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Ref: **KERC5822**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **04/05/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**APPEAL BY WAY OF CASE STATED FROM A DECISION OF AN
INDUSTRIAL TRIBUNAL**

CAROLINE FLYNN and BEATRICE DEBAST

Appellants

-and-

**M J MALCOLMSON, LAURELHILL COMMUNITY COLLEGE and
SOUTH EASTERN EDUCATION and LIBRARY BOARD**

Respondents

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a Fair Employment Tribunal whereby it held that it did not have jurisdiction to entertain the appellants' complaints of unlawful discrimination. The appellants had complained that they had been the victims of unlawful discrimination on the grounds of religious belief in relation to their application to be appointed Head of Modern Languages at Laurelhill Community College, Lisburn. Both appellants had been employed as teachers at the college.

[2] At a preliminary hearing held on 31 May 2006, the respondents contended that article 71 (1) (b) and article 71 (1A) of the Fair Employment and Treatment (Northern Ireland) Order 1998, as amended, provided that

applicants for a teaching post such as the Head of Modern Languages were not entitled to the protection of the legislation. The tribunal accepted that contention and so held in a written decision given on 26 June 2006. The appellants asked the tribunal to state a case for the opinion of the Court of Appeal and on November 2006 the tribunal complied, posing the following question for the opinion of this court: -

“Whether the tribunal has jurisdiction to consider the claims of unlawful discrimination on the grounds of religious belief in view of Article 71 (1) (b) and 1A of the Fair Employment and Treatment (Northern Ireland) Order 1998.”

Factual background

[3] Both appellants were employed as language teachers at Laurelhill School; Ms Flynn since 1 September 1992 and Ms Debast from 1 September 1989. In September 2005 a post of Head of Modern Languages was advertised internally within the school following the retirement of the previous incumbent. There was no external advertisement of the post.

[4] The document in which the invitation to apply was contained had a covering page entitled ‘Management Allowances for Posts of Responsibility’. This document contained the following statements: -

“Please note as a result of the most recent pay award it was agreed by the teachers’ salaries negotiation committee that management allowances for posts of responsibility will be frozen and that any new management allowances awarded must be for a fixed period not exceeding one year. However, this may be extended up to the date of a new system being introduced.

The following management allowances for posts of responsibility for the positions of year head and head of modern languages will be awarded for a fixed period of one year from the date of appointment. However, this may be extended up to the date of a new system being introduced.

1.0 Management Allowances for Posts of Responsibility

1.1 The following Management Allowances for Posts of Responsibility are available: -

Post 1: Year Head (a maximum of 2 management allowances)

Post 2: Head of Modern Languages (a maximum of 2 management allowances)

1.2 Please note that the position of Head of Modern Languages is being trawled internally.

1.3 Staff who are awarded allowances by the Board of governors will normally subsume their existing posts of responsibility."

[5] Potential candidates were informed that a relevant application form and "a copy of the relevant post description" could be obtained by telephoning a named member of staff. It appears, however, that job descriptions were not sent to applicants initially but were provided some time after the application forms were completed. Candidates were not asked to provide references. The form merely required applicants for the position to state the date of their appointment to Laurelhill; to specify their current post; and to outline the qualifications, training and experience which they considered made them suitable for appointment.

[6] The Grievance Procedure whereby a teacher is given the opportunity to have any individual grievance arising from their contract of employment and/or conditions of service resolved did not apply to the appointment to this post. The appellants relied on this as a strong indicator that the appointment of the head of modern languages did not involve a recruitment exercise since, they claimed, it was inconceivable that this procedure would be excluded from such an exercise.

[7] Both appellants applied for the post, were interviewed but were unsuccessful. The post was offered to two other internal candidates who had applied on a job-sharing basis.

The statutory provisions

[8] Article 19 (1) of the Fair Employment and Treatment (Northern Ireland) Order 1988 forbids discrimination against a person in relation to employment. The relevant parts of the provision are as follows: -

"19. - (1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland, -

...

(b) where that person is employed by him -

(i) in the terms of employment which he affords him; or

(ii) in the way he affords him access to benefits or by refusing or deliberately omitting to afford him access to them; or

(iii) by dismissing him or by subjecting him to any other detriment.”

