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Judgment: approved by the Court for handing down | *Delivered:* **24/09/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

CHARLES JOHNSTON

Plaintiff

and

CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY AND POLICE AUTHORITY FOR NORTHERN IRELAND AND THE SECRETARY OF STATE FOR NORTHERN IRELAND AND THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Defendants

STEPHENS J

Introduction

[1] By Writ of Summons issued on 18 February 1999 the plaintiff, Charles Johnston, commenced an action against, amongst others, the Chief Constable of the Royal Ulster Constabulary and the Secretary of State for Northern Ireland. The plaintiff alleges that the Secretary of State for Northern Ireland failed to comply with Directive 1976/207 of the Council of the European Communities (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions**)** ("the Directive"). The Directive was adopted by the Council of the European Communities on 9 February 1976 and was addressed to Member States.

The Directive

[2] The purpose of the Directive, that is the putting into effect of the principle of equal treatment for men and women, is set out in Article 1 (1) in the following terms:-

> "The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment"."

[3] The application of the principle of equal treatment is set out in Article 3 (1) of the Directive as follows:-

> "Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy"

[4] Article 3 (2) (a) of the Directive then provided for one of the measures to be taken by the member states as follows:-

> "*To this end, Member States shall take the measures necessary to ensure that* –
>
> a. *any laws,* regulations and administrative provisions *contrary to the principle of equal treatment shall be abolished*;
> b. … "(emphasis added)

[5] Further relevant provisions of the Directive are then to be found in Articles 6 and 8. Article 6 provides:-

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to reply to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

Article 8 provides:

> "Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment."

[6] The date by which there had to be compliance by member states with the Directive is set out in Article 9 in the following terms:

> "Member states shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification and shall immediately inform the Commission thereof."

The effect of Article 9 was that there had to be compliance with the Directive by the end of October 1978.

Height requirement for appointment to the Royal Ulster Constabulary

[7] On 9 February 1976, the date upon which the Directive was adopted by the Council of the European Community, the Royal Ulster Constabulary had in place height requirements in relation to persons applying for appointment. The height requirements were contained in Regulation 7(1)(d) of the Royal Ulster Constabulary Appointment and Service Regulations (Northern Ireland) 1970. Those Regulations imposed different height requirements for male and female applicants. The defendants in this action now recognise that as a result of the Directive the differing height requirements between male and female applicants to the Royal Ulster Constabulary should have been abolished by the Secretary of State for Northern Ireland by the end of October 1978.

[8] The height requirements, and therefore the discrimination as between male and female applicants, were abolished on 1 July 1994. In the meantime many male applicants to the Royal Ulster Constabulary suffered unlawful discrimination in that their applications were rejected on the basis of height whereas an application by a female would have been accepted. The plaintiff in this case was one of the persons who suffered such discrimination.

Facts in relation to the plaintiff

[9] In 1975 the plaintiff had applied to be appointed as an officer of the Royal Ulster Constabulary. His application was rejected as he did not meet the height requirements for male officers of the Royal Ulster Constabulary although he would have met the height requirement for female officers. Instead of being offered admission to the Royal Ulster Constabulary he was instead offered and accepted admission to the full-time Royal Ulster Constabulary Reserve. He took up that appointment on 1 March 1976.

[10] If at any stage the height requirement had been abolished or if the male height requirement had been reduced to the same as the female, then it is

accepted by the defendants that the plaintiff would have successfully applied to become a member of the Royal Ulster Constabulary. In the event the height requirement was not abolished until 1 July 1994. Thereafter the plaintiff joined the Royal Ulster Constabulary on 9 April 1995.

Financial differences between engagement in the Full time Royal Ulster Constabulary Reserve and the Royal Ulster Constabulary

[11] There were substantial financial differences between engagement in the full-time Royal Ulster Constabulary Reserve as opposed to in the Royal Ulster Constabulary. The basic rates of pay and the opportunities and pay for overtime were the same for constables whether they were in the Royal Ulster Constabulary or in the full time Royal Ulster Constabulary Reserve. However there were no promotion prospects for a Reserve Constable. An inevitable consequence of the failure to gain admission to the Royal Ulster Constabulary was that the plaintiff remained a constable in the full time Royal Ulster Constabulary reserve. This consequence is illustrated by contrasting the plaintiff's career in the full-time Royal Ulster Constabulary Reserve with his subsequent career in the Royal Ulster Constabulary, now the Police Service of Northern Ireland. In the full-time Royal Ulster Constabulary Reserve he remained as a constable for nearly two decades. After joining the Royal Ulster Constabulary on 9 April 1995 he was promoted to the rank of:-

(a) Sergeant on 5 April 1999.
(b) Acting Inspector on 1 September 2001.
(c) Inspector on 1 March 2002.
(d) Acting Chief Inspector on 8 December 2003.

