Neutral Citation no. [2007] NICA 13 (3)

Ref: **SHEC5754**

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

Delivered: **1.3.2007**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CHARLOTTE CARTWRIGHT

and

RAYMOND McMICHAEL

Applicants/Appellants;

- and -

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent.

SIR JOHN SHEIL

[1] This matter comes before this court by way of a case stated by an Industrial Tribunal on 24th May 2005. Chief Inspector Charlotte Cartwright, the first-named appellant, by way of an originating application dated 4th July 2000, lodged a complaint with the Industrial Tribunal that she had been unlawfully discriminated against by way of victimisation by reason of her having been served with a Form 17/3 complaint against her in relation to evidence at an earlier Industrial Tribunal hearing in which she had been a complainant, which claim had been dismissed by that earlier Tribunal in June 2000. In her complaint to that earlier Tribunal, Chief Inspector Cartwright complained that her line manager in the RUC Traffic Branch, Superintendent Laird, had been guilty of sex discrimination against her. At that earlier Tribunal Constable Raymond McMichael, the second-named appellant, gave evidence in support of Ms Cartwright's complaint. On 1st August 2000 by way of an originating application, Constable McMichael lodged a complaint of unlawful discrimination by way of victimisation by reason of his having been served with a Form 17/3 complaint in relation to him having given evidence at that previous Tribunal hearing. The Form 17/3 complaints had

been served on both of the appellants on 19th May 2000 during the course of that previous Industrial Tribunal hearing.

[2] The Form 17/3 complaint alleged as against each of the appellants that, in relation to the earlier Industrial Tribunal hearing, they had disclosed personal information about Superintendent Laird to Chief Inspector Cartwright's legal advisers which allegedly compromised the safety of Superintendent Laird. This information consisted of details of a personal nature relating to Superintendent Laird in respect of his golf club membership, ownership of a caravan and current home address which had been compiled by Constable McMichael who gave it to Chief Inspector Cartwright. In addition it was alleged that Chief Inspector Cartwright had wrongly disclosed to her legal advisors personal details relating to Sergeant Shirlow and Sergeant Wilson, which allegedly had compromised their safety. This consisted of the home telephone number of Sergeant Wilson and the home telephone number and address of Sergeant Shirlow.

[3] The investigation of the Form 17/3 complaint against Chief Inspector Cartwright was carried out under the RUC (Discipline and Disciplinary Appeals) Regulations 1988 (as amended), which investigation found there was no evidence that she had made any improper disclosure of information, but a direction was given that she should be the subject of informal discipline in the form of a constructive discussion as to how to deal with the personal details of members of the Police Service. Insofar as the Form 17/3 complaint against Constable McMichael was concerned, that investigation was closed in May 2000, as Constable McMichael had by then resigned from the Police Service; Constable McMichael was never personally informed of the fact that the investigation against him had been closed although his solicitor was subsequently informed by letter of 16th July 2001.

Due to a number of factors, which are referred to in the judgment of Nicholson LJ, there was very considerable delay in determining the outcome of the complaints based upon the 17/3 forms.

[4] The complaints of the two appellants lodged on 4th July and 1st August 2000 respectively, were heard together by the Industrial Tribunal in September and October 2004. On 8th December 2004 the Tribunal in a written decision dismissed the complaints of Chief Inspector Cartwright and Constable McMichael, which decision is the subject of this appeal. On 24th May 2005 the Tribunal, following an application by both appellants, stated a case for the opinion of this court, which posed the following questions:-

1. Did the Industrial Tribunal err in law in excluding evidence about the reason for which complaints were made to the respondent about the conduct of the appellants in connection with their involvement in previous proceedings against the respondent?

2. Did the Industrial Tribunal err in law in holding that the respondent was compelled to instigate a formal procedure to start an investigation of the events leading up to the complaints without hearing evidence to test the credibility of any of the allegations or the bona fides of those who made the complaints against the appellants?

3. Having held at paragraph 11 that the appellants had been subjected to potential discriminatory procedures because they had given evidence in the first appellant's previous Tribunal hearing, did the Industrial Tribunal err in law by rejecting their claims of unlawful discrimination by way of victimisation on the ground that any appropriate comparator would have been treated in the same way?

