Neutral Citation No: [2025] NICA 61	*Ref:* **McC12913**
	ICOS Nos:
Judgment: approved by the court for handing down (subject to editorial corrections)	*Delivered:* **05/12/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

Between:

ARMAGH CITY, BANBRIDGE AND CRAIGAVON BOROUGH COUNCIL
Appellant

and

LOUIS O'NEILL
Respondent

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Ian Skelt KC and Sean Doherty (instructed by Worthingtons Solicitors) for the Appellant
Louise Maguire (instructed by GSC Armagh) for the Respondent

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Before: McCloskey LJ, Colton LJ and Kinney J

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

Introduction

[1] Louis O'Neill (the "claimant") brought proceedings in the Employment Tribunal (the "Tribunal") alleging unlawful discrimination on the ground of his sex against Armagh City, Banbridge and Craigavon Borough Council (the "Council"), his employer. The Tribunal having found in his favour, the Council appeals to this court.

Narrative

[2] Following case management intervention by this court, all of the following is uncontentious. The dispute between the parties revolves around the post of Corporate Planning Manager ("CPM"). The claimant was appointed to the post of Development Officer in March 2006. His designation changed to that of Community Renewal Manager ("CRM") in August 2012. This was a fixed term contract ("FTC"), scheduled to expire in March 2015 subsequently extended by one year and, in June 2017, altered to the status of permanent employment.

[3] The issue of the post of CPM first arose in November 2018. The claimant was offered appointment to this post on a temporary, fixed term basis, expiring on 15 March 2019, subject to extension. He accepted this offer and occupied this post from 7 January 2019. He signed the appropriate fixed term contract accordingly. Some five months later the lady ("DG") who occupied another CPM permanent post vacated it. This vacant permanent post was not advertised and was at no time offered to the claimant.

[4] Between April 2020 and February 2022, there were seven separate extensions of the claimant's fixed term contract, the last extended expiry date being 30 June 2022. This was followed by letters to the claimant in May and June 2022 confirming his return to the post of CRM, which materialised on 9 July 2022. In the meantime, the claimant had initiated an appeal and grievance. The outcome of these processes was not in his favour and subsequent internal appeals were unsuccessful. The next development was the initiation of the Tribunal proceedings.

[5] Temporary contracts of employment for specified periods subsequently extended were clearly one of the practices of the Council during much of the period under scrutiny. One of the reasons proffered by the Council for offering temporary contracts only, which ultimately expired, was a lack of funding.

The Claim

[6] From his appointment to the post of CPM in January 2019, the claimant worked as one of three Tier 4 Management in the Council's Community Planning Department ("CPD"). The other two managers were female. Reorganisation measures were introduced by the Council in March/July 2021. One consequence of this was the addition of a fourth Tier 4 Manager (a lady, "LO") to the CPD, importing that person's roles and responsibilities from her extant appointment. Several months later, the claimant was alerted to the possibility that his managerial post in the CPD would be extinguished.

[7] The theme of structural and organisational changes permeated much of the period of the claimant's occupation of the temporary post of CPM. With the passage of time another related, recurrent theme was that of the "matching process", linked to and stimulated by the preceding theme.

[8] The CPD was restructured, this mainly taking effect around the beginning of April 2022. The fourth Tier 4 Manager who had joined the CPD under one year previously, LO, retained her appointment. The following is a key complaint in the claimant's case:

> "The claimant contends that [LO] was deliberately moved into the [CPD] so that she would be eligible for matching to the role of Place and Strategic Projects Manager* and that

> the post was created for her out of the roles and responsibilities of his seconded post."

(*PSPM*)

The claimant was further informed that two new posts at the level of Officer (below managerial grade) had been created and were being filled by two female employees ("MM" and "EO"), through the "matching" process.

[9] What was the gravamen of the claimant's complaint of sex discrimination? Much of his detailed statement of complaint is diffuse and repetitive. Its most salient and concrete elements are the following:

(i) LO was "deliberately moved into" the CPD so that she would be eligible for matching to the subsequently newly created role of PSPM, a post that was "… created for her out of the roles and responsibilities of [the claimant's] seconded post."

(ii) Another female employee, EO, received different and advantageous treatment in progressing from a FTC appointment to a new permanent appointment of "PO."

(iii) The claimant's FTC appointment to the post of CPM was actuated by sex discriminatory motives.

(iv) Ditto the termination of the claimant's FTC appointment to the post of CPM.

(v) The claimant was treated less favourably on the ground of his sex because, unlike his comparators, he was not "… advised of … status and options …"

(vi) The claimant is "significantly more experienced and qualified" for the post of PSPM than LO.

