were received from the Respondent ("the Respondent's documents"). The attachments were entitled

a) Response comments;

b) Bury Bogdan Grievance Appeal Outcome letter 121015;

c) Bury Bogdan Appeal Outcome 150415;

d) Bury Bogdan Appeal Outcome 230317;

e) Bury Bogdan Appeal Outcome 230715; and

f) Bury Bogdan Grievance Outcome 230715.

The attachment "Response comments" was stated in the e mail to be a brief response to the Appellant's comments. The other attachments were stated to be "some supplementary information."

[11] On 12 February 2019 this court directed that the Appellant was to be asked for his written response to the Respondent's documents by 22 February 2019.

[12] On 18 February 2019 the Appellant provided written comments on the translation of his further written submissions. He stated that in the translation of his "testimony" to this court there were a few mistakes. He identified them. For instance in relation to I Section - Particulars Paragraph 5 he stated that there was a "lack" of translation of

> "Korespondenci ze strony the Fair Employment Tribunal nigdy nie deklarowali w tej korespondencji, że nie potrafią przeczytać i zrozumieć treść pism the Claimant/Appellant, przez niego redagowanych w języku angielskim, według jego umiejętności."

He proposed that the appropriate translation should be

> "Correspondents from the Fair Employment Tribunal have never declared in this correspondence that they cannot read and understand the content of the Claimant/Appellant, written by him in English, according to his skills."

It can be seen that either on his own or with the assistance of another unidentified individual the Appellant was content to check and to correct the translation provided by the court translator. We also consider that this example demonstrates as do the other submissions made by the Appellant and the views expressed by the court translator that he has difficulties expressing himself clearly either in Polish or in English. We will make significant allowances for that when considering the Appellant's submissions.

[13] On 22 February 2019 the Appellant lodged his written response dated 21 February 2019 to the Respondent's documents.

[14] The documents which have been considered by both members of this court include:

a) The decision of the Tribunal issued to the parties on 20 April 2018.

b) The notice of appeal dated 31 May 2018.

c) A letter dated 22 October 2018 from the Appellant asking for the help of an interpreter for the call over on 26 October 2018.

d) The letter from Sinead Sharpe dated 19 June 2018.

e) A 14 page submission from the Appellant dated 9 November 2018. These submissions were made by the Appellant in English at a time when no interpreter had been appointed by this court for the purposes of the appeal. The submissions (if prepared purely by the Appellant) did not demonstrate any inability on his part to understand or to communicate in English but rather demonstrated difficulties in identifying and then focusing on the issues. It is for that reason that as a matter of practice this court reviews cases involving personal litigants to explain the process.

f) A 34 page submission from the Appellant dated 30 December 2018 with numerous attachments. These submissions were lodged on 4 January 2019 in Polish and then translated into English by the court appointed translator and once translated made available to this court on 4 February 2019.

g) An undated document from the Appellant with at the top the typed words "[stamp: High Court of Justice for Northern Ireland – 4 Jan 2019).

h) The Respondent's documents.

i) The response of the Appellant dated 18 February 2019 to the translation of his further written submissions.

j) The response of the Appellant dated 21 February 2019 to the Respondent's documents.

The decision of the Tribunal

[15] The Appellant was employed as a part time cleaner by the Respondent from 2013 until 14 February 2017 when he was summarily dismissed for gross misconduct. The issues in relation to whether the Appellant was unfairly dismissed related to an incident which occurred in May 2016 when it was asserted that during a discussion with his supervisor in a kitchen area about his holidays and having been told that he had to speak to HR the Appellant lifted a knife and pointed it towards the supervisor stating that he needed to know about his holidays ("the knife incident").

[16] The Appellant is a Seventh Day Adventist in relation to whom the Respondent accepted a restriction on the Appellant's ability to work shifts from a Friday to a Saturday so as to accommodate this aspect of his religious observance. The Appellant asserted that he was harassed by his supervisor in relation to this restriction.

[17] The Tribunal heard evidence from (a) the Appellant (b) the Appellant's supervisor Mr Crumley; (c) Ms Fry, the investigating officer; (d) Ms Mitchell, the disciplining officer who took the decision to dismiss; (e) Ms Bradley, the appeals officer who confirmed the decision to dismiss; and (f) Ms Sharpe, the HR director.

