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

Delivered: 13/06/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY ROBERT ANTHONY
McLOUGHLIN FOR JUDICIAL REVIEW**

WEATHERUP J

The application for Judicial Review.

[1] This is an application for judicial review of a decision of the Chairman of a Fair Employment Tribunal dated 9 July 2004 refusing to order disclosure to the applicant by the Police Service for Northern Ireland and the Northern Ireland Office of unredacted security documents. Mr Kelly BL appeared for the applicant, Mr McCloskey QC and Mr McMillan appeared for the Police Service for Northern Ireland and the Northern Ireland Office as notice parties.

The application for employment in the Police Ombudsman's Office.

[2] In May 2001 the applicant applied for the post of Assistant Investigation Officer with the Police Ombudsman's Office. On 9 July 2001 he was informed that his name was being placed on a reserve list to be offered a post if a vacancy arose in the following six months. The applicant became aware that others on the reserve list were offered posts with the Police Ombudsman's Office and on 13 or 14 November 2001 in a telephone conversation with a member of the Police Ombudsman's Office the applicant was informed that he was not to be offered a post. This is confirmed by letter dated 15 November 2001 to the applicant from the Police Ombudsman's Office.

The application to the Fair Employment Tribunal.

[3] On 15 January 2002 the applicant applied to the Fair Employment Tribunal complaining against the Police Ombudsman's Office of discrimination on the grounds of religious belief or political opinion. His description of his complaint stated that when he phoned the Police Ombudsman's Office to ask when he would be getting an offer he was told that no such offer would be forthcoming because of his perceived political or religious views. The applicant then discovered that he had been refused employment in the Police Ombudsman's Office on the basis of security information furnished by the Police Service to the Northern Ireland Office and then to the Police Ombudsman's Office. In applying for the post with the Police Ombudsman's Office the applicant had completed a security questionnaire. The security questionnaire had been forwarded to the Northern Ireland Office and to the Police Service who reported on 25 July 2001 "We have on record a person whose details are identical with those of your candidate. He is recorded during the early to mid-70s as an active member of PIRA." On 12 November 2001 a meeting took place between a representative of the Police Ombudsman's Office and a representative of the Northern Ireland Office who advised that on the basis of the information supplied that there would be security risks if the applicant were appointed to the post in the Police Ombudsman's Office.

[4] The applicant applied for the Police Service and the Northern Ireland Office to be added as second and third respondents to the discrimination claim. On 12 December 2002 the Fair Employment Tribunal ordered that the Northern Ireland Office and the Police Service be joined as parties to the proceedings. On 9 September 2003 the Fair Employment Tribunal ordered the respondents to provide discovery and inspection of all documents relevant to the issues in the proceedings. The Police Service disclosed redacted copies of intelligence records relating to the applicant. The applicant applied to the Fair Employment Tribunal for discovery of unredacted copies of the security records. The respondents' questioned the relevance of the unredacted copies of the intelligence records and sought an order requiring the applicant to furnish particulars of the claims made against the respondents. Accordingly on 22 December 2003 the Fair Employment Tribunal made an order for further particulars requiring the applicant to furnish the precise grounds relied on by the applicant in the complaints against the Police Service and the Northern Ireland Office. The applicant furnished those particulars on 31 December 2003.

[5] In the further particulars of claim against the Police Service and the Northern Ireland Office the applicant relied on Article 35 of the Fair Employment and Treatment (Northern Ireland) Order 1998 which deals with accessories and incitement and provides that:

- “(1) Any person who -
- (a) knowingly aids or incites; or
 - (b) directs, procures or induces,

another to do an act which is unlawful by virtue of any provision of part III (discrimination in the employment field)... shall be treated for the purposes of this Order as if he, as well as that other, had done that act.”

[6] The applicant’s particulars proceeded on the basis that the Police Service and the Northern Ireland Office had responsibility to inform the Police Ombudsman’s Office that the security assessment was based on information that was 30 years old and that the applicant had never been arrested by police on foot of that information and that this failure amounted to procuring or inducing unlawful discrimination for the purposes of Article 35 of the 1998 Order. Further the applicant claimed a breach of the Home Office Guidelines, adopted by the Police Service and which govern the use of information by police officers, and that the information should have been authenticated or evaluated and updated or destroyed. To supply information that it was known would be used in effect to disbar the applicant from the post at the Police Ombudsman’s Office was said to procure or induce the unlawful discrimination.

