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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEAL BY WAY OF CASE STATED FROM A DECISION OF THE FAIR EMPLOYMENT TRIBUNAL

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DERMOTT McNALLY

Applicant/Respondent;

-and-

LIMAVADY BOROUGH COUNCIL

Respondent/Appellant.

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Before Kerr LCJ, Campbell LJ and Sheil 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 whereby it found that Limavady Borough Council had been guilty of victimisation of its former economic development officer, Dermott McNally, within the meaning of article 3(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998.

Statutory Background

[2] In so far as is material article 3 of the 1998 Order provides:

> "3. - (1) In this Order "discrimination" means –
> ….

(b) discrimination by way of victimisation;

and "discriminate" shall be construed accordingly.
.....

(4) A person ("A") discriminates by way of victimisation against another person ("B") in any circumstances relevant for the purposes of this Order if –

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (5).

(5) The reasons are that –

(a) B has –

(i) brought proceedings against A or any other person under this Order …".

[3] Thus a person is guilty of victimisation of another if, for any of the reasons specified in paragraph (5) of article 3, he treats that person less favourably than he would treat someone else in those circumstances. The reasons include the bringing of proceedings by the person who claims to have been victimised against the person who is alleged to have victimised him or against any other person. In the present case, therefore, what was at stake was whether Mr McNally had been treated less favourably than another would have been treated because he (Mr McNally) had taken proceedings against the council.

Factual Background

[4] Mr McNally was appointed economic development officer of the council in April 1998. Subsequently he presented seven complaints of discrimination and victimisation to the Fair Employment Tribunal. These related to a period of employment from October 1999 to some time in 2002. They included claims that the council, together with the Local Government Staff Commission and Derry City Council, had unlawfully discriminated against Mr McNally on the grounds of his religious belief/political opinion contrary to the FET Order.

[5] The originating applications were heard together and the Tribunal dismissed all but one of Mr McNally's claims. The single claim in which he

was successful related to an incident on 23 April 2001. On that date Mr McNally was instructed to attend a disciplinary hearing arising out of his refusal to carry out an investigation into the behaviour of a Mr Trainor, a member of staff for whom he had line management responsibility. He had not been able to conduct that investigation, Mr McNally said, because Mr Trainor had featured in his (Mr McNally's) complaints against the council. The disciplinary hearing into Mr McNally's refusal to carry out the investigation into Mr Trainor's behaviour was conducted by the Chief Executive, Mr Stevenson, who was Mr McNally's line manager. The disciplinary hearing took place in October 2001. The Tribunal found that Mr Stevenson's presiding at the disciplinary hearing amounted to victimisation. It said this in paragraph 18 of its decision: -

> "The applicant was sent a letter on 23 April 2001 stating that the council considered his actions were major misconduct. There was a disciplinary hearing and it was conducted by Mr Stevenson, as the applicant's line manager. The Tribunal viewed this action with concern. When we considered the respondents' disciplinary procedure it was evident that there was another avenue open to the Chief Executive and this was to appoint a nominee. The nominee could have been another head of department or someone who was not as closely involved with the applicant as the Chief Executive was. He was fully aware of the applicant's claims to the Fair Employment Tribunal. In Mr Stevenson's evidence to the Tribunal, there was no consideration of using anyone else to discipline at this stage. The Tribunal is aware that the Chief Executive was in a very difficult position by this stage because he was technically the applicant's line manager but in the particular circumstances where he knew the difficulty and the potential claims, the tribunal questions why he did not nominate someone else to discipline the applicant. It had been done before in the applicant's previous incident, and it was done for Mr Trainor later. In conclusion we find that he did treat the applicant less favourably than he would have treated someone who had not brought a claim. He knew the difficulties that his disciplinary action was going to present and still he carried on with it. The Tribunal finds that this action by the Chief Executive does amount to victimisation and it did result in a formal written warning which was given on 16 October 2001 and was the subject of application 37/02FET."

