Neutral Citation No.: [2008] NICA 49

Ref: **COG7283**

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

Delivered: **30-10-08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY JAMES ROBERT PEIFER FOR AN ORDER COMPELLING THE INDUSTRIAL TRIBUNAL SITTING AT STRABANE IN THE COUNTY OF TYRONE AND BELFAST TO STATE A CASE FOR THE OPINION OF THE COURT OF APPEAL IN NORTHERN IRELAND IN ACCORDANCE WITH THE PROVISIONS OF ORDER 61 RULE 4 OF THE RULES OF THE SUPREME COURT (NORTHERN IRELAND) 1980

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BETWEEN:

JAMES ROBERT PEIFER

Applicant;

-and-

CASTLEDERG HIGH SCHOOL
AND
WESTER EDUCATION AND LIBRARY BOARD

Respondents.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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Coghlin LJ

[1] This is an application by James Robert Peifer for an Order compelling the Industrial Tribunal sitting at Strabane and Belfast between 4 September 2007 and 15 February 2008 to state a case for the opinion of the Court of Appeal. Mr Peifer appeared before the Tribunal and this court as a personal litigant, while the respondents were represented by Mr Colmer. Mr Peifer had clearly spent a considerable amount of time and energy in researching

and preparing his detailed written and oral submissions and the court is grateful to both him and Mr Colmer for their assistance.

Background facts

[2] On 18 August 2005 Mr Peifer submitted a claim to an industrial tribunal alleging that he had been the subject of direct and indirect sex discrimination as a consequence of the failure by ten different schools to appoint him as a classroom assistant. In the course of completing his claim form he relied not only upon the Sex Discrimination (Northern Ireland) Order 1976 as amended ("the Order") but also upon the provisions of a number of European and International Treaties and Human Rights Charters, Conventions and Covenants.

[3] On 22 September 2005 the second named respondent ("the Board") served a response to Mr Peifer's applications to St Patrick's and St Bridget's College Claudy, Limavady High School and Castlederg High School. In relation to Castlederg High School ("the school") the Board's response was as follows:

> "There were 14 applicants for this post, 13 female, one male. Two applicants (female) did not meet the short-listing criteria. Whilst it would appear that Mr Peifer met the specified criteria the Panel took the decision not to shortlist him on the basis that his form was incomplete, ie. he had not signed it.
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> The short-listing criteria for this post was as follows:
>
> **Essential**;
>
> 1. Applicants must have attained qualified status.
> 2. Applicants must have experience of working with special needs children.
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> One female applicant was selected for appointment and one female applicant was placed on a waiting list."

[4] The Tribunal sat to hear Mr Peifer claims on the following dates:

4 September 2007	Strabane
26-30 November 2007	Strabane
3-7 December 2007	Strabane
21 December 2007	Belfast
4 January 2008	Strabane

22 January 2008 Strabane
15 February 2008 Strabane

On 28 March 2008 the Tribunal delivered its judgment, a copy of which is annexed hereto. The Tribunal dismissed Mr Peifer's claims for indirect and direct sex discrimination and refused his application for costs. The Tribunal also refused Mr Peifer's request for a reference to the European Court of Justice in accordance with Article 234 of the EU Treaty.

[5] On 9 May 2008 Mr Peifer delivered to the Office of the Industrial Tribunals and the Fair Employment Tribunal a requisition asking the Tribunal to state a case for the opinion of the Court of Appeal comprising some 75 different questions. On 12 May 2008 the Chairman of the Tribunal directed a letter to be sent to Mr Peifer requesting him to specify precisely the matters that he considered to be points of law for the Tribunal to consider. Mr Peifer replied on 14 May 2008 confirming that he required all 75 questions to be referred and the Chairman of the Tribunal replied on 11 June 2008 refusing to state a case on the questions contained in Mr Peifer's requisition. On 9 July 2008 Mr Peifer submitted an application to this court for an order compelling the Tribunal to state a case.

Mr Peifer's claims

[6] As is apparent from the contents of his requisition and supporting documentation Mr Peifer has sought to place a substantial number of questions and claims both before the Tribunal and before this court. These include:

(*i*) Direct and indirect sexual discrimination with regard to his failure to obtain appointment as a classroom assistant at the school.

(*ii*) That the decision by the Tribunal to compare his circumstances with those of a female candidate for a similar post who was not considered for interview in May 2002 was unsupported by any relevant evidence and, consequently, irrational and perverse.

