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

Delivered: 19/05/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY DYLAN EARLY FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE MINISTER FOR
EDUCATION AND THE DEPARTMENT OF EDUCATION**

COLTON J

Background

[1] The applicant in this matter is a 36 year old school teacher.

[2] He seeks to challenge a ministerial and departmental decision of the Minister for Education and the Department of Education ("the Department") to implement what is known as the "Investing in the Teaching Workforce Scheme" ("the Scheme").

[3] His grounding affidavit in support of the application reveals a man of commendable personal attributes. Having dropped out of school at the end of sixth year due to a lack of motivation he began his working life in the Royal Mail. Because of an injury he re-engaged in education and enrolled in an ABD in environmental science and ultimately graduated from the Ulster University in 2008 having also obtained a BSC Honours in geography and commerce. He achieved a commendation in one degree and 2.1 in the other. He remained at university for a further year and earned his PGCE with citizenship.

[4] Since qualifying as a teacher he has worked almost continuously in temporary teaching positions in various colleges in Tyrone and Derry.

[5] A feature of his employment however is that he has been unable to obtain a full-time position in teaching. Understandably this is a matter of great

disappointment and frustration to him which is exacerbated by the fact that he now has a partner and daughter.

[6] Despite the obvious commitment to his chosen vocation he has spent his entire professional teaching career working in various temporary and maternity posts. Because of the length of time he has been qualified as a teacher he has now reached the teacher pay scale at “M6” for which he receives daily remuneration of £165.

[7] A feature of having reached this scale is that he sits near the top of the relevant pay scale for teachers making him more expensive to hire as a substitute teacher which might act as a deterrent for schools employing teachers who must work within restricted budgets.

[8] The scheme he seeks to challenge is best explained in the following extract from the Department of Education’s website:

“The scheme will enable up to 120 teachers aged 55 years and over on 31 March 2017 to be released from the teaching profession, at their request, providing job opportunities for up to 120 recently qualified teachers, who have qualified in the years from 2012 up to, and including, 2016.

The scheme had originally been announced in December 2015 and was intended to launch in Spring 2016; however, this was delayed following concerns in relation to the criteria for the scheme. At this time, those eligible to apply for the vacant posts created under the terms of the scheme were teachers who had graduated in 2013 up to, and including, 2016. Having listened to these concerns on 29 June 2016 the Minister announced his intention to extend the criteria to include teachers who had qualified in 2012.

Recruitment for recently qualified teachers who wished to apply for the posts which become vacant as a result of this scheme will not be advertised until all applications, from teachers aged 55 years and over who wish to be released from the profession, have been assessed and approved. Therefore, these posts will not be advertised until Spring 2017.”

Relief

[9] He seeks the following relief:

- “(a) A declaration that the decision of the Minister and the Department of Education to implement the “Investing in the Teaching Workforce Scheme” in the terms set out in Circular 2016/12 is *ultra vires*, unlawful and of no effect as being out with the competence of either of them in that the aforesaid scheme is contrary to European Union law and its implementation would therefore be contrary to Section 24(1)(b) of the Northern Ireland 1998.
- (b) An order of certiorari bringing up and quashing the decision of the proposed respondents to implement the aforesaid scheme as being out with the competence of either of them, the scheme being contrary to European Union law.
- (c) ...”

[10] The applicant’s complaint about this scheme is that it will confine new employment opportunities for full-time teachers to graduates from 2012 onwards. He will be unable to apply for any of the vacancies created and the Scheme will only benefit (as was clearly intended) young teaching graduates.

[11] His legal case is that this scheme constitutes indirect discrimination on the grounds of age, contrary to EU law and Section 24 of the Northern Ireland Act 1998 which prohibits a department or minister from acting contrary to EU law.

[12] I heard this matter as a “rolled-up” hearing on Wednesday 3 May 2017. Mr Ciaran White BL appeared on behalf of the applicant. The respondents were represented by the Attorney General for Northern Ireland, John F Larkin QC, who appeared with Mr Aidan Sands BL.

[13] I am obliged to all the counsel involved in this case for their concise, focused and helpful written and oral submissions.

[14] The benefit of those submissions is that the court can easily focus on the central issues in the case.

[15] I take the view that no issue in relation to delay or alternative remedy arises.

[16] I accept that the applicant is correct when he submits that the Scheme indirectly discriminates against him on the ground of age in that although the Scheme is not defined in terms of age, a significant majority of recently qualified teachers will be in their early to mid-twenties, and accordingly the Scheme has an adverse impact on those teachers who are outside this age group.

