Neutral Citation no. [2004] NICh 6 | *Ref:* **MORF4185**

Judgment: approved by the Court for handing down | *Delivered:* **22.06.04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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BETWEEN:

DEPARTMENT OF HEALTH, SOCIAL SERVICES & PERSONAL SAFETY

Plaintiff;

-and-

STELLA STACEY

Defendant.

_____

MORGAN J

[1] The defendant is a civil servant employed in the plaintiff department. Between 2 September 1996 and 27 June 2000 she had sick leave totalling 358 days. On 2 May 2000 she claims that she was advised that once she reached 365 days sick leave she would receive a lower rate of pay in respect of periods off sick. She says that 176 days of her sick leave were pregnancy related and that 114 days were possibly pregnancy related. She contends that the proposed treatment of her by the plaintiff amounted to unlawful discrimination and was contrary to the Equal Pay (NI) Act 1970 and all relevant European law.

[2] The application was listed for hearing before an industrial tribunal on 19 April 2004. A short period prior to the proposed hearing date counsel for the plaintiff became aware that the defendant intended to rely on the document with which these proceedings are concerned.

[3] It appears that in or about the time that she launched her application before the industrial tribunal the defendant approached a colleague in the personnel office of the department for leaflets relating to maternity and pregnancy rights. He had provided her with materials including a document in respect of which, it is agreed, the plaintiff was entitled to assert legal advice privilege.

[4] The official who supplied the document and the defendant both held their posts subject to the Northern Ireland Civil Service Terms and Conditions paragraph 956 of which provides:

> "956. a. Civil servants exercise care in handling the information that has come into their possession in the course of their official duties and should not forget that they are employed for the purposes of the Department in which they are now serving. They owe duties of confidentiality and loyal service to the Crown.
>
> d. All civil servants owe the Crown, as their employer, a duty of confidentiality. Whether or not the criminal law applies they must protect official information which is held in confidence."

[5] The supply of the document to the defendant was without authorisation and in breach of the duty of confidence owed by the official to the plaintiff. The defendant would not, of course, have been aware of the breach of confidence until she read the document but thereafter it would have been apparent to her that it had been supplied in breach of the duty of confidence owed to the plaintiff.

[6] Although no orders for discovery had been made in the industrial tribunal proceedings the defendant's counsel, Miss Higgins BL, properly disclosed to Mr O'Reilly BL, representing the plaintiff, that she intended to rely on the document at the hearing. In those circumstances Mr O'Reilly BL applied to adjourn the proceedings on 19 April 2004 in order to enable this application to be made.

[7] On 5 May 2004 the plaintiff launched these proceedings seeking an injunction to restrain and prohibit the defendant from using, producing or referring to the document.

The Arguments

[8] For the plaintiff Mr Coll BL who appeared in these proceedings submitted that the court will always assist a person whose confidential information has been disclosed in circumstances where it ought not to have been. Where the remedy was sought in aid of legal advice privilege no balancing test was appropriate because of the fundamental nature of the privilege. If it was appropriate to carry out any balancing exercise the fundamental nature of the privilege outweighed the competing considerations.

[9] Miss Higgins BL for the defendant submitted that the benefit of legal advice privilege was lost once the document came into the hands of the defendant. The plaintiff could only prevent publication and use of the document by invoking the equitable doctrine of confidence and accordingly the application for the injunction had to be determined by balancing the legitimate interest of the plaintiff in seeking to keep confidential information suppressed and the legitimate interest of the defendant in seeking to make use of it.

[10] Secondly the defendant contends that the law of confidence and privilege must in any event be interpreted so as to be compatible with article 6 of the ECHR. It is accepted that the document is of little or no assistance on the liability issue but it is argued that it would be of assistance to the defendant on damages. To deprive her of the opportunity to adduce this evidence violated her right to a fair trial and interfered with her right to an adequate remedy for alleged breaches of article 6 of the Equal Treatment Directive 76/207.