4. Did the Industrial Tribunal err in law, in the light of the burden of proof regulations, in holding that the appellants had not been discriminated against by way of victimisation?

5. Could any reasonable Industrial Tribunal on the evidence before it, both oral and documentary, and on the facts found, properly directing itself in law have reached the decision arrived at to dismiss the complaints of the appellants?

[5] At paragraph 4 of its decision dated 8th December 2004 the Tribunal stated:-

> "In its ruling at the outset of this hearing the Tribunal stated that Mr McMichael's claim was against the respondent and not against Superintendent Laird and that it would look at the actions of the respondent in instigating a complaint against the applicant and the subsequent action of the respondent in the treatment of the applicant. This is what the Tribunal did at this hearing. It looked at the background to the complaints and the actions of the respondent in handling the complaints."

As can be seen from the papers the respondent was named as the Chief Constable of the PSNI.

At paragraph 12 of its decision the Tribunal stated:

> "The Tribunal considered the originating applications in which the applicants were concerned about the instigation of disciplinary proceedings against them and any motive of victimisation must fall on the desk of Mr Beaney".

Events, which followed the service of the Form 17/3 on both the appellants, are set out in the judgment of Sir Michael Nicholson including the appointment of Assistant Chief Constable Beaney to carry out the investigation.

[6] It is to be noted, with some concern, that while Sergeant Laird, Sergeant Shirlow and Sergeant Wilson were kept regularly informed as to what was happening with these protracted investigations, the subject of the complaints, namely the two applicants, were not kept informed of what was happening and the reasons for the delay. At paragraph 13 of the case stated the Tribunal accepted that "writing a letter to Superintendent Laird advising him of a delay in the procedure did raise the question of a less favourable approach to the appellants, but it was not sufficient to enable the Tribunal to infer discrimination on the grounds of victimisation." The Tribunal at paragraph 13 of its decision of 8th December 2004 stated with reference to this aspect of the matter:

> "The area of concern which the Tribunal considered in some detail was the issue that during the investigation the three complainants were kept informed about the delays and the applicants were not. Counsel for the applicants stressed that as no witness had been called for the respondents in relation to the letters written to Superintendent Laird, we should draw an inference from this failure and find that it was part of a pattern of victimisation against the applicants. It did appear to be an example of less favourable treatment of one group of people than another. There was a potential breach of a procedure here but when we examined the evidence it did not establish that the instigator of the complaint procedure, namely Mr Beaney, was involved."

Counsel for the appellants pointed out that while the Industrial Tribunal at paragraph 13 of the case stated referred to Article 63(a) of the Sex Discrimination (NI) Order 1976 [*as inserted into the 1976 Order by the Sex Discrimination (Indirect Discrimination and Burden of Proof Regulations (NI) 2001*], it made no reference thereto in its decision of 8th December 2004 when it decided that the appellants had failed to prove that they were victimised by the respondent in being made the subject of an investigation procedure.

[7] At the Industrial Tribunal hearing Mr McArdle, counsel for Constable Raymond McMichael, gave notice to the tribunal that he was going to call evidence which would be given by his instructing solicitor, Ms Rosemary Connolly, about her notes of the previous tribunal's proceedings and in particular her notes of cross examination of Superintendent Laird. Counsel for the respondent, Mr Piers Grant, objected to such evidence being given and the documentation allied to it, namely the solicitor's notes of her record of the proceedings and her notes of consultations with the applicant. Mr Grant also drew to the attention of the tribunal the terms of the originating application of Constable McMichael which stated that the decision to serve him with a 17/3 amounted to unlawful discrimination by way of victimisation because he had given evidence in connection with a complaint of sex discrimination brought against the Chief Constable of the RUC. In a ruling dated 20th September 2004 the tribunal ruled as follows:

> "It is common case at this stage that the respondent accepts that the applicant has done a protected act i.e. that he has given evidence or information in connection with Charlotte Cartwright's proceedings at a previous hearing. The applicant's claim is against the respondent, not against Superintendent Laird, and the tribunal has ruled that the case is against the respondent and it will look at the actions of the respondent in instigating a complaint against the applicant and the subsequent actions of the respondent in the treatment of the applicant. The tribunal has ruled that it will not admit evidence from the applicant's solicitor as to her version of evidence at a previous hearing. There was no transcript of a previous hearing and the tribunal is not in the position of making a decision based on the solicitor's record of the proceedings or of her record of cross examination of one of the respondent's witnesses at that previous hearing. Having made this ruling the applicants have sought an adjournment so that it can be judicially reviewed as they are both unwilling to proceed without the evidence as outlined by the

> applicant's counsel. The tribunal will consider the question of an adjournment on 21st September."

On the following day, 21st September 2004, the tribunal refused to consider the question of an adjournment stating that it ought to have been made on the previous day, which of course it had been.

[8] While I agree with the ruling of the tribunal not to admit the actual notes of the previous proceedings made by Constable McMichael's solicitor, Ms Rosemary Connolly, her oral evidence was explanatory of the circumstances in which some personal details of Superintendent Laid and others had been communicated to her as solicitor for one of the parties and was highly relevant and ought to have been heard.

[9] I do not agree with the decision of the Industrial Tribunal that it would only look at the actions of Assistant Chief Constable Beaney. In its decision of 8th December 2004 (29-34) the tribunal returned to that issue stating at paragraph 4:

> "In its ruling at the outset of this hearing the tribunal stated that Mr McMichael's claim was against the respondent and not against Superintendent Laird and that it would look at the actions of the respondent in instigating a complaint against the applicant and the subsequent action of the respondent in the treatment of the applicant. This is what the tribunal did at this hearing. It looked at the background to the complaints and the actions of the respondent in handling the complaints."

[10] At paragraph 11 of its decision of 8th December 2004, the tribunal stated that "in the present case the applicants have shown that they were subjected to potential disciplinary proceedings because they had given evidence in Charlotte Cartwright's previous tribunal hearing". In paragraph 12, to which I have already referred, the tribunal went on to state that "the tribunal considered that the originating applications in which the applicants were concerned about the instigation of disciplinary proceedings against them and any motive of victimisation must fall on the desk of Mr Beaney".

[11] While I agree that no complaint of discrimination can be upheld against ACC Beaney, I consider that the Industrial Tribunal was wrong to confine the complaint to one against Mr Beaney, apparently on the basis of a very narrow view of the originating applications. If one is to take such a narrow view, the originating applications were against the Chief Constable of the PSNI and not against ACC Beaney. Mr Beaney was appointed to carry out the investigation,

but he, like Superintendent Laid, was not named in the originating applications.

[12] Mr O'Hara QC, who with Mr McArdle, appeared for both appellants submitted at paragraphs 8 and 9 of his skeleton argument to this court:

> "Although the appellants' complaints cite the Chief Constable as the sole respondent, complaints of discrimination against the employer as a matter of course include the employer's servants and agents. This ruling of the tribunal shifted the focus of the tribunal inquiry away from the substance of the appellants' complaints (did Mr Laird and some of his colleagues, notably Superintendent Kane, victimise the appellants by instigating [inciting, triggering] disciplinary complaints against them and dragging out the disciplinary investigation?) to a scrutiny of the decision making procedures followed by Assistant Chief Constable Beaney. The tribunal thus discounted the process that led up to Mr Beaney's decision, in particular the risks that the process had been tainted by discriminatory decisions, recommendations and reports before Mr Beaney was required to make any decision in regard to it.
>
> Confident that the initial tribunal ruling had narrowed the scope of the appellants' claims in this way, the respondent felt less need to call as witnesses any of those officers who made complaints against the appellants: Superintendent Laird, Sergeant Shirlow, Sergeant Wilson. The appellants were never afforded the opportunity therefore to explore with the complainants in cross examination the declared reasons for their complaints, or to establish whether they were or were not well founded."