[18] The Tribunal set out the agreed issues relevant to its decision as follows:

(i) Was the Appellant's dismissal due to conduct, namely "aggressive/inappropriate behaviour towards a colleague - in relation to an incident involving a knife?"

(ii) If so, was this a fair or unfair dismissal in the circumstances?

(iii) By being dismissed, was the Appellant subjected to less favourable treatment due to (a) part-time working; and/or (b) religion as a Seventh Day Adventist.

(iv) Were there any other instances of less favourable treatment due to (a) part-time working or (b) religion?

(v) (a) If so, what do these consist of? (b) Who was the Appellant treated less favourably than? (c) When did the less favourable treatment take place? (d) Does the Tribunal have jurisdiction to consider these claims or are they outside the time limit, and if so, should time be extended?

(vi) Did the Respondent take such steps as were reasonably practicable to prevent such discriminatory actions?

(vii) If the (Appellant) was unfairly dismissed (a) Is there contributory fault on the part of the (Appellant)? (b) What loss has the (Appellant) suffered?

(viii) If unlawful discrimination occurred what remedy is appropriate in the circumstances?"

[19] In its careful written decision the Tribunal referred to the Fair Employment and Treatment (Northern Ireland) Order 1998 and set out the applicable legal principles in relation to discrimination citing a number of authorities including *Nelson v Newry & Mourne District Council* [2009] NICA 24, *S Deman v Commission for Equality and Human Rights & Others* [2010] EWCA Civ 1279 and *Laing v Manchester City Council* [2006] IRLR 748. In relation to the claim for unfair dismissal the Tribunal referred to the Employment Rights (Northern Ireland) Order 1996 ("the

ERO") citing *British Home Stores Ltd v Burchell* [1980] ICR 303, *Rogan v The South Eastern Health and Social Care Trust* [2009] NICA 47 and *Connolly v Western Health and Social Care Trust* [2017] NICA 61. The Tribunal stated that the law in relation to less favourable treatment on grounds of being a part-time worker was set out in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000.

[20] A sequence of the various events contained in the Tribunal's decision, a summary of the factual findings made by the Tribunal and its conclusions are as follows:

(a) In March 2015 the Appellant was given a written warning which expired in March 2016. This warning related to aggressive behaviour towards a manager, Ms McC, when the Appellant worked shifts in the Foyleside Centre.

(b) In June 2015 the Appellant received a final written warning which related to inappropriate behaviour against a supervisor. As a consequence of the Final written warning, the Appellant moved from the Foyleside Centre to the Richmond Centre in or around April/May 2015 and it was then that he started to work with Mr Crumley who was his supervisor in the Richmond Centre.

(c) On 26 July 2016 Mr Crumley had written in the hand-over diary that the Appellant had not finished his shift. It later came to Mr Crumley's attention that another manager had told the Appellant to go to another site and, when Mr Crumley became aware of this, he wrote a correction in the diary stating that it had been a misunderstanding.

(d) Mr Crumley's practice was to put up a note on the noticeboard showing dates on which he needed people to volunteer to cover shifts. His evidence, (which the Tribunal accepted), was that the Appellant had put his name down on this note for several shifts, one of which was on 29 July 2016. That day was a Saturday, although that was not indicated on the note as it comprised simply a list of dates on the noticeboard. The Appellant did not go to work on that day because it was a Saturday and Mr Crumley wrote in the hand-over diary: "Bogdan missing". As far as Mr Crumley was concerned the Appellant had not turned up for the shift that he had undertaken to cover.

(e) The Appellant took exception to the diary entry of 29 July 2016 because he felt that his absence related to the requirements of his religion. The Appellant claimed that this and the other diary entry of 26 July 2016 showed that Mr Crumley was harassing him because of his religion.

(f) On 18 August 2016 the Appellant raised a grievance against Mr Crumley. Ms Fry spoke to Mr Crumley about the Appellant's grievance and Mr Crumley readily accepted that he knew about the Appellant's pattern of work because of the Sabbath. He stated however that the Appellant had offered (on the list

of dates on the noticeboard) to work that shift. One of the Appellant's complaints before the Tribunal was that he was never notified of the outcome of the grievance. The Tribunal accepted the managers' evidence which was that they reminded Mr Crumley about the Appellant's requirement not to work on the Sabbath and they monitored timesheets to make sure that the Appellant was not being given shifts on a Saturday. The Tribunal accepted the evidence of Ms Mitchell that she believed that that was the end of the grievance, in circumstances where the Appellant had made it clear that he did not want to make the grievance formal. The Tribunal found that the fact that the Appellant was not notified of a formal outcome in these circumstances did not amount to a detriment.