(*iii*) That, in any event, it was not necessary for him to establish that he, personally, had been subjected to any act of direct or indirect discrimination or that, as a consequence, he had suffered any detriment or disadvantage since he was able to rely directly upon the wording of Article 2(2) of Directive 2002/73/EC (Equal Treatment for Men and Women Re Employment).

(*iv*) That the Tribunal ought to have acceded to his request for a reference to the European Court in accordance with Article 234 of the EC Treaty.

(*v*) That the respondents had been guilty of discriminatory advertising with regard to the post for which he applied.

(*vi*) Alleged breaches of a number of international treaties and agreements including the Universal Declaration of Human Rights, the United Nations Charter, the International Covenant on Civil and Political Rights, the EU Treaty, Articles 2 and 3 and the European Convention for the Protection of Human Rights and Fundamental Freedoms Article 14.

The Tribunal hearing

[7] Whilst it would be difficult to fault Mr Peifer's industry and application, it became clear to this court that his submissions have a tendency to become significantly unfocused and discursive and it would appear from paragraph 6 of the Tribunal's decision that this tendency was also apparent during the course of the 18 days of evidence. The Tribunal defined the relevant issues as being whether Mr Peifer suffered unlawful direct or indirect discrimination on the ground of his sex during the recruitment for the post of classroom assistant at Castlederg High School. The Tribunal found that Mr Peifer's application form had been neither signed nor dated and, having listened carefully to the evidence, the Tribunal concluded that Mr Peifer's application had not been considered further in accordance with an established unwritten policy not to short-list such a candidate. In support of this policy the respondents relied upon comparison with a female candidate whose application form had been rejected for similar reasons in 2002. The Tribunal was satisfied that such an unwritten policy had been established and that it had been adhered to in the case of Mr Peifer as recorded in the report of the proceedings of the short-listing panel (RS3) compiled by Ms Wiltshire and signed by Mr Montgomery as Chairman. The Tribunal carefully examined the evidence in relation to Mr Peifer's claim that the female candidate in 2002 had been rejected at the short-listing stage not because of her failure to sign the application form but on the basis that she had been unable to comply with the short-listing criteria but, having done so, preferred to accept the consistent oral evidence given by the respondents' witnesses who were responsible for the 2002 short-listing that her form had been rejected in accordance with the same unwritten policy. During the course of the proceedings before this court copies of the original short-listing assessment forms completed by the relevant panel in respect of the exercise carried out on 28 May 2002 were produced and these appeared to support the findings of the Tribunal. In such circumstances, having found that in rejecting Mr Peifer's application form there was no evidence that he had been treated less favourably than a woman upon the ground of his sex, the Tribunal refused to state a case for the opinion of the Court of Appeal in relation to his claim of direct discrimination.

[8] In reaching its conclusion with regard to the policy upon which the school relied the Tribunal also took into account the correspondence between Mr Williamson, the School Principal, and the Board, dated 7 and 14 November 2005, relating to the acceptance of unsigned application forms. In his letter Mr Williamson referred to the policy adopted by the school and raised an inquiry as to whether a candidate should be given a chance to sign an unsigned form. In her reply Mrs E Palmer, Senior Manager (Central Services at the Board) said:

> "As failure to sign an application form can often be due to an oversight on the applicant's behalf, the Board will advise that if a candidate meets the criteria specified he/she should be short-listed for interview and given an opportunity to sign the form at interview."

The Tribunal referred to and accepted the consistent evidence of the Governors of the school who noted that since the correspondence from the Board contained the word "should" rather than "must" decided that they would continue to apply their own policy until a specific direction in writing was received from the Board to the effect that it should be discontinued. While this court considers that there was substance in the advice given to the school by the Board, the Tribunal was entitled to reach such a conclusion on the evidence.