[9] Article 71 provides: -

“71. - (1) Subject to paragraph (2) -

(a) Part VII does not apply to in relation to employment as a teacher in a school; and

(b) The other provisions of this Order do not apply to or in relation to the recruitment of a person as a teacher in a school.

(1A) For the purposes of (1) (b) ‘recruitment’ means any step in the process of engagement of a person for employment up to the commencement of the employment.”

[10] The relevant provisions in relation to this case are article 71 (1) (b) and 71 (1A). These provisions were inserted by regulation 30 of the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 in order to comply with the requirements of Council Directive 2000/78/EC of 27 November 2000. Paragraph 12 of the preamble to the Directive provides: -

“... any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. ...”

[11] Articles 1 and 2 of the Directive, so far as is material, provide: -

“Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1."

[12] Following negotiations with the European Commission special provision was made in the Directive in relation to teachers in Northern Ireland. These are to be found in article 15.2 of the Directive: -

"In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation."

[13] In its original form the 1988 Order had excluded from the protection afforded by the legislation all aspects of employment as a teacher. As first enacted article 71 (1) provided: -

"Subject to paragraph (2), this Order does not apply to or in relation to employment as a teacher in a school."

Paragraph (2) dealt with monitoring of the exception contained in paragraph (1) by the Equality Commission.

[14] As a result of the Directive it was necessary to confine the scope of the exception to the recruitment of teachers - hence the new article 71 (1) (b) and 71 (1A). The net question that arises on this appeal, therefore, is whether the

exercise to appoint a head of modern languages constituted a recruitment within the meaning of article 71 (1) (b) and article 71 (1A).

Appointment to a post or promotion?

[15] For the appellants Ms McGreenera QC submitted that the fact that an internal trawl was conducted to fill this position and the lack of many of the appurtenances of a normal recruiting exercise indicated strongly that this was not a recruitment but a promotion opportunity for members of staff of the college. She referred to the definition of a 'promotee' contained in the Fair Employment (Monitoring) Regulations (Northern Ireland) 1999 (as amended by the Fair Employment (Monitoring) (Amendment) Regulations (Northern Ireland) 2000) which provides in paragraph 15c: -

“(c) any reference to a promotee in a registered concern, in relation to any monitoring return prepared in respect of that concern, shall be construed as a reference to an employee who, in the period to which the prescribed information in that return about employees must relate by virtue of regulation 6(2):

(i) moved from one situation to another within the concern;

(ii) in doing so did not fill a vacancy in the concern for which persons not already employed in the concern could apply; and

(iii) remained in the situation to which he moved for a continuous period of not less than six months or was notified in writing that he would so remain,

where, as a direct result of the move, there was an increase in remuneration (excluding expenses) to which he was entitled from the concern for the calendar year in which the move took place”

[16] Ms McGreenera accepted that these regulations did not apply to teachers such as the appellants but suggested that they provided a valuable insight into the concept of a promotion. She argued that all the attributes of a promotee described in this provision applied to the appellants and that, on that account, the appointment of the head of modern languages should be recognised as merely an adjustment to the terms and conditions of an internal candidate's employment rather than a recruitment to a post. In this context she also relied on the terms of the document which solicited applications. The

emphasis in this document was, she said, on the payment of allowances. There was nothing in the document to support the claim that the respondents had made that this was a freestanding post involving 'the process of engagement of a person for employment up to the commencement of the employment'. All the candidates for the position were already in employment with the college. The successful applicant could not be said to have been 'recruited' to the post. The appointment to that position merely involved a modification to existing terms and conditions.

[17] In answer to questions put to her by the court, Ms McGreenera accepted that the college could ensure that it would attract the exception by the simple expedient of externally advertising every competition for appointment. If this were done, she said, all candidates for the post would come within the exception provided for in article 71 (1) (b) and 71 (1A). She argued, however, that the provision should be given a purposive construction so as to bring it as closely as could be achieved with the overall purpose of the Directive. That purpose was to extend as far as possible the scope of the principle of non-discrimination in the employment field. The exemption from that principle should be confined to the narrowest of margins.

[18] I have concluded that appointment to the position of head of modern languages involves a recruitment within the meaning of article 71A. It is a post within the college that required to be filled on the retirement of the previous holder. It carries with it a range of responsibilities that are quite separate from those of other teachers. The Shorter Oxford English Dictionary (5th edn 2002) defines the verb "recruit" as meaning to reinforce, supplement or keep up the number of (a class of people or things); to replenish, refresh, re-invigorate or renew. Given that this was a particular post within the school's teaching complement, we are unable to reach any conclusion other than that appointment to it involved a recruitment exercise.