(g) The Tribunal recorded Mr Crumley's evidence that he had mentioned the knife incident to a manager soon after it had occurred but had heard nothing more about it. The Tribunal found that that manager had left the Respondent so it could not be verified as to whether or not Mr Crumley had raised it at the time. The Tribunal found that Mr Crumley raised the knife incident *again* on 9 September 2016 when Ms Fry spoke to him about the Appellant's grievance. We have added emphasis to the word "again" as this would imply that the Tribunal accepted that Mr Crumley had reported the matter to a manager soon after it had occurred and indeed that is what the Tribunal did decide as in paragraph [45] it stated that it was regrettable that the investigation did not happen "when it was first raised shortly after it occurred in May 2015." In any event in addition there is a clear factual finding by the Tribunal that the incident which occurred in May 2016 was reported in September 2016 and not on 18 November 2016 as alleged by the Appellant. The case made by the Appellant was that Mr Crumley only raised the knife incident on 18 November 2016 because that was the day when Mr Crumley had rung the Appellant to ask him to work a shift on Saturday. The Appellant's point was that Mr Crumley did this "in revenge" because the Appellant refused to work the shift on the Saturday. The Tribunal rejected the Appellant's evidence on this point.

(h) On 18 November 2016 a telephone conversation took place between the Appellant and Mr Crumley which the Appellant recorded. The Tribunal panel listened to that recording in full prior to the hearing. The Appellant characterised this conversation as Mr Crumley continuing to harass him because of his religion and that it was proof that he "broke an agreement" he had made with managers after the grievance, namely that he would not ask the Appellant to work shifts on a Saturday. The Tribunal did not accept the Appellant's interpretation of the conversation. Rather it determined that this was a friendly conversation where neither side was sure about which day of the week they are in nor the day of the week that the shift they are discussing

was on. Mr Crumley offers a shift the next day to the Appellant and the Appellant ultimately says that he will not do it as it is on a Saturday. Mr Crumley immediately accepts that and there is absolutely no suggestion of Mr Crumley reacting adversely to that. The Tribunal found that the whole tenor of the conversation was very friendly and there was no suggestion of pressure being put on the Appellant to work on Saturday. The Tribunal also found that in the conversation there was absolutely no complaint by the Appellant of the fact that he was being offered a shift on a Saturday. The Tribunal considered that the telephone recording illustrates the friendly nature of the relationship between the two men, and did not support the Appellant's account that Mr Crumley was harassing him on any grounds never mind on grounds of religion.

(i) The Tribunal found that the nature of the Respondent's business was that cleaners were allocated shifts for different days at different times and in different locations and the rota of shifts and staff was therefore constantly changing. The Tribunal accepted that as part of Mr Crumley's job was to ensure that shifts were covered that there could be confusion at times. The Tribunal also found that Mr Crumley had particular pressures on 18 November 2016 due to the terminal illness of a relative, the absence of workers on sick leave and the fact that he was short of cover. The Tribunal accepted Mr Crumley's evidence that he simply made a mistake by ringing the Appellant to offer him a shift the next day, which happened to be a Saturday. The Tribunal did not accept that this act of Mr Crumley was detrimental to the Appellant and it found that it did not amount to harassment. Further the Tribunal did not accept that it was capable of amounting to discrimination on grounds of religion. The Tribunal also rejected the Appellant's point that there was a breach by Mr Crumley of some agreement with managers following the Appellant's grievance. The Tribunal found that at no point was the Appellant actually required to work on the Sabbath. The Tribunal also did not accept that Mr Crumley ever put the Appellant under pressure to do so, and did not accept that Mr Crumley reacted badly to the Appellant over this.

(j) The Tribunal rejected the Appellant's case that Mr Crumley was engaged in harassing him at all never mind on grounds of his religion. The Tribunal found that the two points relied upon by the Appellant namely the diary entries and the phone call did not support his case that he was harassed on an ongoing basis by Mr Crumley. In particular the Tribunal rejected the case that Mr Crumley treated the Appellant badly from 2015 as the Appellant agreed that he had been very friendly with Mr Crumley until July 2016 and as the recording supported that account.