[13] Article of the Sex Discrimination (NI) Order 1976 reads as follows:

> *"Liability of Employers and Principals*
>
> 42(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

In Nagarajan v. London Regional Transport [1999] IRLR 572, a case of complaints of race discrimination and victimisation brought under the Race Relations Act 1976 and the Sex Discrimination Act 1975, Lord Nicholls stated:

> "It matters not that different employees were involved at different stages, one employee acting in a racially discriminatory or victimising fashion and the other not. The acts of both are treated as done by the respondent employer. So if the employee who operated the employer's interviewing arrangements did so in a discriminatory manner, either racially or by way of victimisation, Section 4(1)(a) is satisfied even though the employee who set up the arrangements acted in a wholly non discriminatory fashion. The effect of treating the acts of the discriminatory employee as the acts of the employer is that the *employer* unlawfully discriminated in the arrangements *he* made for the purpose of determining who should be offered employment by him."

[14] It is perfectly clear from the facts of this case that both the appellants were complaining of unlawful discrimination against them because of the application made by Chief Inspector Cartwright at the previous industrial hearing, in the course of which Constable McMichael had given evidence in support of her claim. In her application to the Industrial Tribunal dated 4th July 2000, Chief Inspector Cartwright stated her complaint at paragraph 13 as follows:

> "In or about December 1998 I initiated a complaint of unlawful discrimination on grounds of sex against my employer – Chief Constable of the RUC. That complaint was followed by three further complaints alleging discrimination on grounds of sex and by way of victimisation. By notice of report dated 19th May 2000 I was informed that three complaints had been made against me by the Chief Constable of the RUC concerning evidence that had been adduced on my behalf at the Industrial Hearing into my complaints and concerning contact made with two witnesses in that connection also. I consider that each of the matters complained of was dealt with perfectly properly in the context of the legal proceedings in which I was then engaged. I consider that the decision to initiate formal complaints against me in relation to the three matters complained of amounts

> to unlawful discrimination by way of victimisation contrary to the Sex Discrimination (NI) Order 1976."

Constable McMichael in his application to the Industrial Tribunal stated his complaint as follows:

> "On or about 19th June 2000 I was served with a Form 17/3 Notification of Complaint in which it was alleged that I had given evidence at an Industrial Tribunal hearing and in so doing had compromised the security of another member of the Force and acted without authority from my superiors. I was subpoenaed to attend the Tribunal and when there gave evidence on oath to the best of my knowledge and ability. I consider that in so doing I acted entirely properly and appropriately and I consider that the decision now to serve me with a 17/3 amounts to unlawful discrimination by way of victimisation because I gave evidence in connection with a complaint of sex discrimination brought against the Chief Constable of the RUC."

At the hearing before the Industrial Tribunal in September/October 2004, Superintendent Laird and Sergeants Shirlow and Wilson were present, but they were not called to give evidence by counsel for the respondent, Mr Grant, in the light of the ruling made by the tribunal on 20th September 2004. Their evidence was in my opinion highly relevant in relation to the complaints made by both appellants to the Industrial Tribunal as they questioned the bona fides of the original complaints made by Superintendent Laird and Sergeants Shirlow and Wilson that they felt that their security had been compromised by reason of the disclosure of some personal information about them to Ms Rosemary Connolly, solicitor for Constable Raymond McMichael.

[15] While I agree with the decision of the tribunal that it was entirely proper for ACC Beaney to proceed with the investigation following the Form 17/3 complaints, I do not agree with the tribunal's decision to confine its decision to the actions of ACC Beaney, who appears to have acted entirely properly throughout.

[16] No appeal is brought against the decision of the tribunal to dismiss the additional claim by Constable McMichael of constructive unfair dismissal.

[17] Accordingly, I consider that the answer to the **first question** in the case stated is "Yes". The case should be remitted to the Industrial Tribunal with a direction to admit the evidence of Ms Rosemary Connolly. The answer to the **second question** is "No". With regards to the **third question**, it does not arise in this case; it was conceded by Mr McCloskey for the respondent that there was some confusion on the part of the Industrial Tribunal in relation to the question of comparators. As this court is remitting the matter back to the Industrial Tribunal, **question five** does not have to be answered. Likewise, **question four**, does not have to be answered but the Industrial Tribunal will no doubt bear in mind the provisions of Article 63(a) of the Sex Discrimination (NI) Order 1976.