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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **23/11/2007**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

CHRIS RYDER

Claimant/Respondent

and

NORTHERN IRELAND POLICING BOARD

Respondent/Appellant

_____

Before Kerr LCJ, Higgins LJ and Girvan LJ

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a Fair Employment tribunal holding that a number of views and opinions expressed by the claimant/respondent (hereafter 'the respondent') constitute 'political opinions' for the purpose of the Fair Employment and Treatment (Northern Ireland) Order 1998.

Factual background

[2] The respondent applied for the post of Communications Director with the appellant in 2003. He was not short listed for interview and lodged an originating claim with the Office of the Industrial Tribunal and Fair Employment tribunal on 23 September 2003 alleging that he had been discriminated against by the appellant on the grounds of his religious belief and political opinion. The appellant did not make an appointment on foot of that recruitment exercise but re-advertised the post of Communications

Director in January 2004 with an amended candidate specification which excluded persons with a journalistic background.

[3] The respondent notified the appellant that he felt this was a further act of discrimination and victimisation and he lodged a further originating claim on 26 July 2004 claiming discrimination and victimisation on the basis of religious belief and political opinion. Both claims were consolidated; a pre hearing review was ordered with the agreement of the parties and this was held on 14 and 15 September 2006 to determine "whether the respondent's political opinion comes within the ambit of the Fair Employment and Treatment (Northern Ireland) Order 1998".

[4] The respondent had lodged a written submission with the tribunal which included a statement of his political opinions. In that submission he stated at paragraph 4 "I hold independent and radical views about policing which are on the public record arising from my extensive work as an author, journalist and broadcaster and from my former membership of public bodies, as fully documented in the application form. My political opinion is comprehensively reflected and outlined in the contents of my detailed answers to the questions on the application form."

The proceedings before the tribunal

[5] At the pre-hearing review the Fair Employment Tribunal reached the following conclusions on the facts: –

> "(a) The respondent has political opinions.
>
> (b) The respondent's political opinions do not appear to be connected to any particular political party, philosophy or ideology.
>
> (c) The respondent's submission does not distinguish between political opinions that relate to the conduct of the government of the state or matters of public policy which benefit from the protection of the 1998 Order and methods to achieve political ends which do not enjoy the benefit of the 1998 Order.
>
> (d) None of the political opinions in the respondent's submission relate to the government of the state.
>
> (e) Most of the respondent's political opinions as set out at paragraph 14 appear to the tribunal to

relate to the methodology of achieving political aims and objectives.

(f) Three of his political opinions seem to the tribunal to relate to matters of public policy –

> (i) With the significant and growing number of people from other national and cultural backgrounds now residing here the police must develop an awareness of their fears and wishes and develop appropriate and effective responses (paragraph 14(f) above).
>
> (ii) In the future people will have to take greater individual responsibility for their welfare and the security of their lives and property and work in partnership with the police and other public agencies in a far more collective effort to ensure the well being of all and the general tranquillity of society (paragraph 14(h) above).
>
> (iii) The NIPB needs to persuade the community at large of its determination to represent them in vigorously holding the police to account in upholding their rights (paragraph 14(k) above).

(g) There is not a requirement that to benefit from the protection of the Fair Employment legislation the political opinion must be an opposing opinion. The comment by Carswell LCJ in *Gill* case and as set out at page 16 of the transcript:-

> "It seems to us that the type of political opinion envisaged by the Fair Employment legislation is that which relates to one of the opposing ways of conducting the government of the state"

seems to the tribunal to be a reference to competing or different ways of conducting the government of the state and not to introduce a qualification that any political opinion must be one which opposes a status quo.

> (h) Some of the respondent's political opinions therefore fall within the protection afforded by the 1998 Order".

[6] By requisition dated 22 December 2006 the appellant requested that the tribunal state a case on the following questions of law for the opinion of this court: –

> "(1) Whether on the facts presented or agreed a reasonable tribunal of fact properly directed could have reached the conclusions as set out at paragraph 6(e)(i) and (ii) and (iii) and paragraph 6(f) of page 4 of the tribunal's decision.
>
> (2) Whether as a matter of law the matters outlined at paragraph 6(e)(i) and (ii) and (iii) of page 4 of the tribunal's decision constitute matters of public policy.
>
> (3) Whether as a matter of law the aspirations set out at paragraph 6(2)(i), (ii) and (iii) of page 4 of the tribunal's decision constitute matters of public opinion within the terms of the Fair Employment and Treatment (Northern Ireland) Order 1998."

