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	ICOS No:
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **07/10/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

BETWEEN:

JENNIFER ANDREWS

Appellant:

-and-

BRYSON CHARITABLE GROUP

Respondent:

Before: McCloskey LJ and Scoffield J

Representation

Appellant: Unrepresented
Respondent: Mr Sean Gerard Doherty, of counsel, instructed by Kennedys

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McCloskey LJ (*delivering the judgment of the court*)

Introduction

[1] Jennifer Andrews ("the Appellant"), who has at all times been an unrepresented litigant, was formerly employed by Bryson Charitable Group ("the Respondent"). Her period of employment was 2 October 2017 to 29 June 2018. She was employed for the purpose of providing maternity leave cover and had a fixed term contract to this end. Any dispute about her precise designations and duties during her employment is not for this court to resolve and is of peripheral importance at best.

[2] Following the termination of her employment the appellant pursued two tribunal claims. The first of these, a wages claim, gave rise to a hearing on 6 March

2019 and a dismissal decision of the Industrial Tribunal (the "Tribunal") dated April 2019.

[3] This court is concerned only with the second of the appellant's tribunal claims, which was initiated on 26 March 2019. The substance of this claim can be ascertained from the appellant's witness statement deployed in the tribunal proceedings. This includes the following material passages:

> "I joined Bryson in September 2017 via Agency as a Senior HR Officer and was contracted to the HR Business Partner ……. and in addition appointed Interim Assistant Director of HR from 09 October 2017 …….
>
> This appointment to Interim Assistant Director was in conjunction with and did not replace the HR Business Partner role ……..
>
> From day 2 of my posting as Assistant Director I experienced behaviours and decisions of Senior Managers which caused me concern, which showed amongst other issues of financial probity and disrespect for governance within Bryson including the various Boards ……."

The out-workings of this headline allegation follow, in some detail. The following passage is illuminating:

> "I had many staff who disclosed alleged wrongdoing by Senior managers to me, however were too afraid for their employment to progress their complaints. I quickly began to see patterns in behaviour and operations across the Group and when directly asked by the Company Officers reported same. However despite invoking the Whistle Blower Policy and Procedure I was not protected or fairly treated either during the course of my employment or following through **the Managing Grievance Process …….."**
> [Emphasis added]

[4] The decision of the Tribunal which the appellant seeks to challenge in this court records that the focus of her second claim was the grievance which she had pursued with the respondent, unsuccessfully. The Tribunal identified that this gave rise to the central complaint in the proceedings that the dismissal of the grievance was vitiated by unlawful detriment and/or less favourable treatment. The Tribunal decided that the appellant had failed to establish a prima facie or arguable case of the detriment or less favourable treatment asserted, with the result that the respondent had no onus to provide an explanation. The Tribunal observed that having considered the appellant's

evidence during a period of some two days her case (in substance) resolved to bare, unsupported assertion. The Tribunal was particularly impressed by the fact that the respondent, though under no legal obligation to do so, had voluntarily subjected the grievance of the appellant, a former employee, to a full-blown investigation. Finally, the Tribunal found, in empathetic terms, that the procedure applied by the respondent to the investigation, processing and determination of the appellant's grievance had been fair.

[5] The appellant seeks to challenge the Tribunal's decision in her appeal to this court. The central complaint formulated in her Notice of Appeal is that she did not receive a fair hearing at first instance. The particulars of this headline complaint are that the Tribunal refused her request to be accompanied by a McKenzie Friend; the hearing was "made a spectator event" for the benefit of certain law students in attendance; the appellant could not represent herself adequately since, inter alia, she suffered two panic attacks during the hearing; there was unfairness in the way in which the provision of hearing bundles to the appellant was handled; the appellant was not permitted to question the respondent's witness (or witnesses); and:

> "There was an inequitable and unbalanced proportion of representation and spectators within the Tribunal weighing favourably on the respondent's side. This was grossly intimidating and directly impacted upon my ability to deliver my key arguments …."

[6] The appeal has been in the Court of Appeal system since 29 January 2021. The pandemic and lockdown followed. There was several months delay by the appellant in paying the requisite court fee, £652. This payment was eventually effected on 27 July 2021.

[7] Active case management of the appeal dates from the first formal order of this court, which is dated 17 January 2022. Other case management orders followed. The main issue at this stage was completion of Form COAC1. On 25 February 2022 this court convened its second case management review listing. The appellant attended remotely. So too did the respondent's solicitor and counsel. By this stage the respondent had filed and served an application to dismiss the appeal for want of prosecution and the appellant had taken two active steps of some substance. First, she had compiled a bulky hearing bundle. Second, she had attended the first such listing, on 3 February. Her replying affidavit followed the second of these listings, on 28 February 2022.