[12] It is contended on behalf of the plaintiff that these promotions would have come at an earlier stage if he had been engaged in the Royal Ulster Constabulary throughout his career and that he would have achieved promotion to the level of Chief Superintendent. That with each promotion there would have been a further increase in salary. That his pension and severance pay is calculated on the basis of his final salary in the Royal Ulster Constabulary and accordingly he has been deprived of increases in his severance pay and pension. That his pension will be affected in that the full time Royal Ulster Constabulary Reserve was non pensionable until 6 April 1988 and when considering an enhancement to his pension his service in the full time Royal Ulster Constabulary Reserve is not reckonable service. The financial differences can be illustrated by the difference between his present salary as an Acting Chief Inspector of £47,722 as opposed to a salary of £68,961 if he had achieved the rank of Chief Superintendent. The amount of the plaintiff's severance payment is not affected by his period of engagement in the full-time Royal Ulster Constabulary Reserve as that is a reckonable period of employment for the purposes of severance. However if he had been a member of the Royal Ulster Constabulary since 1978 as opposed to the full-

time Royal Ulster Constabulary Reserve he would have been in the optimum financial position to take a severance payment on 7 January 2006 rather than having to wait until 10 October 2008.

The preliminary issue

[13] It is accepted by the defendants that they are liable to compensate the plaintiff for his financial losses sustained as a result of the failure to implement the Directive and that they unlawfully discriminated against him throughout the entire period 1 November 1978 to 9 April 1995 when he eventually joined the Royal Ulster Constabulary.

[14] The Writ of Summons was issued on 18 February 1999. The defendants rely on the provisions of Article 6 (1) of the Limitation (Northern Ireland) Order 1989. That Article in so far as it is relevant is in the following terms:

> "**6.**—(1) … an action founded on tort may not be brought after the expiration of six years from the date on which the cause of action accrued."

The defendants contend that any cause of action which accrued prior to 18 February 1993 is statute barred.

[15] By agreement between the parties various preliminary questions were formulated in relation to specific items of financial loss claimed by the plaintiff in his statement of claim. However it became apparent during the course of the hearing of those preliminary issues that there was insufficient information available to answer the specific questions. I therefore limit the preliminary issue to the following three questions namely:

(a) On what date did the plaintiff's first cause of action accrue?
(b) What was the date upon which the plaintiff's last cause of action accrued?
(c) Which causes of action are not barred by limitation?

The cause or causes of action

[16] The plaintiff's statement of claim alleges breach of contract, breach of statutory duty, misfeasance in public office, breach of European law and negligence against the defendants. However the case argued in front of me relied on breach of statutory duty and I confine this judgment to that cause of action.

[17] The statutory duty is imposed by Article 3(2)(a) of the Directive and Section 2(1) of the European Communities Act of 1972. The Decisions of the European Court of Justice in *Francovich v. Italy* joined cases C-6/90 and C-9/90 (1992) IRLR 84, (1991) ECR I-5357 and *Brasserie du Pecheur SA v. Germany, R v. Secretary of State for Transport, exp Factortame Limited* joined cases C-46 and C-48/93 [1996] All ER (EC) 301, (1995) QB 404 have established, and it is not disputed, that a Member State may incur liability to a person under community law where three conditions are satisfied. They are that –

(a) the rule of community law infringed is intended to confer rights on individuals;
(b) the breach is sufficiently serious, and in particular that there was a manifest and grave disregard by the Member State of its discretion; and
(c) there is a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured party.

[18] There is no dispute in this case that those three conditions will be established.