[11] Thirdly the defendant indicated that it was her intention to rely on a circular dated 16 October 2001 from the Employment Conditions and Statistics Division of the Cabinet Office to, among others, the personnel director of the Northern Ireland Office that gave advice in respect of absences due to pregnancy related illnesses as follows:

> "**ABSENCES DUE TO PREGNANCY RELATED ILLNESSES**
>
> Issue: The treatment of absences due to pregnancy related illnesses occurring outside the period of confinement.
>
> Action: That departments and agencies review their policies on absence management to ensure that any absence occurring as a result of an illness due to pregnancy is not counted towards an individual entitlement to contractual sick pay or for the purposes of inefficiency procedures.
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> Timing: Immediate.
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> **Introduction**
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> 1. Following the recommendations of the Managing Attendance report and the Treasury review of Ill Health Retirement departments and agencies

have introduced robust attendance policies aimed at reducing levels of absenteeism and ill health retirement. These often include the use of trigger points, early referrals to occupational health providers and ultimately, in cases where ill health retirement is not appropriate, dismissal due to inefficiency.

The potential for discrimination

2. However such absence policies should not be applied mechanically and consideration should be given to the needs of specific groups. One example concerns absences that occur as a result of a pregnancy related illness outside the period of confinement. If these absences are treated no differently from absences generally a potential claim for sexual discrimination can arise due to the individual suffering a financial loss or being the subject of inefficiency procedures.

Current legal advice

3. Although there has been no legal ruling on this particular point a number of departments have had claims for sexual discrimination made against them. None of these cases reached an Employment Tribunal, but consistent legal opinion was given in each instance. This was that where a department or agency counted absences that occurred outside the period of confinement but were as a result of a pregnancy related illness for the purposes of entitlement to contractual sick pay or inefficiency procedures then there was a strong likelihood that an employee could bring a successful claim against that department or agency for sexual discrimination.

Next steps

4. In the absence of a definitive legal ruling on this subject departments and agencies are advised not to county pregnancy related illnesses towards entitlement for contractual sick pay or inefficiency procedures."

[12] The defendant asserted that in light of that advice and in particular the reference to consistent legal opinion it constituted misfeasance in public office for the plaintiff to treat the Defendant as it did and further that the pursuit of its defence in the industrial tribunal was designed to mislead the tribunal as to the law. In those circumstances the plaintiff could not come to the court for an equitable remedy with clean hands.

[13] Finally the defendant submitted that there had been delay of such a nature that the plaintiff should in any event be denied a remedy. I do not find any merit in that point. The proceedings were issued just over 2 weeks after the adjournment. It is agreed that the application before the tribunal will not get another date until after the summer. In those circumstances I see no basis upon which to criticise the plaintiff for delay.

The loss of privilege

[14] Legal advice privilege is a rule of evidence that protects a party to litigation from being obliged to disclose documents containing advice on legal rights and obligations that the client has obtained from his lawyers. The justification for the rule is based on public interest considerations and has been most authoritatively set out by Lord Taylor in R v Derby Magistrates' Court, ex p. B (1995) 4 All ER 526 at 540j:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

[15] Once, however, a document, in respect of which a party has not waived privilege, has been seen by an opposing party there is no rule of evidence to prevent the other party from leading secondary evidence of the document if relevant. That is the effect of Calcraft v Guest [1898] 1 QB 759. In those circumstances it may be necessary to rely upon the law of confidence in order to protect the privilege as explained in Lord Ashburton v Pape [1913] 2 Ch 469.

[16] Where as here a party invokes the equitable doctrine of confidence it is necessary to strike a balance between the public interest underlying legal advice privilege and the public interest in ensuring that all relevant information is available and admissible in adversarial proceedings. The proper approach to that balancing exercise was set out by the Privy Council in B and others v Auckland District Law Society and Another [2003] AC 736. In that case privileged documents had been disclosed for a limited purpose. The other party indicated that it intended to use the documents in order to pursue disciplinary proceedings. In delivering the opinion of the Privy Council Lord Millett said:

> "71. The fact that the claim to recover the documents is made on equitable grounds does not mean that it must yield to an overriding countervailing public interest. The documents are both confidential and privileged. Whether a claim to the return of such documents is based on a common law right or an equitable one, the policy considerations which give rise to the privilege preclude the court from conducting a balancing exercise. A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he consent in future to disclosure for a limited purpose those limits will be respected: see Goddard v Nationwide Building Society [1987] QB 670, 685, per Nourse LJ."

[17] In this case the disclosure to the defendant was unauthorised and I have found that it would have been readily apparent to her that the material was disclosed to her in breach of confidence as soon as she read it. In those circumstances B and others suggests that the balancing exercise comes down strongly in favour of the Plaintiff.