[8] The substantive listing of this appeal was scheduled for 14 March 2022. This had to be abandoned as the Tribunal had not provided its written judgment. Both parties were advised to this effect by electronic communication dated 10 March 2022. A new hearing date was required. On 10 August 2022 both parties were informed, in the same way, that the re-scheduled date was 22 September 2022, to be preceded by a further review listing on 14 September.

[9] At the review listing on 14 September 2022 the respondent was represented by solicitor and counsel. The appellant did not attend. Nor did she attend the substantive listing on 22 September.

[10] A review of the email traffic and other sources reveals that up to and including 7 March 2022 the appellant was actively communicating with both the court and the respondent's solicitor. Since that date the court and the respondent's solicitor have transmitted multiple electronic communications to the appellant. However, there has been no further communication from her. The last electronic communication from the appellant is dated 7 March 2022. This was directed to the respondent's solicitors and its subject matter was the delivery of her affidavit and exhibits in hard paper form. The last electronic communication to the court from the appellant is dated 28 January2022.

[11] On 26 January 2022 the respondent's application to dismiss the appellant's appeal for want of prosecution was filed. The main facts and considerations which this raises are these: the appeal was served/filed in time; the pandemic and lockdown then intervened, with the associated interruption of normal court business; any delay by the appellant in the exercise of completing Form COAC1 was minimal at most; the appellant has described E-mail complications and certain health problems; she was cooperative with the court, requiring only a little additional time to comply with certain directions; and her status has at all times been that of unrepresented litigant. Taking everything together, the court is satisfied that this application cannot succeed. In short, neither inordinate, inexcusable delay nor prejudice to the respondent, the two pre-requisites to making an order of this kind, is established (*NIHE v Wimpey Construction* [1989] NI 395).

[12] The separate question which the court began to examine most recently is a somewhat different one, namely whether there has been a failure by the appellant to prosecute her appeal during the last six months approximately. Since early March 2022 no communication of any kind from or on behalf of the appellant had been received. Following careful investigation the court had no reason to suppose that she has not received the multiple electronic communications sent to her by both the court and the respondent's solicitor. Latterly the appellant had failed to attend a case management review listing. Most recently she also failed to attend the substantive listing of her appeal. By reason of the aforementioned lack of communication no explanation of these failures had been provided. This framework invited the analysis that prima facie the appellant had failed to prosecute her appeal.

[13] This failure, if correct, would be surprising having regard to the appellant's active engagement with the court during the main case management phase, ie January/February 2022, her compliance with court directions and her payment of a substantial fee to pursue her appeal. Given the myriad possibilities arising in this context the court was loath to infer that the appellant had abandoned her appeal. In

the abstract there could be many reasonable explanations for her apparent inertia and lack of interest.

[14] On 23 September the court office received a letter dated 22 September from the appellant. This enclosed her earlier letter to the court dated 20 May. The subject matter of both letters was that of relisting arrangements in the wake of the delisting of the substantive hearing in March 2022. Both letters also contain certain confidential medical information which the appellant links to her inability to communicate by electronic means.

[15] The court is mindful of the respondent's entitlement to finality in these appeal proceedings within a reasonable time and the several principles and standards enshrined in the overriding objective which are engaged. Reacting to the latest, unexpected development noted' the court listed the appeal for further review on 28 September 2022 and has made the following further CMD order:

CASE MANAGEMENT DIRECTIONS ORDER No 4

1. The appellant seeks to challenge the Tribunal's decision in her appeal to this court. The central complaint formulated in her Notice of Appeal is that she did not receive a fair hearing at first instance. The particulars of this headline complaint are that the Tribunal refused her request to be accompanied by a McKenzie Friend; the hearing was "made a spectator event" for the benefit of certain law students in attendance; the appellant could not represent herself adequately since, inter alia, she suffered two panic attacks during the hearing; there was unfairness in the way in which the provision of hearing bundles to the appellant was handled; the appellant was not permitted to question the respondent's witness (or witnesses); and:

> "There was an inequitable and unbalanced proportion of representation and spectators within the Tribunal weighing favourably on the respondent's side. This was grossly intimidating and directly impacted upon my ability to deliver my key arguments …."

2. The respondent shall, make an evidential response to the above, via an affidavit to be sworn by its solicitor, to be filed and served by 21/10/22.

3. The rearranged hearing date for the appeal is 23/11/22

4. There shall be a case management review at 09.45, 16/11/22.

5. The precise mechanics of the hearing will be the subject of further direction pending clarification of the appellant's circumstances.

6. Costs reserved.

7. Liberty to apply.