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Judgment: approved by the Court for handing down | *Delivered:* **29/6/07**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

COLIN SIMPSON ARTHUR

Appellant;

-and-

NORTHERN IRELAND HOUSING EXECUTIVE
and

SHL (UK) LIMITED

Respondents.

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Before Campbell LJ, Sheil LJ and Weatherup J

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CAMPBELL LJ

[1] The appellant, Colin Simpson Arthur, suffers from dyslexia and in December 2001 he applied to the Northern Ireland Housing Executive for appointment as a Graduate Management Trainee. He was unsuccessful and on 27 April 2002 he complained to an Industrial Tribunal that he had suffered unlawful discrimination on the grounds of disability contrary to the Disability Discrimination Act 1995, as amended. The tribunal found that reasonable adjustments had been made for Mr Arthur in the arrangements for short listing candidates and dismissed his complaint of unlawful discrimination.

[2] At the request of Mr Arthur the tribunal stated a case for the opinion of this court on the following questions;

(i) Did the tribunal err in law in failing to draw an inference of unlawful discrimination from the

failure of the Executive to apply its Code of Practice?

(ii) Did the tribunal err in its application of the decision in *Archbald v Fife County Council* [2004] 4 All ER 203?

(iii) Did the tribunal err in law in its application of the burden of proof finding that Mr Arthur had not established facts from which an inference of discrimination by the Executive could be drawn?

(iv) Given the findings of facts set out in the decision and in the case stated was the decision of the tribunal one which no reasonable tribunal directing itself properly on the law could have reached?

[3] It was accepted by the Executive in the proceedings before the tribunal that dyslexia is a disability within the meaning of the Disability Discrimination Act 1995 as amended ("the Act").

The facts

[4] There were 770 applicants for 15 graduate management trainee posts with the Executive and it carried out an initial sift which reduced the number of candidates to 446. It was decided to use psychometric tests to reduce this pool of 446 candidates to one of 60 or 70 for interview. To assist it in running the recruitment programme the Executive used the services of SHL (UK) Limited, an internationally recognised organisation, to administer the psychometric tests. It fell to SHL to make any adjustments in the tests that were required to meet the needs of candidates with a disability.

[5] Mr Arthur had not answered the question in the application form where candidates were asked if they had a disability. In response to another question he said that "it may be necessary to provide extra time for any aptitude tests." The tribunal held that this was sufficient to make the Executive aware that he had a disability. SHL became aware of his disability when he telephoned them about it and they in turn told the Executive that he had a disability before the testing procedure began.

[6] In a follow up telephone call SHL discussed with Mr Arthur the level of adjustment that was appropriate. They did so after they had taken advice from Ms. Helen Barron, a clinical psychologist working for SHL in London

and whose responsibilities include the superintendence of equal opportunities policies.

[7] The evidence before the tribunal was that the dyslexia from which Mr Arthur suffers is in the range of mild to moderate and when he was at university he was allowed extra time to complete examinations. He agreed with SHL that he be given 20% extra time to complete the psychometric tests.

[8] Mr Arthur and another candidate with a disability sat the test on a different date to the other candidates and they did so under more relaxed conditions.

[9] Two clinical psychologists gave evidence before the tribunal. Ms Barron was called on behalf of SHL and Professor Davidson on behalf of Mr Arthur. Ms Barron said that there were three options that she regarded as appropriate in the case of Mr Arthur. These were;

> (i) To allow him to go through to the interview stage without sitting the psychometric test
>
> (ii) To test him and offer him an interview whatever score he obtained
>
> (iii) To use the test for short listing.

[10] Ms Barron and Professor Davidson were both satisfied that the test could be modified in such a way as to suit Mr Arthur though Professor Davidson expressed concern that modification could compromise the validity of the test.

[11] When the test was marked Mr Arthur came at number 230 out of 446 candidates with a score of 98. The lowest score obtained by a candidate was 55 and it was agreed by both experts that Mr Arthur's result was in keeping with his academic ability. As those candidates who scored less that 117 were not invited for interview Mr Arthur was excluded.

[12] In 1993 the Executive published, as part of its equal opportunities policy, a code of practice entitled "The employment of people with disabilities". Paragraph 5 of the code which is in a section dealing with specific action in relation to recruitment reads;

> (i) 5.6.1 Testing will only be applied to disabled candidates where appropriate. Special administrative arrangements will be made for testing applicants with a hearing or sight impairment (or those with other types of disability should this be necessary).

(ii) 5.6.2 Tests will be used as a source of information for the panel but not as a short listing device for applicants with disabilities.

(iii) 5.6.3 Guidance on the use of tests with disabled applicants particularly those with a sensory or communication disability should be sought from the policy unit.