[17] That being so, the issue for me to determine is whether or not the respondent can justify the indirect discrimination identified.

[18] The applicant relies on the Equal Treatment Directive 2000/78/EC; Article 6(1) of which permits justifiable discrimination:

“Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, ... in order to promote their vocational integration or ensure their protection;

...”

[19] This Directive has been transposed into law in this jurisdiction by the Employment Equality (Age) Regulations (Northern Ireland) 2006 (“the 2006 Regulations”).

[20] There is no dispute about the applicable legal principles. The issue of indirect age discrimination has been considered by the Supreme Court in the case of Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15. In relation to the approach to justification the court had this to say:

“Justification

[19] The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a

legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

[20] As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, ...:

'... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, ... it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

[21] In Seldon v Clarkson, Wright & Jakes [2012] UKSC 16 the Supreme Court dealt with a case involving direct age discrimination. At paragraph 50 Lady Hale summarised the position by concluding that the aims of any measure justifying direct age discrimination must be "social, policy objectives, such as those related to employment policy, the labour market or vocational training".

[22] She went on to specifically identify nine discrete aims as being permissible by the Luxembourg courts in the context of direct age discrimination:

- “(i) Promoting access to employment for younger people.
- (ii) The efficient planning of the departure and recruitment of staff.
- (iii) Sharing out employment opportunities fairly within the generations.
- (iv) Ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas.
- (v) Rewarding experience.
- (vi) Cushioning the blow for serving employees who may find it hard to find new employment if dismissed.
- (vii) Facilitate the participation of older workers in the workforce.
- (viii) Avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned.
- (ix) Avoiding disputes about the employee’s fitness for work over a certain age.”

[23] The court added the following:

“[5] However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service ...

[6] The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen.

[7] The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is

for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued.”

Application of the principles to the circumstances of this case

[24] Are the aims pursued by the Department legitimate?

[25] The respondents have identified a number of aims of the Scheme, these being:

- “(a) A modest refreshment of the teaching workforce with up to 120 teachers leaving the profession to be replaced by an equivalent number of recently qualified teachers.
- (b) Sharing employment opportunities between generations of teaching graduates.
- (c) Promoting the exchange of expertise and new ideas within the teaching profession.
- (d) Enabling opportunity for promotion for leadership and management roles within schools, for example, where a Head of Department is released under the scheme.”

[26] Echoing Mummery LJ in R(Alias) Mr White argues that the objective of the measure in question must correspond to “a real need”.

Has the respondent established “a real need”?

[27] In a “FAQ” document accompanying the Scheme the Department says as follows:

“55. Why is recruitment and appointment restricted to those recently qualified teachers who qualified in the years 2012, 2013, 2014, 2015 and 2016, who were not in a permanent teaching post and who are registered with the GTCNI to teach by the date of taking up appointment?”

The department carried out an objective and measured approach in relation to the analysis of data which concluded that graduates who had qualified in the years 2012 up to and including 2016 have experienced the greatest difficulty in securing meaningful employment.”

[28] The relevant data was provided to the court. The significant figures relate to the percentage of graduates without an “open job record”. An “open job record” refers to employment which is permanent or significant temporary (a period of one school term or greater). From these figures it is apparent that there is a sharply increasing scale of those without such a job record as one moves from 2004 towards 2015. The percentage of graduates without an open job record who graduated in 2015 is 76.76%, 61.73% for 2014, 48.86% for 2013, 43.44% for 2012, 39.04% for 2011, 32.84% for 2010, 26.9% for 2009, 24.07% for 2008, 22.48% for 2007, 20.62% for 2006, 17.10% for 2005 and 14.71% for 2004.

[29] From these figures the Department concluded that those who have graduated between 2012 and 2016 have experienced the greatest difficulty in securing meaningful employment.

[30] Comparing the group of which the applicant is a member, namely those who have graduated in 2008, it can be seen that 75.93% have an open job record as opposed to only 23.24% of those who graduated in 2015.

[31] The applicant is critical of the aim relied upon by the respondents and says that it does not meet the actual need in relation to permanent posts for teaching graduates. He says that the real need to be addressed is the difficulty that teachers, such as he, continue to suffer in being unable to secure permanent posts. He says that this is the need which the Scheme should endeavour to address. In short he says that the Scheme proceeds from the wrong starting point.

