**Neutral Citation no. [2007] NICA 19** | *Ref:* **CAMF5827**

*Judgment: approved by the Court for handing down* | *Delivered:* **31/05/07**

*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**JR5**

**Appellant;**

**-and-**

**DEPARTMENT OF AGRICULTURE and RURAL DEVELOPMENT**

**Respondent.**

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**Before: Campbell, Higgins and Girvan LJJ.**

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**CAMPBELL LJ**

*Introduction*

[1] The appellant is an official in the Department of Agriculture and Rural Development. She is a male to female trans-sexual and believes that she has been the victim of less favourable treatment because of her sexuality. She presented a claim against the Department to an industrial tribunal in November 2002 alleging discrimination contrary to the Sex Discrimination Order (NI) 1976, as amended by the Sex Discrimination (Gender Reassignment) Regulations Northern Ireland 1999 No 311.

[2] The hearing of her claim began on 13 December 2004 and during it an issue arose as to it being held in private. The appellant was unrepresented and she was granted an adjournment to allow her to obtain advice from the Equality Commission. The hearing resumed in March 2005 when the appellant, who was then represented by counsel, applied for a restricted reporting order, a register deletion order and an order restricting attendance at the hearing. The tribunal dismissed these applications on 21 April 2005 and refused to adjourn the hearing to allow her time to take further legal advice and to

consider making an application for judicial review. The appellant had told the tribunal earlier that she was not prepared to proceed with her claim without protection from publicity as she was fearful that it could lead to intimidation and physical attacks on her and on her home. When she was refused an adjournment she left the court and the tribunal continued the hearing in her absence. The decision of the tribunal to proceed with the hearing was the subject of an application by the appellant for judicial review and the decision was quashed on the ground of procedural unfairness in refusing to adjourn. the proceedings. The matter was referred back for hearing by a differently constituted tribunal

[3] After the decision of 21 April 2005 was quashed the Equality Commission wrote to the President of the Industrial Tribunals asking that the decision be anonymised and deleted from the register. Reference was made in the letter to the media interest that had been generated. The secretary to the Industrial Tribunals replied that the register is a public document and there is no provision in the rules for a record to be anonymised or deleted.

[4] At the request of the Equality Commission the matter was referred to the Vice-President and she held a pre-hearing review. After she heard representations from counsel on behalf of the appellant she decided that there was no power under the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 to delete names from the public register.

*The decision of the Vice-President*

[5] In her decision the Vice- President referred to the uncontested evidence from the appellant as to her concern that if she is identified she may be physically attacked. Having considered decisions of the Employment Appeals Tribunal in similar cases she concluded that the tribunal was constrained by the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 ("the 2005 regulations") and did not have an inherent power to ignore the regulations because of a European Framework Directive. She suggested in her decision that an appellate court may use its inherent power and offer guidance to the tribunal as to how to interpret the regulations in future.

[6] At the request of the appellant the Vice- President stated a case for the opinion of this court on two questions:

(i). Whether the tribunal erred in law in determining that it does not have power to make an order to delete the names of the claimant and respondent from the public register.

(ii). Whether the Tribunal erred in law in determining that there was no provision in the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 to delete names from the public register.

*The submissions on the appeal.*

[7] The Departmental Solicitor's Office, on behalf of the respondent Department, wrote to the court to say that it did not intend to take any part in the appeal and did not have any view on the power of the tribunal to delete names from the register.

[8] Mr O'Hara QC (who appeared for the appellant with Mr Potter) accepted that the relevant regulations do not contain any express power to make a deletion in the register other than in cases concerning sexual offences. He submitted that the tribunal does have power to make such an order where appropriate;

(i) under the rules,

(ii) to give effect to the Equal Treatment Directive and

(iii) so as to interpret the regulations in a manner that is compatible with the Human Rights Act.

*The power under the rules*

[9] The Industrial Tribunals (Northern Ireland) Order 1996 provides for Industrial Tribunal procedure regulations to be made and these are currently contained in the 2005 regulations which came into force on 3 April 2005. Regulation 13 requires the secretary of the Office of the Tribunals to maintain a register containing details of all claims and appeals and the fact of applications together with a copy of all decisions and rulings.

[10] Mr O'Hara accepted that the jurisdiction of the industrial tribunal is statutory and there is no express provision to have the register anonymised save where article 13 of the Industrial Tribunals (Northern Ireland) Order 1996 has given specific power for the regulations to include provision to prevent identification in cases involving allegations of sexual offences. Schedule 1 to the Regulations contains the Industrial Tribunal Rules of Procedure (the rules") and rule 49 allows for omission and deletion from the register of any matter which is likely to lead members of the public to identify any person affected by or making such an allegation.

[11] It was submitted that when the overriding objective of the regulations and of the rules contained in the schedules is taken into account the procedural regulations and rules confer power on the tribunal to make a register deletion order in appropriate cases. The overriding objective of the regulations and the rules is in regulation 3 and it is to enable tribunals and chairman to deal with cases justly. Regulation 3 (3) requires tribunals and chairmen when interpreting the regulations and the rules to give effect to this overriding objective.

[12] In support of this submission Mr O'Hara referred to rules 10 and 59. Rule 10 is in that part of the rules which is headed "Case Management" and under the sub- heading

"General power to manage proceedings". It provides that subject to the rules the chairman may at any time make an order in relation to any matter which appears to him to be appropriate. The rule goes on provide examples of orders which may be made though this is not restrictive, as it also provides that a chairman may make such other orders as he thinks fit. Rule 59 is contained in the general provisions and gives a tribunal or chairman, subject to the provisions of the rules and any practice directions, power to regulate its or his own procedure. In this context "procedure" has been held to be the mode of proceeding by which a legal right is enforced, *Re Northern Health and Social Services Board's Application* [1994] NI 165.