[6] Claim 37/02FET was an associated claim in which Mr McNally complained that the disciplinary action taken against him in April 2001 (as opposed to the decision of Mr Stevenson to preside at that hearing) constituted discrimination and/or victimisation. The disciplinary hearing into Mr McNally's refusal to carry out the investigation into Mr Trainor's behaviour concluded that he should have done so and issued a written warning to him. Mr McNally appealed this finding; an appeal panel of councillors dismissed the appeal and he appealed again to an Independent Appeals Committee constituted by the Labour Relations Agency which decided that the written warning should be reduced to a verbal warning. The Tribunal dismissed the complaint that the finding of the disciplinary hearing constituted discrimination and/or victimisation.

[7] The finding that there had been victimisation was based exclusively therefore on the fact that Mr Stevenson had presided at the hearing of the complaint that Mr McNally should have conducted the investigation into Mr Trainor's behaviour. As we have said, the Tribunal did not consider that the finding made at the hearing amounted to discrimination or victimisation. One therefore has the somewhat unusual – not to say, anomalous – situation that although the Tribunal concluded that by presiding at the hearing, Mr Stevenson victimised Mr McNally, he did not do so by the finding that he made. It is this conclusion that the council seeks to challenge in this appeal.

[8] At the council's request the Tribunal stated a case for the opinion of the Court of Appeal and identified the following three questions as requiring determination: -

> "1. Was the Tribunal correct in law in finding that Mr Stevenson had victimised the respondent by acting as the respondent's disciplinary authority rather than nominating a third party considering that disciplinary action was endorsed by an independent appeals procedure whose finding were accepted by the Fair Employment Tribunal leading to the dismissal of the respondent's claim?
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> 2. Was there sufficient evidence for a Tribunal properly directing itself to find that the respondent was victimised?
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> 3. Was the decision in favour of the respondent in relation to claim 377/01 wrong in law as being unreasonable and illogical in view of the finding that the applicant's claims in 37/02 and

> 151/02 were determined as being unfounded despite the fact that the grounds for discipline were the same as in claim 377/01."

The arguments

[9] Counsel for the appellant, Mr McCollum QC, submitted that three conditions had to be fulfilled in order to show victimisation for the purpose of article 3 (4). Firstly, it must be shown that Mr McNally had acquired protected status by having taken proceedings as stipulated in article 3 (5). (It was accepted that this condition had been fulfilled in the present case). The second condition was that Mr McNally had been treated less favourably than others had been or would have been treated. Finally, it had to be shown that the less favourable treatment had occurred *because* Mr McNally had taken proceedings under the FET Order.

[10] On the second condition Mr McCollum suggested that in acting as the council's disciplinary authority, Mr Stevenson was following standard practice. He was Mr McNally's line manager and, therefore, it was incumbent on him to carry out this task. The two previous instances when someone other than the line manager performed this duty occurred in unusual circumstances. They did not provide (nor should they have been construed by the Tribunal as providing) a precedent for the disciplinary hearing at which victimisation had been held to have occurred. In the first of these Mr Stevenson was a witness to what had occurred and plainly he could not have presided at the hearing. In relation to the second the line manager was Mr McNally and it was because he had refused to conduct the disciplinary hearing that a substitute had had to be found. It was submitted that there was no evidence that other employees of the appellant who were disciplined for failing to carry out a reasonable instruction had been or would have been treated any differently. In similar circumstances a line manager would have presided at the disciplinary hearing of any other employee. The factual foundation for the contrary finding made by the Tribunal simply did not exist, Mr McCollum said.

[11] Counsel further submitted that it had not been shown that Mr McNally had suffered any detriment by reason of Mr Stevenson's having presided at the disciplinary hearing. The Tribunal had held that the finding of the hearing was not discriminatory. It was illogical therefore, Mr McCollum said, to hold that the award of a written warning was a detriment. He accepted that it would have been open to the Tribunal to hold that the *mere fact* of having a case adjudicated by someone not perceived to be impartial was a detriment but this was not the basis on which the Tribunal had concluded that there had been victimisation.