(vii) Had there been a recruitment process for the post of "CPEO" into which MM was "assimilated", the claimant, by virtue of his experience in fulfilling relevant duties at a higher level, would have been a "strong contender."

(viii) Ditto as regards EO and her appointment to the new post of PO.

The Council's defence

[10] We summarise the essential elements of the Council's defence as follows: in 2019/2020 there was a planned structural review of all of the Council's Directorates and Departments; this gave rise to extinguishment of the Regeneration Department ("RD") and a new structure in respect of the Community Planning, Policy and Research Department (CPD) in which the claimant occupied the temporary post of CPM; as a result the claimant's fixed term contract in respect of the CPM post was

terminated; the claimant reverted to his previous post of CRM; the post of PSPM was offered to, and accepted by, LO as "suitable alternative employment" following closure of the RD; MM's post of CPO was extinguished in the restructuring exercise and she was "assimilated into" the new CPEO post, which had similarities to the former; as regards EO, the funding for her post was withdrawn and she too was "assimilated" into a new post; and MM and EO began employment in their new posts on 5 May 2022 and 1 July 2022 respectively. Based on the foregoing factual foundation, the Council's defence is formulated thus:

> "… the claimant's circumstances are markedly different from those of his alleged identified comparators and are therefore not appropriate comparators in the circumstances."

The Tribunal's decision

[11] At the outset of its decision the Tribunal lists nine separate particulars of the unlawful discrimination alleged:

(a) Failing to offer the claimant the post of CPM on a permanent basis after DG had vacated the post in June 2019;

(b) Failing to inform the claimant that if he gave up his substantive post the CPM post would become his substantive post and if he was ultimately unsuccessful at interview or it was terminated, the respondent would be required to redeploy him at that grade;

(c) Failing to hold exit strategy meetings/consultations, whether adequately or at all, with the claimant about the potential redundancy/termination of his post in light of funding issues, in contrast to how LO and EO were treated when, on the Council's case, their posts were at risk of redundancy.

(d) Dismantling the CPM role that had been undertaken by the claimant and allocating its associated roles and responsibilities to other female colleagues, including LO and EO.

(e) Terminating the claimant's CPM role in June 2022 and restoring the claimant to his substantive post, thereby effectively demoting him.

(f) Failing to create a new permanent post for the claimant when his CPM role came to an end, in contrast with LO for whom the PSPM post was created.

(g) Providing a new post for EO and MM.

(h) Assimilating DS into a substantive and seconded post.

(i) Failing to make the claimant's position in his seconded role permanent when he had completed the two years in the temporary CPM post, contrary to the LGRJF Circular of July 2014.

[12] There is a discrete chapter of the Tribunal's decision entitled "Findings of Fact." Within this chapter the following material findings of fact are identifiable:

(a) The claimant was aware that the CPM post to which he was assigned was fixed term in nature.

(b) Funding for the CPM post was not "withdrawn."

(c) All posts, both fixed term and permanent, were subject to funding.

(d) The newly created CPEO post into which MM was "assimilated" was similar to her previously held post of CPO.

(e) The RD in which LO had been employed was dissolved.

(f) Following an evaluation LO was "assimilated" into the post of PSPM. In contrast with LO, the Department in which the claimant had previously worked was not dissolved and in consequence no question of "redistribution" or "assimilation" arose in his case.

(g) The CPD was restructured with roles and responsibilities reallocated.

(h) As a result, neither the claimant's post nor that occupied by LO existed any longer.

(i) Some of the claimant's responsibilities in his CPM role were mirrored in the job description for LO's new post.

(j) The Council had no intention of making the claimant's CPM post permanent.

(k) The claimant was not "in the same situation" as another of his comparators, DS.

[13] In the final section of its judgment the Tribunal expresses three conclusions:

> "(i) The tribunal can appreciate why the claimant had a sense of grievance in having to revert to his substantive post on less generous terms after a lengthy period. This period involved review and restructuring, job evaluations, matching/assimilation of posts, and, in effect, new posts for various female members of staff who are also comparators in this case. Many of these events also ran in

parallel with complaints by the claimant in relation to his treatment and what the tribunal views as lack of clarity in the process in the respondent's evidence. The tribunal found the respondent's evidence at times incohesive, confusing, and difficult to collate. This required multiple clarifications during the hearing.