[13] The existence of the code and the policy contained in this paragraph was not brought to the attention of SHL by the Executive. As a result it was not applied in relation to the application by Mr Arthur and the other candidate with a disability.

[14] Ms Barron conceded at the hearing that the possibility of proceeding straight to interview with or without a test would have been appropriate for Mr Arthur, however she still regarded the adapted test as appropriate. Professor Davidson accepted that if he had been permitted to go straight to the interview stage it would have given Mr Arthur a "differential boost" though he still regarded it as his preferred option.

The findings of the Tribunal

[15] The tribunal was satisfied that the adjustments that had been made to the test put Mr Arthur on the same footing as other non-disabled candidates. They decided that the Executive was not required to treat him more favourably than candidates without a disability to the extent of excusing him from sitting the test.

[16] It was noted by the tribunal that an inference of unlawful discrimination may be drawn from the failure of an employer to implement a code of practice. However it was satisfied that on the facts such an inference could not be drawn. It decided that the issue for it was not whether there had been a breach of the Executive's policy, but whether there had been a breach of the duty to make reasonable adjustments pursuant to Art 6(1) of the 1995 Act. It had to consider whether the respondents had in fact taken such steps as were reasonable in all the circumstances of the case to remove the substantial disadvantage.

[17] The tribunal concluded that SHL had made reasonable adjustment for Mr Arthur so that he did not suffer disadvantage and that the facts did not suggest that he required any further adjustments to be made. It "did not consider that an inference of unlawful discrimination on grounds of Mr Arthur's disability could be drawn solely from the failure of the Housing Executive to implement its policy and code of practice. The tribunal did not

consider that the claimant had established facts from which an inference of discrimination could be drawn".

The legislation

[18] Section 4 of the Act makes it unlawful for an employer to discriminate against a disabled person in the arrangements which he makes for the purpose of determining to whom he should offer employment. It is provided by section 5(1) that an employer discriminates against a disabled person if for a reason which relates to the disabled person's disability, he treats him less favourably.

[19] By reason of his dyslexia the tests put Mr Arthur at a substantial disadvantage in comparison with others who were not disabled and s.6(1) of the Act placed a duty on the Executive to take such steps as were reasonable, in all the circumstances, for it to take in order to prevent the test having that effect. The Act goes on to provide examples of steps which an employer may have to take in relation to a disabled person to prevent the arrangements placing that person at a substantial disadvantage. One of these is to modify procedures for testing or assessment. (s.6(3)(j)).

[20] This duty was on the Executive and anything done by SHL is to be treated for the purposes of the Act as having been done by the Executive. (s. 58(2)). A person who knowingly aids another person to do an act made unlawful by the Act is to be treated for the purposes of the Act as himself doing the same kind of unlawful act. (s. 57(1)).

[21] In determining whether it is reasonable for an employer to have to take a particular step in order to comply with this duty regard is to be had to a number of matters in particular. These include the extent to which taking the step would prevent the effect in question and the extent to which it is practicable for the employer to take the step. (s. 6 (4)).

[22] The Act makes it clear that *subject* to the provisions of section 6 nothing is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others. (s 6 (7)).

[23] Section 17(1C) deals with the onus of proof and is in these terms;

> "Where, on the hearing of a complaint under subsection (1), the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act".

The argument for the appellant

[24] Mr Macdonald QC submitted that a duty lay on the Executive as employer to take such steps as were reasonable to prevent the arrangements it made from placing Mr Arthur at a substantial disadvantage. It was therefore for the Executive to provide evidence of the steps that were available to it so as to allow the tribunal to assess the reasonableness of the step that it had taken. The Executive did not call any evidence and, Mr Macdonald submitted, it was not for SHL to give evidence of the steps it was able to take. If, for example, the Executive had followed its own policy and code in relation to Mr Arthur the test would have been used only for information purposes and not as a short listing device. This would have had the effect of removing completely any disadvantage from Mr Arthur. In so far as this may be said to have put Mr Arthur at an advantage counsel relied on a passage in the opinion of Lord Roger in *Archibald v Fife Council* [2004] IRLR 651 (at para [30]) where he said that the opening words of s6 (7) show that there may indeed be a duty on the employer under s.6 to take steps even if these involve treating the disabled person more favourably than others.

[25] Mr Macdonald contended that in accordance with the guidance given by Gibson LJ in *Wong v Igen* [2005] ICR 931 the questions that the tribunal should have asked itself were;

(i) Leaving out of account any explanation relied upon by the Executive are the facts that have been established by Mr Arthur facts from which the tribunal could conclude that the Executive has acted unlawfully in that it has failed to make reasonable adjustments as required by s.6?

(ii) If so has the Executive proved that it did not act unlawfully?