The arguments

[7] For the Policing Board, Mr Lyttle QC, who appeared with Mr Wolfe, submitted that the matters identified by the tribunal from the respondent's submissions as political opinions should not be so regarded for the purposes of the 1998 Order. These were no more than the expression of views as to how effective policing might be achieved. They were not statements of opinions on matters of public policy. Mr Lyttle relied on the decision of this court in *Gill v Northern Ireland Council for Ethnic Minorities* [2001] NIJB 289 which, he said, was to the effect that a distinction must be drawn between a political opinion requiring the protection of the legislation and the means by which a political aspiration might be fulfilled.

[8] For Mr Ryder, Mr McGleenan argued that the distinction drawn by the court in *Gill* between a political opinion and the methodology employed to further it was not part of the *ratio decidendi* of that decision and was therefore not binding on this court. There was no logical reason, he submitted, that a strongly held view on how a particular public policy objective might be achieved should be regarded as any less of a political opinion than the espousal of the objective itself.

The relevant statutory provisions

[9] Article 19 of the 1978 Order provides: -

> "It is unlawful for an employer to discriminate against a person in relation to employment in Northern Ireland –
>
> (a) Where that person is seeking employment:
>
> (i) in the arrangements the employer makes for the purpose of determining who should be offered employment; or
> (ii) in the terms in which he offers his employment; or
> (iii) by refusing or deliberately omitting to offer that person employment for which he applies."

[10] Discrimination is defined in article 3. It provides: -

> "(1) In this order "discrimination" means –
>
> (a) discrimination on the grounds of religious belief or political opinion; or
>
> (b) discrimination by way of victimisation;
>
> and "discriminate" shall be construed accordingly.
>
> (2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order … if –
>
> (a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or
> (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but –
>
> (i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can

comply with it is considerably smaller than the proportion of persons not of that religious belief or as the case requires not of that political opinion who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it."

[11] Mr Lyttle suggested that for discrimination on the ground of political opinion to occur, it was necessary to show that the victim held political views that prompted the less favourable treatment. I do not accept that argument. It appears to me to be clear that discrimination on political grounds can equally be based on the political opinion of the discriminator. If on the grounds of his own political opinion a prospective employer chooses a candidate on the basis that the candidate's political views are believed to coincide with his own and rejects a candidate whose political views are unknown, that unfavourable treatment can constitute discrimination. I agree with the analysis of this issue in Girvan LJ's judgment at paragraphs [1] and [2].

Gill v NICEM

[12] This case involved an appeal against a decision of the Fair Employment tribunal, finding that the appellant, Northern Ireland Council for Ethnic Minorities (NICEM), had discriminated against the respondent on the grounds of his political opinion in failing to appoint him to the post of co-ordinator. One of the issues that arose was whether the tribunal was correct in law in deciding that the respondent's advancement of an 'anti-racist approach' was a political opinion for the purposes of the 1998 Order.

[13] The court in *Gill* considered that the guidance offered by Kelly LJ in *McKay v Northern Ireland Public Service Alliance* [1994] NI 103 at 117 as to the meaning to be given to the phrase 'political opinion' for the purposes of the fair employment legislation was authoritative and should be followed. In the *McKay* case, Kelly LJ had said this: -

> "There can be no difficulty as to the meaning of the word 'opinion' and none as to the word 'political'. When they come together in the phrase 'political opinion' it means, in broad terms, and without attempting any exhaustive definition, an opinion relating to the policy of government and

matters touching the government of the state. The word 'political' is defined in the *Shorter Oxford Dictionary* as:

> 'Of, belonging or pertaining to the state, its government and policy; public, civil; of or pertaining to the science or art of government.'

It seems to me clear that a person who holds an opinion on matters relating to any of the elements of this definition holds a political opinion."

[14] Applying this reasoning, the Court of Appeal in *Gill* said: -

> "It seems to us that the type of political opinion envisaged by the fair employment legislation is that which relates to one of the opposing ways of conducting the government of the state, which may be that of Northern Ireland but is not confined to that political entity. The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party, philosophy or ideology and which may predispose the discriminator against him. For this reason we consider that the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy. The opinion or opinions held by the respondent which he claimed brought about discrimination against him appear, if we understand the description given by the tribunal, to be concerned with advocating more aggressive means of achieving the objects of NICEM than the "culturally sensitive" methods espoused by Mr Yu and apparently favoured by the panel. We can only go on that description, but from it we conclude that the difference between the "anti-racist" and "culturally sensitive" approaches is one of methods, the one being more aggressive and confrontational than the other, but both being means of advancing the interests of people from ethnic minorities. It might be possible to describe such a difference as constituting a divergence of political opinion, but we do not think that it is the

> type of political opinion intended by Parliament in enacting the fair employment legislation."