[7] Having considered the applicant’s replies and the submissions of Counsel the Chairman of the Fair Employment Tribunal inspected the unredacted documents. At a hearing on 28 April 2004 the applicant contended that the unredacted documents were relevant to his claim against the Police Service and the Northern Ireland Office under Article 35(1) of the 1998 Order and the respondents contended that such a complaint did not require the Fair Employment Tribunal to determine the truth or otherwise of the information provided by the Police Service and the Northern Ireland Office with the result that the unredacted documents were not relevant.

The Chairman’s decision on disclosure.

[8] In his decision of 9 July 2004 the Chairman of the Fair Employment Tribunal refused to order discovery of the unredacted documents. At paragraph 7 it was stated -

“I am satisfied that, in determining the complaint made by the applicant against the second and/or third respondents, pursuant to the provisions of Article 35(1) of the 1998 Order as set out above, the Tribunal will require to consider the information which was transmitted by the second and/or third

respondents to the first respondent in the circumstances referred to above – but in my view, in order to determine any such complaint, it will not require to determine the accuracy or otherwise of that information so transmitted. Having applied the principles set out by Carswell LJ in the case of Re Oaklee Housing Association Limited's application, set out above, and after inspecting the unredacted documents, I am not satisfied that the said unredacted documents are relevant to the issues in the complaint made by the applicant. If the accuracy or otherwise of the information so provided by the second and/or third respondents was an issue, then different considerations would apply.”

The grounds for Judicial Review.

[9] The applicant sets out his grounds for judicial review as follows -

- (a) In deciding not to order that the applicant have sight of the unredacted documents the chairperson acted unreasonably, unlawfully and erred in law.

The applicant believes that the PSNI and NIO aided and incited the Police Ombudsman to discriminate against him. This is unlawful by virtue of Article 35 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

The information supplied by the PSNI is inaccurate. This information which is 30 years old, is inaccurate and should have carried a “health warning” to indicate its reliability. That by not providing information with regard to the accuracy of the information, the PSNI knowingly aided the discrimination by the Ombudsman against the applicant. It is likely that the redacted documents contain information about the reliability of the source, whether the information was directly from a known source or by way of a third party, the date on which the information was gathered and whether there was any collaborating information. These matters are relevant to the issue of whether PSNI should have included a health warning with the information past the NIO.

The chairperson failed to consider that there may be information in the unredacted documents which was relevant to the issue of whether the PSNI aided the discrimination.

- (b) In deciding not to exercise his discretion and order sight of the unredacted security documents the chairperson was depriving the applicant of the right to a fair trial under Article 6 of the European Convention of Human Rights. Since the chairperson has already perused the unredacted documents it will mean that he has sight of information which the applicant does not have sight of and this may inevitably prejudice the applicant.”

Discovery of documents in the Fair Employment Tribunal.

[10] The Fair Employment Tribunal (Rules and Procedure) Regulations (Northern Ireland) 2004 at Schedule 1 paragraph (4)(5) provide that the Fair Employment Tribunal may on the application of a party “require one party to grant to another such discovery or inspection (including the taking of copies) of documents as might be granted by a County Court.” The County Court Rules (Northern Ireland) 1981 Order 15 rule 1 (1) provides that the court may order the discovery of documents relating to any matter in question in the proceedings and rule 1(6) provides that discovery is not to be ordered if it is not necessary for disposing fairly of the proceedings or saving costs.

[11] In Re Oaklee Housing Association Limited Application [1994] NI 227 Carswell LJ dealt with the predecessor of the present rule, then set out in the same terms in Schedule 1 paragraph 4(1)(b) of the Fair Employment Tribunal (Rules and Procedure) Regulations (Northern Ireland) 1989. In an attempt to obtain discovery of documents relating solely to credit, it was argued that the Tribunal might make an order for discovery of documents relating to any type of evidence that might be admissible before the Tribunal, even if it might not be admissible before in the County Court. Carswell LJ held that paragraph 4(1)(b) defined the ambit of discovery which may be ordered by the Fair Employment Tribunal, and therefore if an order would not be made in the County Court the Tribunal did not have jurisdiction to make such an order (page 235c). The County Court would not order discovery on matters that would go solely to cross examination as to credit. An order for discovery of documents applies to documents relevant to the questions in the proceedings and that extends to any documents which it is reasonable to suppose contain information that will enable the party applying for discovery either to advance his own case or to damage that of his opponent and any document which may fairly lead him to a train of enquiry which may have either of those effects (page 233 g-j).