[26] If the tribunal decided against the Executive then it would go on to consider the position in relation to SHL Instead of adopting this course the tribunal reversed the two stages and asked the second question first and having answered it in the affirmative took this into account in answering question 1.

[27] It was submitted that as a result the tribunal had misdirected itself and come to a conclusion that was not open to it to reach at the stage at which it did so and that its decision was therefore perverse.

The argument for the respondent

[28] Mr David Dunlop (who appeared on behalf of the Executive) submitted that the appellant must prove facts which establish all of the constituent

elements of s6(1) and not just two of them. To prove disability and a substantial disadvantage, as Mr Macdonald had suggested, does not suffice. This does not establish an unlawful act as it merely establishes two parts of the three stage test contained in s 6(1) viz. disability, a substantial disadvantage and a substantial disadvantage that is not removed by the reasonable steps taken by the employer.

[29] Counsel submitted that it was open to the Executive to rely on the evidence of Ms. Barron in support of its case that the substantial disadvantage had been removed. There may have been other ways in which the disadvantage could have been removed but this does not permit Mr Arthur to make the case that it should have been removed in the way which he regarded as more advantageous to him.

[30] Mr Dunlop referred to a passage in the decision of the tribunal where it concluded that the adjustment made for Mr Arthur allowing him 20% extra time removed the substantial disadvantage to him in the psychometric test and therefore SHL made reasonable adjustments for Mr Arthur in all the circumstances of the case. This he suggested was a finding of fact that the tribunal was entitled to make and one that an appellate court should be slow to overturn. Having reached this conclusion that is the end of the matter. As Lord Hope said in *Archibald* at para [15];

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies."

Conclusion

[31] In *Wong* v *Igen Ltd and ors* [2005] 3All ER 812 Gibson LJ referred to a two stage process which requires the complainant to prove facts from which a tribunal could conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. At this first stage it is to be assumed that there is no adequate explanation. If those facts are proved the burden of proof shifts to the respondent to prove no breach of the principle of equal treatment.

[32] Gibson LJ points out that at the first stage the tribunal is looking at the primary facts to see what inferences of secondary fact could be drawn from them and he mentions that inferences *may* also be drawn from any failure to comply with any relevant code of practice.

[33] Elias P. said in *Laing v Manchester City Council* [2006] 1519 at para 71;

> "There still seems to be much confusion created by the decision in *Igen* [2005] ICR 931. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race."

[34] Elias P continued at para 73 as follows;

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case."

[35] And at para 75;

> "The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race."

[36] Mummery LJ in *Madarassy v Nomura International Plc* [2007] IRLR 246 said;

> "*Igen v Wong* did *not* decide that a tribunal commits an error of law by omitting to repeat the judicial guidance in its decision or by failing to work through the guidance paragraph by paragraph. The Court of Appeal expressly warned against this possible misuse of the guidance: see paragraph 16. Omitting to refer to

> the guidance or to apply it may increase the risk of errors of law in a decision but such an omission is not in itself an error of law on which to found a successful appeal."

[37] We do not accept that this tribunal misdirected itself as to the significance of the code. It noted that an inference of unlawful discrimination may be drawn from the failure of an employer to implement its code of practice but it was satisfied on the facts established by Mr Arthur that such an inference could not be drawn. It regarded the measures in the code as having the status of possible adjustments however, it decided that the adjustments made for Mr Arthur put him on the same footing as the other non-disabled candidates.

[38] The tribunal stated the position correctly at paragraph 6 of its decision where it said;

> "However the issue for the tribunal was not whether there had been a breach of the NIHE's policy and code of practice for people with disabilities but whether there had been a breach of the duty to make reasonable adjustments pursuant to article 6(1) of the 1995 Act."

[39] The complaint made by Mr Arthur is that the tribunal went directly to the second stage in *Igen*. As Elias P. pointed out in *Laing* at paras.[76] and [77]

> " … where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever. Indeed it is important to emphasise it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something that tribunals will have to bear in mind if they miss out the first stage."

[40] The tribunal in the present case assumed that the burden had passed as it considered whether the Executive had fulfilled the duty placed on it to take such steps as it was reasonable for it to take in order to prevent the test putting Mr Arthur at a substantial disadvantage in comparison with those who were not disabled.

[41] It concluded that the Executive had done so. If the code had been implemented Mr Arthur would have proceeded to the short list without sitting the test. If, as the tribunal found, Mr Arthur was no longer at a substantial disadvantage, to use Lord Hope's words in *Archibald,* the end had been reached. It was not necessary in the view of the tribunal to treat Mr Arthur any more favourably by following the code in order to remove the disadvantage which was attributable to his disability.

[42] In our judgment the tribunal did not err in law and the conclusion that it reached is not one to which no reasonable tribunal could have come. Each of the questions posed in the case stated is answered in the negative.