[15] Mr McGleenan argued that the essential *ratio* of this part of the judgment was encapsulated in the sentence, "… the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy". I agree. I do not consider that the Court of Appeal in *Gill* sought to lay down a universally applicable rule that a view as to the methods by which a particular cause should be advanced could never qualify as a political opinion for the purposes of the legislation.

Preliminary points in tribunal hearings

[16] A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points – see, for instance, *Bombardier Aerospace v McConnell and others* and *Cunningham v Ballylaw Foods*. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe, often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided.

[17] The present case exemplifies the dangers of isolating a solitary subject from all the other questions that the topic gives rise to and dealing with it as an *in limine* matter. As I have already observed, discrimination on the grounds of political opinion may stem from the political views of the discriminator as well as or as an alternative to those of the person who claims to have been discriminated against. Separating the respondent's claimed political opinions from the entirety of the case is distinctly unhelpful as a means of dealing with all the various matters that may come under the umbrella of discrimination on grounds of political opinion.

[18] I consider, therefore, that the tribunal should have declined to deal with this matter as a preliminary issue. The claim of discrimination on the ground of political opinion called for – at least potentially – a much wider review of the reasons for the decision not to short list the respondent.

Disposal

[19] Section 38 (1) of the Judicature (Northern Ireland) Act 1978 provides: -

> "*Powers of court for purposes of appeal*
>
> 38. - (1) For all purposes of and incidental to the hearing or determination of any appeal, other than

an appeal under the Criminal Appeal Act, against any decision or determination of a court, tribunal, authority or person (in this section referred to as "the original court") and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal shall, in addition to all other powers exercisable by it, have all the jurisdiction of the original court and may -

(a) confirm, reverse or vary the decision or determination of the original court;

(b) remit the appeal or any matter arising thereon to the original court with such declarations or directions as the Court of Appeal may think proper;

…

(f) where the appeal is by case stated, amend the case stated or remit it, with such declarations or directions as the court may think proper, for hearing and determination by the original court or for re-statement or amendment or for a supplemental case to be stated thereon;

…

(i) make such other order as may be necessary for the due determination of the appeal."

[20] Mr Lyttle argued that this court could not refuse to express an opinion on the questions posed in the case stated because the decision to hear a preliminary point was not under appeal in the present proceedings. This argument neglects to take account of section 38 (2) which is in the following terms: -

"(2) The powers of the Court of Appeal in respect of an appeal to which subsection (1) applies-

(a) shall not be restricted by reason of any interlocutory order from which there has been no appeal: and
(b) may be exercised notwithstanding that no notice of appeal or respondent's notice

> has been given in respect of any particular part of the decision of the original court or by any particular party to the proceedings in that court or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice;
>
> and the Court of Appeal may make any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

[21] I am entirely satisfied that it is open to this court to refuse to express an opinion on the questions raised in the case stated where it considers that the dispute between the parties giving rise to those questions should not have been tried as a preliminary issue. I would refuse to answer any of the questions posed and remit the matter for hearing by the tribunal on all the substantive issues that the respondent's claim raises.

GIRVAN LJ

[1] Article 19 of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("the 1998 Order") makes it unlawful for an employer to discriminate against a person in relation to employment in Northern Ireland (inter alia) on the grounds of political opinion. Where a person claims to have been the victim of discrimination by a person in, for example, refusing or omitting to offer him employment for which he applies what must be examined is the motivation and thought processes of the alleged discriminator. Discrimination, whether it be on the grounds of gender, sexual orientation, religion, race or political opinion, is something which may be subtle, insidious or hidden. It is for this reason that a tribunal's task has an inquisitorial nature. Since what is central to the inquiry is the working and thought processes of the alleged discriminator, what is to be examined is whether that person acted in the way he did on grounds of political opinion. That may be the opinion of the respondent discriminator or the opinion of the claimant or it may be based on the respondent's perception of the claimant's political opinions or lack of them (which may not even represent the actual position).This is clear from the definition provisions of Article 2 of the 1998 Order. In Re O'Neill [1995] NI 274 Kerr J concluded that a decision taken on the ground of the religious belief of the person who made the decision would amount to discrimination for the purposes of section 19 of the Northern Ireland Constitution Act 1973. This followed the decision of Murray J in

Purvis v. Magherafelt District Council [1978] NI 26 in which he held that a plaintiff does not have to prove that the discriminatory action was taken on the grounds of the religious belief or the political opinion of the plaintiff. It could be the belief or opinion of some third person.