[12] The first stage in requests for disclosure is to determine if the documents are relevant to the proceedings and in the present case the respondents contend that the documents are not relevant. A later stage may be to determine whether, even if the documents are relevant, there are public interest grounds for non disclosure of the documents. These Judicial Review proceedings are concerned with the relevance stage only but in any event the

respondents have made clear that if the unredacted documents were found to be relevant the respondents would claim a public interest in non-disclosure of the documents and seek a certificate of the Secretary of State under Article 80 of the Fair Employment and Treatment (Northern Ireland) Order 1998. This provides for the issue of a certificate if an act specified in the certificate was done for the purposes of safeguarding national security or protecting public safety or public order and that the doing of the act was justified by that purpose. The applicant would then be entitled to appeal against the certificate to the Tribunal established under Section 91 of the Northern Ireland Act 1998 and the Tribunal would determine whether the act specified in the certificate was done for the certified purpose and that the doing of the act was justified by that purpose and if so the Tribunal would uphold the certificate or in any other case would quash the certificate. However if the documents are not relevant in the first place it will not become necessary to consider public interest issues.

[13] So it is necessary for the applicant to establish that the unredacted documents are relevant to the applicant's discrimination claims before the Tribunal. The applicant contends that the unredacted documents are relevant to the applicant's claim that the Police Service and the Northern Ireland Office are guilty of discrimination under Article 35(1) of the 1998 Order. The applicant's claim proceeds on the alleged failure of the Police Service and the Northern Ireland Office to issue a "health warning" with regard to the security information. Accordingly the applicant contends that the unredacted documents are relevant to the reliability of the information and the need for the health warning. Further the applicant contends that the unredacted documents are relevant to whether the Police Service aided the discrimination because the possibility of mistaken identify is raised in the redacted documents where there is an entry that seeks to distinguish the applicant from another person. Further the applicant contends that the unredacted documents are relevant to the application of the Home Office guidelines adopted by the Police Service in that they demonstrate that the Police Service did not maintain an effective system for the updating or destruction of information. Further the applicant contends that the unredacted documents are relevant to the issue of whether the Police Service knowingly aided the discrimination against the applicant. Further the applicant contends that Article 6 of the European Convention on Human Rights, providing the applicant's right to a fair trial and embracing the principles of equality of arms and the right to adversarial proceedings, requires such disclosure to enable the applicant to assess the relevance of the documents and not to have one party submitting documents to the Tribunal which are withheld from another party.

[14] The respondents contend that the accuracy of the information is not an issue in the claim for religious or political discrimination before the Fair Employment Tribunal. According to the respondents the issue in relation to

the Police Ombudsman Office is whether the Office discriminated against the applicant on religious or political grounds. The issue in relation to the Police Service and the Northern Ireland Office is whether either of them knowingly aided or incited or directed or procured or induced each other or the Police Ombudsman Office to discriminate on religious or political grounds. It is pointed out that the applicant's particulars do not suggest that the respondents invented intelligence information to prevent the applicant obtaining employment in the Police Ombudsman's Office because of his religious belief or political opinion. The applicant's case is essentially one of attributing fault to the respondents in failing to re-examine and update the information and issue a caveat as necessary in relation to its reliability. Accordingly the respondents support the Chairman's reasons for his decision to refuse to order discovery of the unredacted documents.

[15] The proceedings against the Police Ombudsman's Office will concern whether the Ombudsman, in refusing the applicant employment, discriminated against the applicant on religious or political grounds. The Tribunal will have to determine the basis on which the Police Ombudsman's Office refused employment to the applicant. It is not in dispute that information and advice about the applicant, as outlined above, was received by the Ombudsman. If the Tribunal find that the information and advice formed the basis of the Ombudsman's decision, the accuracy or otherwise of the security documents grounding the information and advice will not be relevant to the issue of discrimination by the Ombudsman. On the other hand, if the Tribunal find that the Ombudsman's decision was made on some basis other than the information and advice, then again the security documents grounding the information and advice will not be relevant, either to establish whether the information and advice was indeed the basis on which the decision was made or to assess the alternative basis for the decision.