(k) In November 2016 the investigation and disciplinary process in relation to the knife incident began.

(l) Mr Crumley stated that the incident had been witnessed by other workers. Ms Fry undertook the investigation by interviewing Mr Crumley and the witnesses all of whom confirmed that a knife incident had occurred. She then spoke to the Appellant who told her that two of the three witnesses had a motive to lie about this. The Appellant denied that a knife incident had occurred at all. Ms Fry went back to the witnesses to follow up the points made by the Appellant and the outcome of the investigation was that Ms Fry recommended that disciplinary action be taken against the Appellant. The Tribunal found no fault with the investigation by Ms Fry.

(m) Ms Mitchell then dealt with the disciplinary process. She questioned everyone involved, considered the papers and followed up on points made by the Appellant. She outlined her decision-making thought processes in a document dated 10 February 2017 which she kept on file and she decided to dismiss the Appellant. The Tribunal accepted that Ms Mitchell had considered lesser sanctions and reasonably concluded that moving the Appellant would not be appropriate given the nature of the behaviour and the fact that he had previously been moved because of aggressive behaviour towards managers. The Tribunal found that Ms Mitchell was entitled to conclude that the incident had taken place and she was entitled to regard it as a serious matter of itself. The Tribunal was satisfied that she believed that the Appellant was guilty of misconduct and had reasonable grounds on which to base that belief. The Tribunal also found that there was a reasonable investigation in the circumstances and that the Appellant was given a reasonable chance to put his side of the case. The Tribunal considered that in deciding on the penalty that she reached a reasonable conclusion in deciding to dismiss rather than imposing a lesser sanction. The Tribunal found that the dismissal decision by Ms Mitchell was not unfair.

(n) The Tribunal found no material fault with the appeal process. The Appellant's criticism of the appeal was that he did not have certain documents. The Tribunal rejected that case and accepted Ms Bradley's evidence that she sent him the relevant documents. The Appellant also alleged that he did not have a chance to "verify" the documents by which he meant that he did not go through each of the witness statements with Ms Bradley to compare them to see if there were any discrepancies. The Tribunal rejected the Appellant's point that this was somehow a flaw in the procedure. Ms Bradley confirmed the decision to dismiss and the Tribunal find no flaw in the appeal process nor in her decision.

(o) The Tribunal rejected the Appellant's case that his dismissal was an act of discrimination on grounds of his religion finding that there was nothing to suggest that the decision to dismiss was anything other than based on information gathered in the investigation and the disciplinary process.

(p) The Tribunal rejected the Appellant's case of adverse treatment on grounds that he was a part-time worker finding that there was no evidence of any less favourable treatment of the Appellant on these grounds and there was no evidence of any animus by the Respondent towards such workers.

The grounds of appeal

[21] The grounds of appeal set out in the Appellant's Notice of Appeal dated 21 May 2018 are as follows:

(i) The need for a Tribunal to go through a two stage decision-making process.

(ii) The Respondent limited the (Appellant) to effective defence by effective disclosure of the fact by the Respondent/hiding evidence; preventing verification of evidence and testimony verification of protocol of hearing refuse evidence of (Appellant).

(iii) The Tribunal refused to explain the matter of overdue money.

[22] As the Appellant is a personal litigant whose first language is Polish it is appropriate to consider all the other grounds set out by the Appellant in his various written submissions in order to determine whether to permit an amendment of the grounds of appeal and whether this court should on an amended ground allow the appeal.

[23] One of the grounds set out in the written submissions of the Appellant relates to an allegation of procedural unfairness in the proceedings before the Tribunal. The Appellant asserted that

> "the British Fair Employment Tribunal had not agreed to my request for assistance of the interpreter during my oral testimony and had based their decision of 20 April 2018 only on my written statement written by me in English to the best of my skills."

He also asserted that his request for the assistance of an interpreter during his oral testimony was refused. We will refer to these submissions as "procedural unfairness."

Legal principles

[24] The legal principles applicable in relation to unfair dismissal and Article 130 of the ERO have been set out by this court in *Connolly v Western Health and Social Care Trust* in particular by Gillen LJ at paragraph [28] (i) to (xvi).