[2] In totalitarian systems the state authorities may perceive any action or comment by an individual as revealing a political stance or a political threat to the system. Mere lack of enthusiasm for the regime or its policies may be interpreted as the espousal of a political viewpoint. Where the state discriminates against the individual in consequence that discrimination would be on the grounds of political opinion. The discrimination would be motivated by the state's political viewpoint about the individual concerned and/or by the state's interpretation of the individual actions as revealing an unacceptable political viewpoint, even if the individual may be entirely apolitical. This extreme example demonstrates how discrimination on grounds of political opinion may be motivated by the political opinion of the discriminator rather than by the opinion of the victim or by the discriminator's perception of the political views of the victim. Even in a free and democratic society such as our own discrimination on the grounds of political opinion may arise in different ways. Such discrimination may (inter alia) arise because –

(a) the discriminator does not approve of the actual political views or activities of an individual; or

(b) the discriminator wants to advance a political viewpoint of his own;

(c) the discriminator misinterprets or misunderstands the political viewpoint of the individual and does not like that misunderstood viewpoint;

(d) the discriminator wants to favour others whose political opinions or perceived political opinions is more in tune with his own viewpoint.

[3] In McKay v. Northern Ireland Public Service Alliance [1994] NI 103 Kelly LJ considered that there is no difficulty as to the meaning of the word "opinion" and none in the word "political". That case must be read in context. In McKay the Court of Appeal was considering the lower tribunal's conclusion that, in its statutory context, "political opinion" referred to an opinion with some connection or correlation between religion and politics in Northern Ireland. The Court of Appeal, rejecting that argument, showed how a wider rather than a narrower interpretation must be given to the phrase.

[4] In Gill v Northern Ireland Council for Ethnic Minorities [2001] NIJB 289 Carswell LCJ relied on the broad definition given by Kelly LJ in McKay. He stated that –

> "The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party philosophy or ideology and which may predispose him again him."

This clearly cannot have been intended to be an exhaustive definition of discrimination in this context since, as seen above, political discrimination can occur in different ways and can occur even if the victim has no association with a political party, philosophy or ideology. The word "association" must itself be interpreted widely and cannot be restricted to an active, actual or particular association with a party or political viewpoint but includes actual or perceived commitment of the intellect to a political viewpoint.

[5] Much of the debate on the appeal turned on the question whether the respondent's views related to political opinions in the sense of being related to the conduct of the state or matters of public policy or whether they were views that related to methods, in the sense used by Carswell LCJ in Gill. I agree with the Lord Chief Justice that in Gill the Court of Appeal was not seeking to lay down a universally applicable rule that a view as to the method by which a particular cause should be advanced could never qualify as a political opinion. To take a simple example, an opinion that in the running of the state's health service the state should require certain people to pay for their own treatment or contribute to a private insurance scheme, on one view, would be an opinion as to the method of funding the health service. It would also clearly represent a political opinion. On the facts of Gill the court concluded that a difference of view on the method of advancing the objects of NICEM was more truly a viewpoint on method than a political opinion even if some people might seek to portray it as such. Depending on the facts, an opinion on methods of achieving certain results may qualify as being truly a political opinion.

[6] The Tribunal's decision to determine at a pre-hearing, effectively as a preliminary point, the question whether the respondent's political opinion came within the ambit of the 1998 Order focussed on the alleged victim of the alleged discrimination and addressed the question whether his views were a political opinion falling within the legislation. This directed attention to the wrong question or, more accurately, directed attention to only part of the overall question which the Tribunal had to decide which was whether the appellant discriminated on the ground of political opinion. It also presupposed that the viewpoint in question was a political opinion though not necessarily one falling within the legislation.

[7] The dangers posed by inappropriate preliminary issues are pointed out in Tilling v. Whitman [1980] AC 1. At 17 Lord Wilberforce said –

> "I, with others of Your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings."

Lord Scarman at 25 said –

> "Preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense."

Unless a point of law, if decided one way, is going to be decisive, a preliminary point will rarely be appropriate (see Romer LJ in Everett v. Ribbands [1952] 1 QC 198 at 206.) Tribunals, accordingly, must approach with caution and care the question whether a preliminary issue should be ordered. I agree with the Lord Chief Justice that in this instance the question framed for the pre-hearing was not an appropriate preliminary issue. I, too, would remit the case to the Tribunal for hearing on all the substantive issues raised by the respondent's claim.