[18] The Defendant relied upon the decision of Scott J in Webster v James Chapman & Co (a firm) [1989] 3 All ER 939. That was a case where a plaintiff had disclosed an expert report in error. The plaintiff's solicitors sought return of the report and an undertaking that the defendant would make no use of it. In refusing to grant the application Scott J said:

> "The law regarding confidential information is …. now relatively well settled. The court must, in each case where protection of confidential information is sought, balance on the one hand the legitimate interests of the plaintiff in seeking to keep the

> confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information. There is never any question of an absolute right to have confidential information protected … Whether the unauthorised use of confidential information or of confidential documents will be restrained is essentially discretionary and must … be dependent on the particular circumstances of the particular case. The privileged nature of the document in question is bound to be a highly material factor but would not … exclude from the scales other material factors."

[19] The breadth of the discretion suggested in this passage appears inconsistent with the views of the Court of Appeal in Goddard v Nationwide Building Society [1986] 3 All ER 264 and was expressly disapproved by the Court of Appeal in Pizzey v Ford Motor Co Ltd [1993] CA Transcript 315. I do not consider that Webster should be followed on this point.

[20] The second decision upon which the Defendant relied was ISTIL Group v Zahoor [2003] 2 All ER 252. Lawrence Collins J set out five principles which he drew from the authorities about which there was no dispute but Miss Higgins BL placed reliance upon the sixth:

> "Sixth, other public interest factors may still apply. So there is no reason in principle why the court should not apply the rule that the court will not restrain publication of material in relation to misconduct of such a nature that it ought in the public interest to be disclosed to others: see *Initial Services Ltd v Putterill* [1967] 3 All ER 145 at 148, [1968] 1 QB 396 at 405 per Lord Denning MR, who quoted Page Wood V-C in *Gartside v Outram* (1856) 26 LJ ch 113 at 114: 'There is no confidence as to the disclosure of iniquity'. But the defence of public interest is not limited to 'iniquity': see *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417, [1985] QB 526, applying *Fraser v Evans* [1969] 1 All ER 8 at 11, [1969] 1QB 349 at 362, where Lord Denning MR said that iniquity is merely an instance of just cause or excuse for breaking confidence. See also *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 649-650, [1990] 1 AC 109 at 268-269 per Lord Griffiths and *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2001] 4 All ER 666, [2002] Ch 149, approving *Hyde Park Residence Ltd v*

Yelland [2001] Ch 143 at 172, [2002] 3 WLR 215 at 240-241 per Mance LJ."

[21] As set out at paragraph 12 above the Defendant submitted that the Plaintiff was guilty of misfeasance in public office by its treatment of the Defendant. That claim is based on the proposition that the Plaintiff either knew that it was unlawful to treat the Defendant as it did or was recklessly indifferent as to whether it was unlawful to do so. It is apparent that neither the court nor the defendant is privy to the advice that the Plaintiff has received in respect of the lawfulness of the treatment of the Defendant or the prospects of a successful defence of the claim. I can make no assumptions about that advice to which legal advice privilege applies. I cannot accept, therefore, the starting point for the defendant's submission on this aspect of the case.

[22] The height of the Defendant's case on this point was the Cabinet Office letter. The fact that there was a strong likelihood that an employee could bring a successful claim could not in my view establish either that a power was being used for an improper purpose or that an officer acted with reckless indifference as to whether he had the power so to act. The Defendant is entitled to advance its view of the law at the hearing. The Plaintiff is entitled to explore the extent to which there has been departure from the Cabinet Office advice. It may be that the plaintiff will seek to establish whether legal advice was obtained in light of the Cabinet Office circular and perhaps even whether it was followed but I find that no case of misfeasance in public office is established on the materials before me. Accordingly consideration of the breadth of the sixth principle set out by Lawrence Collins J does not arise in this case.

[23] I have also considered the submissions on article 6 of the ECHR and the same article of the Equal Treatment Directive 76/207. In my view the public interest in protecting legal advice privilege arises from the need to secure the conditions necessary for a fair trial. The Defendant will be able to advance her case in respect of injury to feelings. She is not deprived of a fair trial or an adequate remedy because she cannot rely upon privileged documents.

[24] Accordingly I consider that the Plaintiff is entitled to the remedy sought.