[9] The Tribunal recorded that the relevant criteria had been the result of joint negotiations between management and the Trade Unions spanning all five Education Boards in Northern Ireland. During the course of the hearing, Mr Peifer conceded that the criteria of which he was critical had not been applied to him in any way and it seems that the respondent has never disputed that Mr Peifer would have been able to comply with the selection criteria. Ultimately, the Tribunal concluded that Mr Peifer had failed to establish facts from which it would have been reasonable to infer that he had been treated less favourably by the respondents on the ground of sex or that he had been subjected to the application of any provision, criterion or practice which put him at a particular disadvantage when compared with a female. In the context of the evidence placed before the Tribunal together with Mr Peifer's expressed concession that the short-listing criteria had not been applied to him in any way the Tribunal found no basis for a finding that a requirement or condition had been applied to Mr Peifer as required for the purpose of establishing a prima facie case of indirect discrimination in accordance with Article 3(*b*) of the Order. Furthermore the respondents expressly accepted both before the Tribunal and before this court that, Mr Peifer would have been able to comply if he had been subjected to the criteria and, accordingly, it would not have been possible for him to establish the

third element required by Article 3(*b*) namely, disadvantage, because of inability to comply. In such circumstances, as the Tribunal recorded, the agreed statistical evidence with which it had been furnished was simply irrelevant.

[10] The Tribunal recorded that the relevant law was the Sex Discrimination (Northern Ireland) Order 1976 ("the Order") as amended.

Conclusions

[11] In the course of his submissions to this court Mr Peifer relied upon the decision of Mr Recorder Luba QC in Hamling v Coxlease School ltd [2007] I.C.R. 108 with regard to the policy observed by the respondent school. However that case concerned an application to an industrial tribunal in respect of allegations of unfair dismissal and discrimination rather than an application to a school for employment. The applicant's solicitor had omitted to include the applicant's address on the claim form as required by rule 1(4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. The name and address of the firm of solicitors was correctly stated in the form together with a reference number and fax, telephone and e-mail details. On a true construction of the Rules, taking account of the policy background, the learned Recorder concluded that the role of the tribunal chairman envisaged by rule 3(3) involved a judicial as well as an administrative function as to whether the information was "relevant" and whether the omission to provide it was really material or immaterial in the circumstances and context of the particular case. Since the chairman had not asked the relevant questions, especially in the context of the details provided by the claimant's solicitors, Recorder Luba held that there had been no breach of the Rules. In our view that was a very different set of circumstances from those under consideration in this application.

[12] Before this court Mr Peifer submitted that it was not necessary for him to establish that the criteria had been applied to him personally or that he had suffered any personal detriment. In his submissions before this court Mr Peifer relied upon the definitions of direct and indirect discrimination contained in Article 2(2) of Directive 2002/73/EC as affording him a "freestanding" right. He argued that the use of the words "would be" and "would put" entitled him to pursue a claim of what he termed "institutionalised discrimination" in respect of the use by the respondents of

criteria that were potentially discriminatory, for example, in their advertising and recruitment arrangements etc.

[11] It is important to bear in mind that the jurisdiction of the Industrial Tribunal is purely statutory. In Barber v Staffordshire County Council [1996] 2 ALL ER 748 at 754 Neill LJ adopted the reasoning of Mummery J in Biggs v Somerset County Council [1995] ICR 811 at 830 who said:

> "(a) The industrial tribunal has no inherent jurisdiction. Its statutory jurisdiction is confined to complaints that may be made to it under specific statutes……" We are not able to identify the legal source of any jurisdiction in the tribunal to hear and determine disputes about Community law generally.
>
> (b) In the exercise of its jurisdiction the Tribunal may apply Community law. The application of Community law may have the effect of displacing provisions in domestic law statutes which preclude a remedy claimed by the applicant ………
>
> (c) In applying Community law the tribunal is not assuming or exercising jurisdiction in relation to a "free-standing" Community right *separate* from rights under domestic law……..She (the applicant in that case) is not complaining of a "free-standing" right in the sense of an independent right of action created by Community law, unsupported by any legal framework or not attached or connected to any other legal structure. Her claim is within the structural framework of the employment protection legislation….."

That jurisdiction in this case is defined by Article 63(1) of the Order which provides that:

> "63-(1) A complaint by any person ('the complainant') that another person ("the respondent")
>
> (*a*) has committed an act of discrimination … against the complainant which is unlawful by virtue of Part III … may be presented to an Industrial Tribunal."

[12] The Tribunal recorded that the definition of discrimination which was relevant at the time of Mr Peifer's application and the presentation of his case to the Tribunal was contained in Article 3 was in the following terms:

> 3 - (2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if –
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> (*a*) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or
>
> (*b*) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –
>
> (*i*) which is such that it would be to the detriment of a considerably larger proportion of women than men,
>
> (*ii*) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
>
> (*iii*) which is to her detriment.
>
> (3) Paragraph (2) applies to –
>
> (*a*) Any provision of Part III …

Part III of the Order deals with discrimination in the field of employment."