[12] Finally, Mr McCollum argued that there was no evidence from which it could be inferred that the reason Mr Stevenson either acted or failed to act was due to Mr McNally's protected status. Indeed, said Mr McCollum, the Tribunal had simply not addressed this issue. Had it done so, it was bound to have concluded that there was no material on which it could be concluded that the reason that Mr Stevenson had chosen to preside on the disciplinary hearing was that Mr McNally had taken proceedings against the council. That was never an issue in the proceedings and had not featured in the presentation of Mr McNally's case.

Conclusions

[13] The legal test for victimisation in article 3(4) of the Order contains three conjunctive conditions. Firstly, the person alleged to have been victimised must have protected status. Secondly, that person must have been treated less favourably than other persons in the same circumstances and, finally, the less favourable treatment must have occurred because the victimised person had brought proceedings against those who were guilty of the victimisation or any other proceedings under the Order.

[14] As we have said, it is not in dispute that the first condition is fulfilled. There are two aspects to the second condition. It must first be shown that there is a difference in treatment between that meted out to the complainant and that which a comparator had or would have received. The second aspect is that the difference in treatment must result in a less favourable outcome or a disadvantage to the complainant, commonly referred to as a detriment.

[15] The Tribunal fastened on the two instances where other disciplinary hearings had been conducted by someone other than the line manager as indicating that Mr McNally was the recipient of different treatment. These were not good examples in our view and could not be used to sustain the case that he had been differentially treated. The use of someone other than the line manager on both occasions had been dictated by the peculiar circumstances of the particular cases. They could not be regarded (as they appear to have been by the Tribunal) as indicative of a practice of using personnel other than line managers for the conduct of disciplinary hearings. It would have been legitimate for the Tribunal to conclude that the line manager ought not to have conducted the disciplinary hearing because of his involvement with the complaint that gave rise to it. It would also have been possible to conclude on the evidence that this would not have been done in other instances. This is not how the Tribunal approached the matter, however. Their conclusion that the other examples provided evidence of a differential practice in other like cases cannot be sustained. The impossibility of the line managers conducting the other hearings was a critical difference between those cases and the present. They could not be used as comparators.

[16] Our conclusion on the first aspect of the second condition makes it, strictly speaking, unnecessary for us to consider the second aspect but it may be helpful in future cases if we say something about the arguments presented on it. Did Mr McNally suffer a detriment by reason of any differential treatment? We agree with the concession made by Mr McCollum in answer to a question in the course of argument. He accepted that if the Tribunal had stated that the detriment arose because someone who was perceived to be less than impartial to Mr McNally had adjudicated his case, their finding would have been beyond criticism. But that is not how the Tribunal put it. It concluded that the detriment was the award of a written as opposed to a verbal warning. In our judgment that conclusion is irredeemably incompatible with the Tribunal's finding that the imposition of a written warning did not amount to discrimination or victimisation. That finding must have been predicated on the Tribunal's view that the outcome of the disciplinary proceedings was not less favourable to Mr McNally than would have been the case with another comparator. How then could he be said to have suffered a detriment? In our judgment, on the approach taken by the Tribunal, he did not.

[17] We can deal with the third limb of the test for victimisation briefly. The issue of whether Mr Stevenson was actuated to treat Mr McNally differently because he had taken proceedings against the council does not appear to have been canvassed in the course of the hearing before the Tribunal at all. It does not find expression in the Tribunal's decision and we are driven to the conclusion that this aspect of the victimisation test was simply not considered. Had the matter been addressed we feel that it is highly likely that the Tribunal would have felt unable to infer that this was the reason that Mr Stevenson decided to chair the disciplinary hearing. Given that they had decided that the award that was made did not constitute discrimination or victimisation, it is difficult to see how the Tribunal could have concluded that he had elected to preside at the hearing because Mr McNally had taken proceedings. Quite apart from that, however, the complete absence of any evidence on the subject militated strongly against such an inference.

[18] In the event, we have concluded that the decision that the council was guilty of victimisation cannot be upheld. We shall answer the first question in the case stated "No" and allow the council's appeal. We do not find it necessary to answer the other two questions.