[25] In this case pursuant to Article 130(1) & (2) of the 1996 Order it was for the Respondent to establish "the reason (or, if more than one, the principal reason) for the dismissal," and that it "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do" or "relates to the conduct of the employee" or is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Thereafter, if the Respondent fulfilled those requirements then pursuant to Article 130(4)(a) & (b) "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case." It can be seen that once the reason for dismissal has been established the Tribunal in addressing Article 130(4)(b) so as to decide whether the reason justified summary dismissal should ask themselves whether summary dismissal was in accordance with equity and the substantial merits of the case.

[26] As was explained in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 "… an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the Industrial Tribunal, as an Industrial Jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

[27] However, whilst the Tribunal must not substitute its decision as to the right course to adopt for that of the employer this does not mean that there is a requirement of such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within Article 130(4). That is not the law. The question in each case is whether the Industrial Tribunal

considers the employer's conduct to fall within the band of reasonable responses, see *Iceland Frozen Foods Ltd v Jones* at page 25.

[28] As stated in *Connolly* application of the overall test does "not exclude consideration of a lesser sanction as a relevant consideration." Ordinarily the determination of the question whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee "in accordance with equity and the substantial merits of the case" involves consideration as to "whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct."

[29] The character of gross misconduct was considered in *Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood* [2009] UKEAT/0032/09/LA. It was stated that "the question as to what is gross misconduct must be a mixed question of law and fact …." The legal test is that "gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee." That is "something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract" or "conduct repudiatory of the contract justifying summary dismissal." In the disobedience case of *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 at page 710 Evershed MR said that "the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions."

[30] At paragraph [36] of *Connolly* Deeny LJ delivering the majority judgment of this court agreed with the statements in Harvey on Industrial Relations and Employment Law [1550]-[1566] that dismissals for a single first offence must require the offence to be "particularly serious."

[31] In *Connolly* Deeny LJ stated that ascertaining what the reason for dismissal is, where that is in dispute, "is likely to be principally or wholly an assessment of facts." Deeny LJ went on to state that "reaching a conclusion as to whether the dismissal is fair or unfair, 'in accordance with equity and the substantial merits of the case' as required by Article 130(4)(b) would appear to involve a mixed question of law and fact."

[32] The role of this court in relation to factual determinations made by the Tribunal is limited. The relevant principles have been set out by Lord Kerr at paragraphs [78] – [80] when giving the judgment of the Supreme Court in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7. Lord Wilson stated in *In re B (A Child)* [2013] 1 WLR 1911, paragraph [53] that "… where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it." This court does not

conduct a re-hearing and it is only in very limited circumstances that the factual findings made by the Tribunal will not be accepted by this court, see *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]; *McConnell v Police Authority for Northern Ireland* [1997] NI 253; *Carlson v Connor* [2007] NICA 55; *Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A* [2000] NI 261 at 273.

Discussion

[33] We will deal first with the Appellant's submission of procedural unfairness before the Tribunal.

[34] The response comments received from the Respondent on 12 February 2019 stated that these allegations are factually untrue. The Respondent stated that Judge Murray originally delayed proceedings and arranged for a suitably qualified interpreter who was in attendance throughout the proceedings including a full interpretation of the Appellant's oral evidence. Furthermore that Judge Murray on a number of occasions had to stop the Appellant from responding to questions as a matter of courtesy, as she was concerned that he had interrupted the interpreter and hence had not allowed her to fully communicate the question or the answer.

[35] The response from the Appellant dated 21 February 2019 to the submission that there was no procedural unfairness was that

> "therefore, the Claimant/Appellant, asks Her Majesty's Court of Appeal that he should pay attention to the first verbal statements of the Claimant/Appellant, in the process Bogdan Szczesny Bury v Robinson Services, case ref: 29/17FET & 2797/17 in the area jurisdiction of the Fair Employment Tribunal, on 12 February 2018, recorded audio from the process where he asks the Employment Judge Murray "Only about fifteen minutes of oral testimony" – before starting the questioning step, the legal representative of the Respondent do the Claimant/Appellant. Surely, also with this audio record, you can hears this rejection by the Employment Judge Murray. Ms Sinead Sharpe should remember that."