(ii) Although the tribunal is not satisfied that the statutory female comparators are in the same or not materially different circumstances as the claimant, the tribunal is satisfied that a hypothetical female comparator, as defined by the claimant, would, on the balance of probabilities, have been more favourably treated than the claimant. It is not denied that the working environment at the material time was overwhelmingly female. This fact, in itself, does not constitute unlawful discrimination on the ground of sex, any more than unreasonable treatment per se.

(iii) The evidential comparators were all moved on by the respondent in a positive direction, mainly through either suitable alternative employment or matching/assimilation/[to] new posts. There is therefore no evidence before the tribunal that any of the comparators was moved to a less favourable position. In contrast, the claimant's CPM contract, which had lasted for 3.5 years before termination on 8 July 2022, was not allowed to continue for the four year period so as to make the claimant permanent. There is no satisfactory evidence before the tribunal that this was not possible. Instead, the claimant had to revert to his previous permanent CRM contract, on less favourable terms. The tribunal is satisfied that a hypothetical female comparator would have been treated more favourably in line with the general treatment of the evidential comparators. The tribunal is therefore satisfied, on the balance of probabilities, that the claimant has proved facts which, absent explanation could lead to a finding of unlawful discrimination on the ground of sex. The onus therefore moves to the respondent to provide a non-discriminatory explanation. The tribunal is not satisfied, on the evidence before it, that the respondent has discharged this onus and therefore concludes that the claimant has been unlawfully discriminated against on the ground of his sex."

Appeal to this court

[14] In the Council's amended Notice the following grounds of appeal are advanced:

(i) The Tribunal erred in law by concluding that the burden of proof had shifted to the Council in circumstances where the claimant had not established a *prima facie* case of discrimination, in contravention of Articles 3 and 63A of the Sex Discrimination (Northern Ireland) Order 1976 ("SDO 1976").

(ii) Having found that the circumstances of the claimant's chosen comparators differed from those of the claimant, the Tribunal erred in law in attributing weight to how those comparators had been treated by the Council.

(iii) In the alternative to (i), if the burden of proof had passed to the Council the Tribunal erred in law in failing to have regard to the evidence indicating a non-discriminatory reason for terminating the claimant's employment in the CPM post, namely it was a temporary post pursuant to a fixed term contract of employment. Perversity also features in this ground of appeal.

[15] The submissions of Mr Skelt KC for the Council elaborated on each of these grounds. In particular, Mr Skelt argued that there are several unsatisfactory features of the Tribunal's judgment which, individually or collectively, point to a general lack of coherence and misdirections in law. Certain of Mr Skelt's further submissions will feature in our conclusions (*infra*).

[16] On behalf of the claimant, the central themes of the argument of Ms Maguire, of counsel, on behalf of the Council are the following: the Tribunal committed no error of law in its treatment of the claimant's comparators; their circumstances were relevant as they provided a framework for evaluating the claimant's alternative case based upon a hypothetical female employee comparator; the Tribunal committed no error in its formulation of the claimant's hypothetical comparator as "… a female who is in a seconded post in one department and whose substantive post in another department is subject to funding [and whose terms and conditions in both posts mirror those of the claimant]"; the Tribunal's approach to the shifting burden of proof involved no error of law; the evidential burden on the claimant was not an onerous one; this court should respect the Tribunal's findings of fact (see *Nesbitt v The Pallett Centre* [2019] NICA 67 at [60]); the Tribunal did not err in having regard to the overwhelmingly female nature of the claimant's working environment, as context; this must be combined with the Tribunal's assessment of the unsatisfactory character of the Council's evidence and the Tribunal's separate finding of fact that the claimant's chosen comparators all progressed to better posts; the Tribunal's "no satisfactory reason" [see above] finding was a further legitimate contextual factor; and, finally, the temporary nature of the claimant's employment in the CPM post was, at most, a neutral factor.

Our conclusions

[17] Generally, this appeal illustrates some of the intricacies, nuances and challenges which the legislation relating to discrimination in the workplace can pose. This in turn highlights the indispensable need for coherence and precision on the part of all concerned viz the parties and the adjudicating tribunal. We make the further general observation that whereas some hesitation on the part of an appellate court in interfering with essentially factual decisions of a tribunal in this kind of case is appropriate (see *Shamoon v Chief Constable of RUC* [2003] NI 174 at para [59] per Lord Hope), an inadequately reasoned tribunal decision will be vulnerable to challenge (per Lord Hutton at para [86]). Employment tribunals are judicialized bodies.