[19] The nature of the claim in English law has been considered by Hobhouse LJ in *R v. Secretary of State for Transport ex parte Factortame Limited* [1998] 1 CMLR 1353 and by Sir Andrew Morritt VC in *Phonographic Performance Limited v. Department of Trade and Industry and another* [2005] 1 All ER 369. Such liability is best understood as a breach of statutory duty. Accordingly in this case the plaintiff's claim is one "founded on tort"

<u>European jurisprudence in relation to limitation</u>

[20] In *R v. Secretary for State for Transport ex parte Factortame Limited and others* (No 7) [2001] 1 WLR 942 Judge John Toulmin QC reviewed the decisions of the European Court of Justice which established that it is a principle of community law that Member States are obliged to make good loss and damage caused to individuals by breaches of community law for which they can be held responsible. He then set out the three conditions which are required to be met. Then at paragraph 26 of his judgment he set out that the appropriate remedy was for the national court and also dealt with the principles of equivalence and effectiveness in the following terms namely:-

> "(26) The court went on to emphasise that, in the absence of community legislation, it is for each Member State to designate the appropriate courts and to ensure that there was an effective remedy which was not less favourable than those relating to existing domestic claims."

[21] In that case a question had arisen as to whether applications to add additional parties to the proceedings were statute barred. At paragraph 33 of his judgment Judge John Toulmin QC stated:-

> "33 It is agreed, rightly, that if a limitation period of 6 years does apply, such a period of limitation would not offend against the community law principles of equivalence and effectiveness."

[22] In *Emmott v. Minister for Social Welfare* [1991] ECR I-4269 – the European Court of Justice held that:-

> "16 As the Court has consistently held (see, in particular, the judgments in Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer fuer das Saarland* [1976] ECR 1989 and Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio SpA* [1983] ECR 3595), in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law.
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> 17 Whilst the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above, account must nevertheless be taken of the particular nature of directives.
> . . .
>
> 23 It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time."

[23] In the case before me the Directive was not properly transposed until 1 July 1994 and if the principle set out in paragraph 23 of *Emmott v. Minister for Social Welfare*, was applied then no part of the plaintiff's claim would be statute barred.

[24] However in *Fantask A/S and others v. Industriministeriet* [1998] All ER (EC) 1 the European Court of Justice returned to the issue as to whether community law prevented a Member State which had not properly transposed a Directive from resisting an action by relying on a limitation period under national law. The court confined the decision in *Emmott v. Minister for Social Welfare*, to the quite particular circumstances of that case and continued:-

> "47. As the court has pointed out in para 39 of this judgment, it is settled case law that, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules for actions seeking the recovery of sums wrongly paid, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.
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> 48. The court has thus acknowledged, in the interests of legal certainty which protects both the taxpayer and the authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law. Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought (see esp the judgments in *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989 (para 5), *Comet BV v Produktschap voor Siergewassen* Case 45/76 [1976] ECR 2043 (paras 17-18) and *Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* Case C-261/95 (1997) ECJ Transcript, 10 July 1997 (para 28))."

[25] In this case I consider that the 6 year limitation period does not offend against community law principles of equivalence and effectiveness. Accordingly as this is an action "founded on tort" Article 6 of the Limitation

(Northern Ireland) Order 1989 prescribes a limitation period of 6 years from the date "on which the cause of action accrued".

Accrual of the cause or causes of action

[26] The classic definition of a cause of action is that given by Lord Esher MR in *Coburn v. Colledge* [1897] 1 QB 702:-

> "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court".

[27] In this case I take that to mean that the plaintiff must prove that the Secretary of State for Northern Ireland, as a defendant, owed him a duty, has committed a breach of that duty, and that the plaintiff has suffered damage as a consequence of that breach. Specifically the duty was imposed by Article 3(2)(a) of the Directive and Section 2(1) of the European Communities Act 1972. The breach was the failure to abolish the height discrimination between male and female applicants to the Royal Ulster Constabulary and the financial damage occurred when the plaintiff was prevented from gaining membership of that force as a constable.

[28] It is not disputed that a cause of action accrued at the end of October 1978 when the date by which the Directive was to be given effect had passed. However the obligation to abolish the height discrimination between male and female applicants to the Royal Ulster Constabulary did not cease at the end of October 1978. The obligation continued but was not performed. In *Phonographic Performance Limited v. Department of Trade and Industry and another* it was held that the failure by the United Kingdom to implement Article 8(2) of the Council Directive (EEC) 92/100 (on rental, right and lending right and on certain rights related to copyright in the field of intellectual property) was a continuing breach of statutory duty. I considered that in the case before me the failure to comply with Article 3(2)(a) of the Directive is a continuing breach of statutory duty causing damage to the plaintiff it being accepted that if the height discrimination had been abolished the plaintiff would have applied for and within a short period of time thereafter, would have gained membership of the Royal Ulster Constabulary as opposed to the full time Royal Ulster Constabulary Reserve. The short period of time thereafter is significant because the cause of action is complete when damage is suffered. In this case breach of duty on a particular day causes damage to be suffered a short time later. Accordingly a breach of duty on say 1 January 1980 in that the discriminatory height requirement was still in existence, does not lead to damage to the plaintiff until the time has expired during which he applies for and is rejected for admission to the Royal Constabulary. The breach of duty that occurs on say 1 January 1980 leads to a cause of action which accrues when the plaintiff suffers damage some months later when his application for