[13] The tribunal noted that definition of indirect discrimination was amended with effect from 5 October 2005 to read as follows:

"(b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but –

> (*i*) which puts or would put women at a particular disadvantage when compared with men,

(*ii*) which puts her at that disadvantage, and

(*iii*) which he cannot show to be a proportionate means of achieving a legitimate aim."

For the purposes of these proceedings we do not consider that such an amendment was of any significance

[14] There is nothing to indicate from the Tribunal's decision that such a freestanding right was argued and/or considered by the Tribunal in this case although it is right to say that the Directive was included amongst a number of international treaties, charters and covenants referred to by Mr Peifer at Section 12 of the IT1 form submitted in support of his application to the Tribunal.

[15] In our view the submission by Mr Peifer relating to the wording of the Directive is, to some extent, misconceived. In Article 2(2) of the Directive the reference to "would be treated" in relation to the definition of direct discrimination is to a comparator rather than a complainant and the Directive requires the complainant to be "treated less favourably on the grounds of sex". In this case, as a matter of fact, the Tribunal has found that Mr Peifer was not so treated. In the same context Mr Peifer has been unable to show that he would have been put to a particular disadvantage by the recruitment criteria as required by the definition of indirect discrimination since it is accepted by the respondents that, had he properly completed the application form, he would have been able to comply with the relevant criteria.

[16] With regard to Mr Peifer's complaints relating to institutional sex discrimination we note again the restricted statutory jurisdiction of the Industrial Tribunal concerned with a complaint brought by an individual under the provisions of the Order. Article 62 provides that no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of the provisions of the Order except as provided by the Order. Article 63 provides that a complaint in respect of any act of discrimination alleged to be unlawful by virtue of Part III of the Order may be presented to an Industrial Tribunal.

[17] However neither the Directive nor the Order restricts the availability of anti-discrimination remedies to individuals. Part VII of the Order created the Equal Opportunities Commission for Northern Ireland (subsequently subsumed within the Equality Commission for Northern Ireland) and assigned that body the following duties:

(*a*) To work towards the elimination of discrimination, to promote equality of opportunity between men and women generally, and

(*c*) To keep under review the working of this Order and the Equal Pay Act and, when the Commission is so required by the Department or otherwise thinks it necessary, draw up and submit to the Department proposals for amending them. The Commission has power to conduct formal investigations within the provisions of the Order including the power to obtain information for the purposes of such investigations.

[18] Article 38 of the Order relates to "Discriminatory Practices" and sub-paragraph (2) provides as follows:

> "A person acts in contravention of this Article if and so long as –
>
> (*a*) he applies a discriminatory practice, or
>
> (*b*) he operates practises or other arrangements which in any circumstances would call for the application by him of a discriminatory practice."

However, sub-article (3) provides that proceedings in respect of a contravention of Article 38 shall be brought only by the Commission.

[19] Article 39 relates to the prohibition of discriminatory advertisements, Article 40 to instructions to discriminate and Article 41 to inducing or attempting to induce a person to discriminate. Once again, by virtue of Article 72 of the Order, proceedings in respect of contravention of any of these articles may only be instituted by the Commission.

[20] Mr Peifer also referred to the statutory duty imposed upon public authorities in this jurisdiction by section 75 of the Northern Ireland Act 1998 to promote equality of opportunity. However the effect of section 75(4) and Schedule 9 of that Act is make the Commission the body responsible for enforcement of the relevant duties imposed by that provision.

[21] Mr Piefer also asked both the Tribunal and this court to refer a question of law for the opinion of the European Court of Justice in accordance with Article 234 EC. The point of law that he wishes to be referred would seem to be whether Article 3(1)(b) of the Order, which requires a complainant to show that a requirement or condition has been applied to him/her, is incompatible with the definition of indirect discrimination contained in Article 2 of the Order. It seems to us that this is to misunderstand the structure and effect of the Directive.

[22] Article 6 of the Directive requires member states to ensure that, inter alia, judicial procedures are available for the enforcement of obligations

under the Directive to all persons who "*consider themselves wronged*" (our emphasis) by failure to apply the principle of equal treatment and introduce into national legal systems measures to ensure compensation for *the loss and damage* sustained by a person "*injured as a result of discrimination contrary to Article 3*" (our emphasis). That is precisely what is achieved by Article 3 of the Order. As a matter of fact Mr Piefer has been unable to establish that he has been individually wronged or suffered loss and damage as a consequence of indirect discrimination since it is common case that the impugned criteria were not applied to him and, in any event, had they been so applied, he would have been able to comply. As we have noted above the Order provides for discriminatory practices, advertising, instructions etc to be dealt with by the EOC. In such circumstances we do not consider that it has been established that a reference to the ECJ is necessary to enable us to give judgment as required by Article 234 of the Treaty.