[32] He is critical of the data in that although the object of the Scheme is to increase the number of younger persons in permanent employment the data provided makes no distinction between the levels of temporary and permanent jobs occupied by registered teachers. Further, he says that the figures are merely a “snapshot” and do not look at a pattern which may or may not have developed over a period of years.

[33] The applicant is particularly critical of the respondents when he argues that notwithstanding the stated objectives of the Scheme it is fundamentally driven by cost considerations. The Scheme’s genesis lies in the availability of funds from the Public Sector Transformation Fund (“PSTF”).

[34] Under the Fund a Department can bid for financial support for a scheme if it can be demonstrated that cost savings will be achieved. In particular it was the issue of the assessment of whether savings could be achieved which resulted in 2012 graduates being the cut-off mark for the Scheme. That this was so is demonstrated by email correspondence between the applicant and the Minister for Education who when responding to correspondence from the applicant replied in the following terms:

“Thank you for your email. I would indicate that the legal advice that we have received from a number of sources is that the scheme is legally sound, but let me explain the situation.

The scheme costs around £33m up front over the period of 2016-8 and is funded through the Public Sector Transformation Fund. This is money separate to education but one of the requirements of the fund is that it will only fund a scheme that makes greater savings to the public purse than the initial cost. That is just about doable with a max 5 year qualifying restriction, but if open ended it does not come close to paying for itself. Thus, if we proceeded under that premise then funding would be ineligible from the fund. The only alternative would be for the department to fund it itself. Not only does the department not have £33m to spend on any scheme, it would not make sense to spend £33m of education money to save schools maybe £15-20m over a number of years.

Thus, the only options are a 3 year qualification limit as originally proposed, a 5 year limit or no scheme going ahead at all. The option of an open-ended scheme simply is not doable, and if other options are ruled out, there simply will not be a scheme.”

[35] The applicant points out that one of the reasons why the Scheme does not save any funds if the cut-off period is extended beyond 2012 it is because of the fact that he and his group of teachers have reached the M6 pay scale. The applicant argues that the issue of saving costs is front and centre of this scheme. In this regard Mr White relies on the authority of Cross v British Airways Plc [2005] IRLR 423 and on paragraph 72 of the judgment:

“A national state cannot rely on budgetary considerations to justify a discriminatory social policy. An employer seeking to justify a discriminatory PCP cannot rely *solely* on consideration of costs. He can however put costs into the balance, together with all other justifications if there are any.”

[36] This is referred to as the distinction between a “costs plus” (which is permissible) and a “costs alone” approach (which is not).

[47] Mr Larkin responds that a voluntary redundancy scheme based on “least cost” in order to work within an approved budget, even though indirectly

discriminatory on age grounds, was considered to be objectively justified by the President of the Employment Appeal Tribunal in HM Land Registry v Benson and others [2012] IRLR 373. Similarly, the EAT in Braithwaite and Edie v HCL Insurance BPO Services Ltd [2015] UKEAT/0152/14/DM found that a scheme to reduce staff costs which put older staff at a disadvantage was nonetheless objectively justified.

[38] Costs are clearly a relevant factor. Mr Barry Jordan who is the Director of Education Workforce Development in the Department of Education for Northern Ireland who swore an affidavit on behalf of the respondents in this matter makes it clear that if the vacancies created were to be open to those graduating prior to 2012, to include the applicant, then the Scheme would never break even and the whole purpose of the Scheme itself could be defeated.

[39] In considering this issue I am satisfied that the objective of the Scheme is in pursuit of a legitimate aim. I accept that more information in terms of further sub-dividing the statistics into those in permanent positions and those in significant temporary positions would be helpful. The difficulty I have with the applicant's argument is that he has identified a different need. He can certainly make a case that an important need for registered qualified teachers in Northern Ireland is the amount of people in his situation who have not obtained permanent positions and who rely on repeated temporary positions. From his perspective it may well be that this is a more pressing need. However, objectively speaking it seems to me that the aim of the Scheme is a legitimate one and the need identified is a real one. Whilst one might quibble, as the applicant does, with some of the aims I am satisfied that the respondents have established that objectively speaking there exists a real need to promote access to employment for younger graduates in the teaching profession. I am also satisfied on the facts of this case that the respondents have clearly adopted a "costs plus" approach. I have already referred to the declared aims of the Scheme. These can succinctly be described as the need to address recently qualified under-employment in the teaching profession. I am satisfied that these aims are both genuinely held and legitimate.