*To give effect to the Equal Treatment Directive*

[13] Mr O'Hara's second submission was that if the regulations and rules do not confer power on the tribunal, when they are read in conjunction with the Equal Treatment Directive there is a basis for making a register deletion order.

[14] Article 6(1) of the Equal Treatment Directive (Directive 2002/73/EC) was amended by Council Directive 76/207/EEC and provides that;

> "Member States shall ensure that judicial and/or administrative procedures . . . , for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them . . ."

[15] In support of this submission counsel relied on the decision of the Employment Appeal Tribunal in X *v. Stevens- Commissioner Metropolitan Police Service* [2003] IRLR 411. This is a decision of the Employment Appeal Tribunal on the jurisdiction of a tribunal at first instance to make a register deletion order and restricted reporting order. The claimant asserted that she and others like her would find it difficult if not impossible to bring a claim because they would be scared of airing in a public hearing the facts, details and histories of their transgender situations and associated problems. It was argued on her behalf that Article 6 of the Directive should be used in order to supplement, interpret and enforce the statutory legislation and procedures. The tribunal at first instance held that it had no power to make either order.

[16] In *X v Stevens* it was argued that there would be a breach of article 6 of the Equal Treatment Directive if the tribunal did not make a register deletion order. The President (Burton J.) said at paragraph 36:

> "Article 6 plainly does mean that this Member State had to introduce into its national legal systems the appropriate measures there referred to, and the Employment Tribunal in the *Chief Constable of the West Yorkshire Police* case was certainly satisfied that it had the power to make an order by what was called "the European route" and this was not it

> seems appealed . . . But the Chairman here has decided there is no such jurisdiction. Is there? We are satisfied that there is.
>
> The obligation under Article 6 is one imposed on the Member State and its judicial bodies, a public body such as this Tribunal and indeed the Employment Tribunal doing justice."

Burton J. went on to refer a passage in the judgment of Mummery J. in *Biggs-v Somerset* [1995] IRLR 452 where he said:

> "An industrial tribunal may, within the scope of its statutory jurisdiction, administer, apply and enforce not only United Kingdom domestic law but also Community law… Thus, in the exercise of its statutory jurisdiction, the industrial tribunal is bound to apply and enforce relevant Community law, and disapply an offending provision of United Kingdom domestic legislation to the extent that it is incompatible with Community law , in order to give effect to its obligation to safeguard enforceable Community rights".

*To interpret the regulations in a manner compatible with the Human Rights Act*

[17] The third argument put forward on behalf of the appellant is that the Industrial Tribunal must take into account the Human Rights Act 1998 and afford the appellant the protection of articles 6 and 8 of the European Convention in relation to her right to a fair trial and her right to respect for her private and family life.

*Conclusion*

[18] Given their literal meaning and read in isolation the regulations and rules do not give an industrial tribunal or chairman power to order that an entry in the register be deleted. The secretary is required by rule 32, subject to rule 49, to enter certain documents in the register. Rule 49 which is the only rule dealing with omission and deletion from the register, is in mandatory terms and is confined to proceedings involving allegations of the commission of sexual offences. Although rule 59 gives a tribunal or a chairman a wide discretionary power to regulate procedure this power is subject to the provisions of the rules. Rule 10 does not assist the appellant's case as it is concerned with the management of cases and the powers under that rule would not extend to ordering a deletion from the register.

[19] In *Webb v Emo Air Cargo Limited* [1993] 1 WLR 49 at page 59 Lord Keith of Kinkel said:

> "…it is for a United Kingdom court to construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the Directive as laid down by the European Court of Justice, if that can be done without distorting the meaning of the domestic legislation.

This interpretative obligation does not apply until the time limit for the introduction of national implementing legislation has passed which in this case was 5 October 2005 (see opinion of Advocate Jacobs in Case C-168/95).

[20] The Vice-President, in her decision distinguished *X v Stevens* on the ground that unlike *X*'s case the appellant's evidence related to matters concerning her personal safety and did not involve any allegations of sexual offences. Burton J. in *X v Stevens*, at paragraph 31 of the judgment, said that as the matter had been fully argued the Employment Appeal Tribunal had concluded that it was appropriate to proceed further and assume for the purposes of the judgment that the facts would not have fallen within rule 15(6) and 16, - which are in similar terms to rules 49 and 50 in this jurisdiction- and deal expressly with the decision of the tribunal that the Employment Tribunal had no jurisdiction.

[21] The Employment Appeal Tribunal decided in *X v Stevens* that the correct course was for Article 6 of the Directive to impose its effect on the power given to tribunals under the rules to regulate their own procedure. It regarded this power as wider than that given in the specific circumstance of an allegation of the commission of a sexual offence as in rule 49.

[22] Member States are required by the Directive to ensure that procedures for the enforcement of obligations under the Directive are available to all persons who consider themselves wronged by failure to apply the principles of equal treatment to them. If it is established by the evidence that the appellant will be unable to enforce an obligation because of the risk to her physical safety, unless the procedure can afford her sufficient protection as to allow her to do so, the obligation under the Directive will not be met. In our view, without any distortion to its meaning rule 59 can be read so as to permit a tribunal to make an order that is in such terms as may be necessary to omit from the register or to delete from it any material likely to lead any member of the public to identify her as the claimant.

[23] Having arrived at this conclusion we do not propose to express an opinion on the third ground advanced by Mr O'Hara under the Human Rights Act 1998 as we have not had the advantage of hearing any contrary argument.

[24] Both questions in the case stated are answered in the affirmative. In answering question 1 we wish to add that where it is decided that the power should be exercised this should be limited to the extent necessary to omit anything likely to lead any member of the public to identify the particular claimant.