[36] The Appellant gave evidence before the Tribunal. There was no suggestion in the response from the Appellant that his evidence was not interpreted except perhaps in relation to some 15 minutes though this is not at all clear. Furthermore in his response the Appellant did not suggest that Judge Murray on a number of occasions did not have to stop the Appellant from responding to questions as a matter of courtesy, as she was concerned that he had interrupted the interpreter and

hence had not allowed her to fully communicate the question or the answer. We consider that each of these omissions in his response dated 21 February 2019 to be highly significant and that either of them would lead us to the conclusion that the Appellant has not established any procedural unfairness. However in order to ensure that there was no misapprehension on our part we invited the Tribunal to respond to the assertions of procedural unfairness.

[37] The response from the Tribunal was that

> "(the) claimant was provided with an interpreter for the entire duration of the hearing and the interpreter's services were used by the claimant throughout the hearing. At no point was the claimant denied the use of an interpreter by the tribunal. The allegation that the claimant was refused an interpreter is therefore factually incorrect.
>
> In the Case Management process in advance of the substantive hearing, the claimant had agreed to the use of witness statements and had accordingly provided his two statements in English. He also had a copy of his statements in Polish with him throughout the hearing.
>
> At the outset of the hearing on 12 February 2018 the claimant had also asked for permission to refer during his cross-examination to his copy of some relevant documents on which he had written some notes in Polish which he had prepared as a guide in advance of the hearing. This application was granted. In addition the interpreter translated any parts of documents to which the claimant was referred in cross-examination, as and when required by the claimant: in this the tribunal was guided by the claimant as he had stated that he understood English and could read documents in English but needed the services of the interpreter for oral testimony."

[38] Putting it at its mildest we find that the Appellant has not established any procedural unfairness. If the grounds of appeal were amended to include this ground we would dismiss that part of the appeal.

[39] The Appellant has raised a number of criticisms of the statutory processes followed by the Respondent prior to his dismissal. For instance he has stated that "…the Respondent has never provided the official statement (with the justification) whether the Claimant/Appellant was or wasn't subjected to harassment from the

Respondent's staff. Therefore, in this way the Respondent denied the Claimant/Appellant's right to complain." All the points in relation to the processes prior to dismissal were considered by the Tribunal. As we have indicated the role of this court in relation to factual findings made by the Tribunal is limited. The Appellant's submissions in this respect were commented on by the Respondent who provided a clear sequence of all the steps taken prior to dismissal. We have also considered the Appellant's response dated 21 February 2019. We note that the Tribunal did consider the point that there was no formal outcome to the grievance raised by the Appellant. We can find no fault with the factual findings made by the Tribunal or with the legal principles that were applied in relation to the investigations carried out by the Respondent, the disciplinary process or the appeal process.

[40] Another potential ground of appeal in the Appellant's written submissions is that the procedure followed by the Respondent was inappropriate in that "Ms Laura Fry have never questioned other members of staff who would confirm or deny whether they witnessed as Noel Crumley was laughing at the Claimant/Appellant's religiousness in public for many months; for example, he advised him to change his religion for the one which would allow him to work on Friday's nights and on Saturdays." The response from the Respondent was that during the investigation the Appellant did not provide details of any witnesses to the comments that he alleged were made to him and that the comments were denied in full by Mr Crumley. It was open to the Tribunal to accept the evidence of Mr Crumley and also to come to the conclusion that there was no fault with the investigation process.

[41] There are a large number of other matters raised in the Appellant's written submissions which amount to appeals against factual findings made by the Tribunal. For instance at paragraph 14(b) of his document dated 21 February 2019 it is asserted that the Appellant provided credible evidence. The question as to whether the Appellant's evidence was or was not credible was for the Tribunal and not for the Appellant's own assessment. Also that assessment is not for this court subject only to very limited exceptions. None of those exceptions apply in this case. We consider that there is no substance in any of those further potential grounds of appeal. Rather we consider that the Tribunal gave careful consideration to all the evidence both documentary and oral and that they came to entirely appropriate factual findings on that evidence. In essence they found that despite the Appellant's denials the Respondent was entitled to conclude that the Appellant had brandished a knife at his supervisor. Thereafter the Tribunal considered every aspect that was involved in the decision to dismiss. We consider that the Tribunal was entirely justified in arriving at the decision dated 20 April 2018. We also consider that the Appellant has not demonstrated any error of law in the decision of the Tribunal.

Conclusion

[42] We dismiss the appeal.

[43] We have had this judgment translated into Polish and a copy as translated will be provided to the Appellant.

[44] We will give consideration to whether any order for costs should be made in circumstances where the Respondent did not participate in the appeal except for the preparation of the Respondent's documents.