employment is rejected on the basis of height and therefore sex discrimination. The height requirement was abolished on 1 July 1994 thereafter there was no breach of duty and the plaintiff gained admission as a member of the Royal Ulster Constabulary on 9 April 1995. The last cause of action was complete on either 8 or 9 April 1995, but for ease of assessment I hold that it was notionally complete in the hours before his admission to the Royal Ulster Constabulary and therefore was complete on 9 April 1995. The last breach of duty first caused damage on that date.

[29] If at any stage earlier than 9 April 1995 the plaintiff had been accepted into the Royal Ulster Constabulary as a constable then he would have increased his chances of promotion and availed of the additional financial benefits whether as a consequence of those promotions or in any other way. The earlier the plaintiff could have gained admission to the Royal Ulster Constabulary as a constable then the less the potential adverse effect on his career taking into account that promotion prospects are in part a function of years of service and experience. The greater the delay has been in gaining membership of the Royal Ulster Constabulary then the greater the potential adverse effect. I say potential adverse effect because it is always open to a particular plaintiff to establish that, even though his entry was delayed, he would still have achieved rapid promotion, given his particular abilities, if he had been able to gain membership of the Royal Ulster Constabulary some years earlier than he in fact did. Alternatively that there was a particular opportunity in the Royal Ulster Constabulary of which he would have been able to avail if he had gained membership of the Royal Ulster Constabulary some years earlier than he in fact did. It is the effect of the delay on a particular individual within the six year limitation period that is not barred by the provisions of Article 6 (1) of the Limitation (Northern Ireland) Order 1989. If the plaintiff had been appointed to the Royal Ulster Constabulary on 18 February 1993 as a constable then the exercise which the court is required to perform in assessing those damages which relate to causes of action which are not barred by the limitation period is to calculate the financial difference between what the plaintiff did and will in the future achieve in the terms of promotion, salary, pension and severance as a consequence of joining the Royal Ulster Constabulary as a constable on 9 April 1995 as opposed to joining it as a constable on 18 February 1993. The difference is the award to which the plaintiff is entitled.

[30] The consequence of the breach of duty by the Secretary of State is that the applicant was not permitted to be engaged in the Royal Ulster Constabulary as a constable. If he had been permitted entry into the Royal Ulster Constabulary as a constable in 1978 then he contends that he would now be a Chief Superintendent on a higher salary with a greater number of years of service. If he had been permitted to join as a constable say one decade later in 1988 then it should now be possible to assess what rank he would have achieved over the period 1988-2007 and what salary he would now have been on and what his future losses will be. If he had been engaged in the Royal

Ulster Constabulary on 18 February 1993 then the exercise which the court is required to perform in assessing those damages which relate to the causes of action which are not barred by the limitation period is to calculate the difference between what the plaintiff did and will in the future achieve in the terms of promotion, salary, pension and severance as a consequence of joining the Royal Ulster Constabulary as a constable on 9 April 1995 as opposed to joining it as a constable on 18 February 1993.

Conclusion

[31] I answer the three preliminary questions as follows:

(a) The plaintiff's first cause of action accrued on 1 November 1978.
(b) The date upon which the plaintiff's last cause of action accrued was on 9 April 1995.
(c) The causes of action in relation to the additional financial benefits that the plaintiff would have gained if the plaintiff had joined the Royal Ulster Constabulary as a constable on 18 February 1993 as opposed to joining the Royal Ulster Constabulary as a constable on 9 April 1995 are not barred by limitation.

[32] I direct the plaintiff to amend the particulars of special damage in the statement of claim so that the amounts claimed relate only to the financial difference between what the plaintiff did and will in the future achieve in the terms of promotion, salary, pension and severance as a consequence of joining the Royal Ulster Constabulary as a constable on 9 April 1995 as opposed to joining it as a constable on 18 February 1993.