[16] In relation to the discrimination proceedings against the Police Service and the Northern Ireland Office, the applicant's case relies on Article 35 and will concern whether the Police Service and/or the Northern Ireland Office knowingly aided, incited, directed, procured or induced another to unlawfully discriminate against the applicant. The applicant contends that liability may be established against the Police Service or the Northern Ireland Office even if discrimination is not established against the Police Ombudsman's Office. By advancing an independent basis for liability being established against the Police Service or the Northern Ireland Office the applicant seeks to establish an entitlement to discovery of the unredacted documents even if they are not relevant to the claim against the Police Ombudsman's Office. I will assume, without deciding, that the applicant's argument is correct. Further I will assume, without deciding, that there was the necessity for a "health warning" and that none was issued. However none of this renders the contents of the unredacted security documents

relevant to the alleged discrimination based on the absence of the health warning. Similarly the unredacted security documents are not relevant to the alleged discrimination based on the applicant's points about mistaken identity and breach of the Home Office guidelines. The applicant certainly wishes to examine the contents of the unredacted documents but in relation to the discrimination claims the contents are not relevant and will not advance the applicant's case of discrimination or undermine the respondent's defence of the alleged discrimination.

[17] In so far as the applicant relies on the right to a fair trial under Article 6 of the European Convention a fair trial does not entitle an applicant to access to documents that are not relevant to the issues in the proceedings. In any event there is no absolute right to documents that are relevant to the proceedings as there may be a public interest in non disclosure of certain relevant documents in a particular case. Jasper v UK [2000] 30 EHRR 441 and Fitt v UK [2000] 480 deal with competing public and private interests in criminal proceedings where relevant documents may be withheld. There is substance in the further complaint that the Chairman has had sight of documents not disclosed to the applicant. However it has not been established that the Chairman will hear the applicant's discrimination claim and it is common in Courts and Tribunals for a substantive hearing to be conducted by a different Judge or Chairman if there would otherwise be prejudice to a fair hearing.

[18] I accept the respondents' argument that the Chairman was correct in his ruling that the unredacted documents are not relevant to the issues arising in the discrimination proceedings before the Fair Employment Tribunal.

Scrutiny of security information.

[19] The applicant makes clear his purpose in seeking the unredacted intelligence information. He wishes to challenge the accuracy of the contents, to identify and consider the reliability of the source, to establish the date on which the information became available and to ascertain the existence of any collaborating information. The Fair Employment Tribunal is not the vehicle by which such a challenge can be undertaken. The Chairman in his decision referred to an alternative legal remedy that may enable the applicant to make such a challenge. Re McConway's Application [2003] NIQB 59 was a decision of Kerr J in a Judicial Review of a decision of the Northern Ireland Prison Service to refuse security clearance to the applicant as a result of intelligence information furnished by the Police Service. Kerr J dismissed the application. The Chairman noted that Re McConway's Application was under appeal.

[20] Since the Chairman's decision was delivered the Court of Appeal has delivered judgment and allowed the appeal in Re McConway's Application

[2004] NICA 44. The Court of Appeal found a breach of paragraph 20 of the Home Office guidelines. While it was recognised that it was inevitable that information obtained from informers would not always or even usually be amenable to verification, it was found that there was important information which could have been authenticated and was not authenticated.

[21] Further the Regulation of Investigatory Powers Act 2000 established the Investigatory Powers Tribunal with powers to examine issues relating to security information. It has not been necessary in these proceedings to determine whether the applicant's circumstances satisfy the conditions for examination by the Investigatory Powers Tribunal. Further a complaint about breach of the adopted Home Office guidelines may be investigated under police procedures. In addition the applicant raised in the Judicial Review proceedings the prospect of invented intelligence being produced by the police, although that had not been a feature of the particulars in the present case. There are procedures for the investigation of such complaints by independent bodies and the entitlement to undertake proceedings for misfeasance in public office. None of this may lead to the disclosure of the unredacted documents to the applicants but may in some cases lead to independent assessment of the contents of the documents.

[22] There are no grounds for setting aside the decision of the Tribunal refusing an order for disclosure of the unredacted documents to the applicant. The application for Judicial Review is dismissed.