[19] I am fortified in that conclusion by the consideration that, on Ms McGreenera's analysis, whether an appointment could be transformed into a recruitment as opposed to a promotion depended on whether the school opted for external advertisement of the post. I cannot accept that this was this intention of the legislature. Whether appointment to a particular post qualifies as a recruitment must be judged principally by the nature of the position to be filled rather than the means chosen to fill it.

[20] While I accept that the overall purpose of the Directive was to eliminate discrimination over as wide a field as possible, the exemption provided for in Article 15.2 is clear. Recruitment to teaching posts in schools in Northern Ireland does not fall within its purview. The essential issue in this case is a net one, therefore. It is whether this particular appointment must be classified as a recruitment. For the reasons that I have given, I consider that it must be.

[21] I should observe that an appointment to a teaching post will not lose the characteristics of a recruitment exercise solely because it can be described in common parlance as a promotion. One can quite understand how a teacher appointed from the staff of Laurelhill to the head of modern languages might regard that as a promotion but this does not mean that it is not also a recruitment exercise. As we have said, this depends principally on the nature of the post to be filled rather than any perception as to whether it represents preferment. In any event, as Mr Lyttle QC for the respondents pointed out, it is not inevitable that the appointee would be promoted since the position was open to staff who held more senior positions at the college.

[22] The same considerations apply to the contents of the document that invited applications for appointment to the post. It is true that this gave prominence to the matter of management allowances but that does not alter the true nature of the exercise. Likewise the absence of a grievance procedure cannot change the intrinsic quality of the appointment. This was a dedicated post within the school. It required to be filled. That could only occur by the recruitment of a person (or, as has happened in this instance, two people on a job share basis) to the position.

Conclusion

[23] I consider that the tribunal was correct in its view that the appellants' complaints were excluded by the provisions of article 71. I would answer the question posed in the case stated by declaring that "the tribunal did not have jurisdiction to consider the claims of unlawful discrimination on the grounds of religious belief in view of Article 71 (1) (b) and (1A) of the Fair Employment and Treatment (Northern Ireland) Order 1998" and dismiss the appeal.

Ref: **GIRC5821**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **04/05/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE FAIR EMPLOYMENT TRIBUNAL
ON 31 MAY 2006**

BETWEEN:

CAROLINE FLYNN and BEATRICE DEBAST

Appellants;

and

**M J MALCOLMSON
LAURELHILL SCHOOL**

and

SOUTH EASTERN EDUCATION AND LIBRARY BOARD

Respondents.

GIRVAN LJ

[1] The question posed by the Fair Employment Tribunal is whether the Tribunal had jurisdiction to consider the appellant's claims of unlawful discrimination on the grounds of religious belief in view of the provisions of Article 71(1)(b) and (1A) of the Fair Employment and Treatment (Northern Ireland) Order 1998. In their applications the appellants complained that they had suffered such unlawful discrimination in relation to their application for the post of Head of Modern Languages in Laurelhill Community College ("the School"). The School denies that any such discrimination occurred.

[2] The Tribunal directed the hearing of a preliminary issue on the jurisdictional question and following a hearing on 31 May 2006 by its decision

dated 26 June 2006 it found that it did not have jurisdiction to consider the claims under the relevant statutory provisions.

[3] The appellants were modern language teachers in the school. Ms Debast commenced employment on 1 September 1989 and Ms Flynn on 1 September 1992. In September 2005 the post of Head of Modern Languages was advertised internally, the previous incumbent having retired. The post was trawled internally within the School and was not publicly advertised. A document entitled "Management Allowances for Posts of Responsibility" was provided to them. The job description stated that the post was an important post within the School's posts of responsibility structures. The job description spelt out the general and specific roles and responsibilities of the post. Persons interested in applying for the post were invited to collect an application form and a copy of the relevant post description from the college office. The closing date for applications was 7 October 2005 and both applicants applied by that date. They were informed by letter on 11 October 2005 that they were unsuccessful in their applications.