[18] It is also appropriate to recall the cautionary words of Lord Nicholls. First at paras [7]–[9], Lord Nicholls highlighted the risks which can arise when a tribunal separates the issues of less favourable treatment and the reasons for such treatment. The two issues are, he warned, "intertwined." He then developed this theme at para [10]:

> "… the less favourable treatment issue is incapable of being decided without deciding the reason why issue. And the decision on the reason why issue will also provide the answer to the less favourable treatment issue."

At para [11], Lord Nicholls urged tribunals to concentrate on the central question, namely:

> "Was [the offending treatment] on the proscribed ground which is the foundation of the application? This will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails."

[19] Lord Rodger, for his part, drew particular attention to the challenges involved in establishing discrimination, given that it is "… rarely open and may not even be conscious", with the result that it "… will usually be proved only as a matter of inference …": para [143]. He continued:

> "The important point is that there are no restrictions on the types of evidence on which a tribunal can be asked to find the facts from which to draw the necessary inference …
>
> Of course, a tribunal cannot draw inferences from thin air, but it can draw them by using its good sense to evaluate the evidence, including the comparisons offered."

At para [129], Lord Rodgers, with reference to the issue of comparators, emphasised:

> "… the similarities or differences in the two contexts are precisely what matters in deciding whether the tribunal discriminated against the woman by treating her less favourably than the man."

At para [134], drawing on the decision of the House in *Nagarajan v London Regional Transport* [2000] 1 AC 501, at 510/511 per Lord Nicholls, Lord Rodger added, with reference to the "why question":

> "… save in obvious cases, this will call for some consideration of the mental processes of the alleged discriminator in order to identify the grounds of his decision … 'the relevant circumstances' in Article 7 [of the 1976 Order] are those which the alleged discriminator takes into account when deciding to treat the woman as he does or when deciding to treat the man as he treats, or would treat, him."

[20] In order to complete the framework of relevant legal rules and principles, we draw attention to the decision of this court in *Nesbitt v The Pallet Centre* [2019] NICA 67 at [57]–[63]. In short, in every appeal to this court of the present kind the question for this court is whether the tribunal, within the confines of the grounds of appeal, erred in law in some material respect or respects. The variety of errors of law which may arise are identified in these passages.

[21] Our analysis of the Tribunal's decision is the following:

(i) The first identifiable frailty is that in the discrete chapter entitled "Findings of Fact", much of the text is devoted to narrative and recitation of evidence. Furthermore, while the Tribunal in a previous passage had rehearsed the nine separate particulars of the claim of sex discrimination, it failed to relate any of its findings of fact to any of these. An intense forensic exercise is required in order to establish any correlation, an exercise which confirms that some of the particulars were not the subject of any corresponding findings of fact.

(ii) Secondly, as rehearsed in para [13](i) above, the Tribunal stated that the Council's evidence was "… at times incohesive, confusing and difficult to collate [requiring] multiple clarifications during the hearing." This statement is crying out for specificity, combined with associated findings of fact. However, there is neither and, moreover, there is no satisfactory foundation upon which it would be open to this court to make appropriate inferences or otherwise fill the gaps.

(iii) In the same paragraph the Tribunal concluded that a hypothetical female comparator would have been "… more favourably treated than the claimant".

This is another purely conclusionary statement. It begs the following question: in what respects? Once again, no specificity or associated findings of fact can be found.

(iv) As emphasised by Mr Skelt, the Tribunal made no findings of fact relating to the discriminatory decision, the decision maker or what actuated the decision maker.

(v) While the Tribunal made a clear finding of fact that none of the statutory comparators invoked by the claimant was in a similar, or not materially dissimilar, situation (see [13](ii) above), the Tribunal nonetheless proceeded to treat these non-qualifying comparators as actual, or statutory, comparators (para [13](iii) above). This is plainly unsustainable.

(vi) Fundamentally, there were in play two non-discriminatory reasons for the Council's offending conduct, namely the claimant's employment was pursuant to a contract of employment which, ultimately, was neither extended nor renewed and this was the product of an extensive restructuring exercise. It was incumbent upon the Tribunal to squarely engage with these two reasons as they were of central importance to the inter-related questions of whether the burden of proof transferred to the Council and, if so, whether discrimination on the ground of the claimant's sex had been established. The Tribunal failed to do so.

[22] For the reasons given this court concludes that the Tribunal's decision is unsustainable in law. The appeal therefore succeeds. Having invited the parties' submissions on the appropriate consequential order, we exercise our power under section 38 (1) (a)&(b) of the Judicature (NI) Act 1978 by allowing the appeal, reversing the decision of the Tribunal and remitting the case to a differently constituted tribunal for fresh consideration and determination.