Are the means chosen by the respondents proportionate?

[40] I adopt the test set out in **de Freitas** namely:

- (a) Is the objective sufficiently important to justify limiting a fundamental right?
- (b) Is the measure rationally connected to the objective?
- (c) Are the means chosen no more than is necessary to accomplish the objective?

[41] In considering this issue it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. As was the case in assessing whether or not there is a legitimate aim this is an objective matter to be determined by the court on an assessment of the evidence.

[42] The applicant is critical of the Department's alleged failure to look at alternative schemes such as permitting "non-RQTs" (recently qualified teachers) to opt for a reduction in their pay scale point to put them on the same level of the salary scale as "RQTs" or altering the criteria for recruitment to the permanent positions that would be created by omitting any real need or desirability for teaching experience thereby eliminating any perceived advantage that non-RQTs have in such a recruitment process and/or by adding criteria relating to matters that are to be "refreshed" by this Scheme, such as knowledge of up-to-date IT technologies, or knowledge of recent pedagogical theories and teaching methodologies, in relation to which the Department has assumed the "RQTs" have, or would have an advantage.

[43] However, what I have to examine is the Scheme itself. It seems to me that the Scheme goes no further than is necessary to achieve its stated aims. These were characterised by Mr Jordan in his affidavit as:

"A modest and time limited attempt at rebalancing the teaching workforce to assist more recent teaching graduates to obtain permanent employment."

[44] It is important to examine the actual effect of the Scheme which is being proposed. Firstly, it will create a limited number of permanent posts. Although there was some debate between the parties on this issue it is clear that in a normal year about 450 permanent positions become available each year. Whilst some of the 120 envisaged under the Scheme may well have retired in any event the fact remains that notwithstanding the Scheme the applicant should have the opportunity to apply for permanent positions which arise in the normal course of events when the Scheme is in place. For the most part the 120 jobs will be "new jobs". That is not to understate or underestimate the fact that the applicant is at a disadvantage in not being able to apply for the particular posts created under the Scheme. However, I take this into account in assessing the overall effect of the Scheme. He is not losing his employment as a result of this Scheme and opportunities to apply for full-time positions will remain open to him.

[45] Further, it is clear that the respondents are aware of the issue of the concerns of persons like the applicant who do not meet the criteria of recently qualified teachers. In the screening document provided in support of the Scheme the following passage appears:

"Additionally, all employing authorities are carrying out a review of substitute teachers to determine those teachers who have 4 year plus continuous service in his/her current school. In accordance with the fixed-term employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 the employing

authorities, in conjunction with the schools, will determine if it is appropriate to confirm the teacher permanent. There is potential for the exercise to assist in addressing concerns highlighted by some of the temporary teachers who do not meet the criteria of recently qualified teachers and who will be excluded from applying for posts under the scheme.”

[46] Clearly, therefore the respondents are alive to the applicant’s situation and those like him.

[47] Considering the proportionality of the Scheme I also take into account that in proposing it the respondents point out that the initial proposal came from the Trade Unions and that it was developed in consultation with key stakeholders, specifically with assistance from a representative from the Northern Ireland Teachers’ Council (which is made up of the INTO, UTU, AEL, NASUWT and NAST) and a representative from management side (which was made up of the Education Authority, CCMS, Governing Bodies Association, NICIE and Comhairle na Gaelscolaiochta) on the Project Board who played a central role in its development.

[48] It is also clear that as the Scheme was considered it actually extended the eligible criteria for RQTs to teaching graduates from years 2012 up to and including 2016, a proposal which was finally endorsed by the Northern Ireland Executive in 2016.

[49] It is also significant in my view that what is being proposed is a limited “pilot scheme” for one year which will be assessed at the end of the year.

[50] In this regard Mr Larkin points me to the passage in Lady Hale’s judgment in Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27 at paragraph 29:

“A final salient feature is that it is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels and firefighters or policemen spring to mind. But, as

Langstaff J pointed out in the EAT in *Essop* a wise employer, will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.”

[51] This Scheme is a “controlled experiment” which, in accordance with what would be expected of a responsible employer, will be monitored at the end of the year.

[52] Having considered all of the matters I have come to the view that this Scheme is a proportionate means of achieving a legitimate aim.

[53] I dealt with this as a “rolled-up” matter. I grant leave to the applicant but refuse the relief sought on the substance of the issues raised. The application is therefore dismissed.