[4] Under the provisions of Section 37 of the Fair Employment (Northern Ireland) Act 1976 as originally enacted the provisions of Part II and IV of the Act (which render discrimination on the grounds of religion or political opinion unlawful) did not apply "to or in relation to employment as a teacher". This provision was replicated in the Fair Employment and Treatment (Northern Ireland) Order 1998.

[5] The European Directive 2000/78/EC of 27 November 2000 established a general framework for equal treatment in employment and occupations. The recitals to the Directive point out that the principle of equal treatment in relation to men and women was well established in particular by Directive 76/207/EEC of 9 February 1976 on the principles of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. Article 1 of the 2000 Directive provided that the purpose of the Directive was "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment or occupation with a view to putting into effect in the member states the principle of equal treatment." It defined in Article 2 the well established concept discrimination. Article 3(1)(a) provided that within the limits of the areas of competence conferred on the Community the Directive was to apply to all persons as regards both the public and private sectors including public bodies in relation to:

"(a) conditions for access to employment, to self employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity or at all levels of the professional hierarchy, including promotion."

[6] Recital (34) of the Directive referred to the fact that “the need to promote peace and reconciliation between the majority communities in Northern Ireland necessitates the incorporation of particular provisions into the Directive.” Article 15 contains those particular provisions. Paragraph 1 related to special provisions in respect of recruitment of the Police Service of Northern Ireland and is not relevant. Paragraph 2 is of central relevance in the present appeal. It provides –

“In order to maintain a balance of opportunity and employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in the Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.”

[7] Regulation 30 of the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 amended Article 71 of the 1998 Order. Article 71 as substituted now reads –

“71(1) - Subject to paragraph (2) -

- (a) Part VII does not apply to or in relation to employment as a teacher in a school; and
- (b) The other provisions of this Order do not apply to or in relation to the recruitment of a person as a teacher in a school.

(1A) For the purposes of paragraph (1)(b) “recruitment means any step in the process of engagement of a person for employment up to the commencement of the employment.”

[8] Miss McGreenera QC for the applicants argued that the definition of “recruitment” in Article 71(1A) is clear and unambiguous and covers only the steps in the process of engagement up to the commencement of employment. Since both appellants were already employed and no question of recruitment as such related to them. What they were effectively seeking was promotion within the school hierarchy and this did not fall to be treated as recruitment to employment.

[9] The Directive permitted the United Kingdom to introduce legislation in accordance with Article 15 of the Directive. It was for the United Kingdom to decide whether the derogation from the general principle should be incorporated into domestic law. It was open to the United Kingdom to limit

the extent of the derogation permitted from the general principle. Regulation 30 of the Amendment Regulations transposed into domestic law the permitted derogation. The proper interpretation of Article 71 of the 1998 Order as amended must take in its Directive context.

[10] As Miss McGrenara's persuasive argument showed the meaning of the word "recruitment" is not one free from doubt. On one view it could refer to the employment of a teacher who, once employed, could not be considered as having been recruited as a teacher if he or she happens to move up the hierarchal ladder within a school's teaching force. On the other hand it could refer to recruitment in the sense of the process of filling a particular post as Mr Lyttle QC contended. In interpreting the European Directive regard must be had to all the language texts to distil the purpose and effect of the European provision, each language being relevant in that exercise. Of significance in the present context is the German text which uses the terminology *Einstellung von Lehrkräften* while the English text speaks of recruitment of teachers. *Einstellung* carries with it the connotation of taking into employment an employee to fill a place an interpretation also borne out by the Italian language equivalent *assunzione*. The problem with the earlier law was the width of the exclusion from the anti-discrimination provisions in relation to the "employment of teachers". This was wide enough to cover not merely the process of the engagement of a teacher to fill a post but also how the employer thereafter treated that teacher once taken on. Clearly the view was taken that this latter concept of employment was unjustifiably wide but it was recognised that at the stage of taking on an employee it was necessary to continue the permissive power to discriminate. It becomes a question of fact in any given case whether a person is being taken on for what is in effect a new and different teaching post. If he or she is being so taken on, then Article 70(1) and 1A have the effect of depriving the person of the protection of the equality provisions in relation to the appointment to that post. If the employee has been engaged to fill a post, that person can rely thereafter on the anti-discrimination provisions. In this instance the post of Head of Modern Languages represented a new and different teaching post within the School. The process of filling that post thus constituted "recruitment" for the purposes of Article 71 as properly understood. Accordingly, I answer the tribunal's question No.