[23] In conclusion, after carefully considering the oral and written submissions we have been unable to identify any question of law in respect of which the Tribunal would have had jurisdiction that ought to be considered by this court and, accordingly, Mr Peifer's application must be dismissed.

Neutral Citation No.: [2008] NICA 49

Ref:	**GIR7276**

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

Delivered:	**30/10/08**

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

JAMES ROBERT PEIFER

Claimant/Appellant;

And

1. **CASTLDERG HIGH SCHOOL**
2. **WESTERN EDUCATION AND LIBRARY BOARD**

Respondents.

GIRVAN LJ

[1] I agree with the judgment of Coghlin LJ and wish only to add a few observations in the light of a disturbing feature of this case, namely the length and protracted and disjointed nature of the hearings in the proceedings before the tribunal in a case which at the end of the day turned on a relatively straightforward question of fact.

[2] Industrial tribunals were originally intended to provide an expeditious and relatively informal and cheap means of resolving disputes arising in the workplace. Proceedings were intended to dispense with the formality of court proceedings and to avoid the legalism and formalism that marked ordinary litigation, features which contributed to the perception of unnecessary cost and delay in ordinary litigation. With the increasing complexity of modern legislation in the field of employment and discrimination law the industrial tribunal has itself become increasingly costly and litigation in the tribunals is characterised by increasing length of proceedings, delays and lengthy breaks in the course of hearings. This court has on occasions had to warn against the readiness of tribunals to determine apparently preliminary points in such proceedings which turn out at the end of the day not to be shortcuts to a resolution of a dispute but in fact add to

delay and increase the length of the proceedings. The problems caused by delay and unnecessary length of proceedings in the tribunals are self evident. Unnecessary length substantially increases the overall costs of proceedings; ties up tribunal chairman and members unduly; delays other cases coming on for hearing; and often requires the attendance of witnesses for undue length of time thus affecting their capacity to do their own jobs or run their own businesses.

[3] Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 ("the Rules of Procedure")is based on the provisions of Order 1 Rule 1A of the Rules of the Supreme Court. The provisions of Order 1 Rule 1A and Regulation 3 were intended to be exactly what they are described as being, namely *overriding* objectives. The full implications of those rules identifying the overriding objectives have not been fully appreciated by courts, tribunals or practitioners. These overriding objectives should inform the court and the tribunals in the proper conduct of proceedings. Dealing with cases justly involves dealing with cases in ways which are proportionate to the complexity and importance of the issues ensuring that the case is dealt with expeditiously and fairly and the saving of expense. Parties and practitioners are bound to conduct themselves in a way which furthers those overriding objectives. Having regard to the imperative nature of the overriding objectives tribunals should strive to avoid time wasting and repetition. Parties should be required to concentrate on relevant issues and the pursuit of irrelevant issues and questions should be strongly discouraged. Our system of justice properly regards cross examination as a valuable tool in the pursuit of justice but that tool must not be abused. Tribunals must ensure proper focus on the relevant issues and ensure that time taken in cross examination is usefully spent. The overriding objectives, which are, f course, always intended to ensure that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. Tribunals can expect the appellate and supervisory courts to give proper and due weight to the tribunals' decisions made in the fulfilment of their duty to ensure the overriding objectives. Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost. Tribunals should be encouraged to use their increased costs powers set out in Regulations 38 et seq of the Rules of Procedure to penalise time wasting or the pursuit of cases in a way which unduly and unfairly increases the costs falling on opponents. Tribunals should feel encouraged to set time limits and time tables to keep the proceedings within a sensible time frame.

[4] When parties before the tribunal appear in person without the benefit of legal representation the lack of legal experience on the part of the

unrepresented party may lead to the pursuit of irrelevancies and unnecessary length of proceedings. While tribunals must give some latitude to personal litigants who may be struggling in a complex field they must also be aware that the other parties will suffer from delay, incur increased costs and be exposed to unstructured and at times irrelevant cross examination. While one must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objectives in Regulation 3 are pursued.