Funding of applicant's costs is a discrimination claim against Equality Commission – relevant policy to be followed – change of policy – legitimate expectation – equality police of Commission – engagement of independent counsel by Commission to advise – whether identity of counsel had to be agreed.

Neutral Citation No. [2006] NIQB 51 | *Ref:* **GIRC5568**

Judgment: approved by the Court for handing down | *Delivered:* **18/05/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOSEPH LENAGHAN FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE EQUALITY COMMISSION FOR NORTHERN IRELAND

GIRVAN J

[1] In this judicial review application the applicant challenges the way in which the Equality Commission for Northern Ireland ("the Commission") has dealt with his applications for funding in respect of two applications which he has instituted in the Fair Employment Tribunal against the Commission. The applicant is an employee of the Commission although presently on secondment. He was previously employed by the Commission's predecessors, the Fair Employment Commission and the Commission for Racial Equality.

[2] The applicant's claim relate to allegations of unfair treatment on the basis of his perceived political opinion, religious belief and on the grounds of sex. The first claim brought in January 2002 relates to a failure to be appointed to two directorship posts, namely the post of Director (Public Sector Statutory Duty unit) and the post of Director (Equality Programmes). In 2000 and 2001 he was acting up as Director (Public Sector Statutory Duty Unit). When the permanent position came to be filled he applied but was not appointed. He was appointed as a reserve candidate on 7 August 2001. His understanding was that if he was not appointed, should another similar post

become available, he would be appointed if he applied. He was not appointed contrary to his expectations, the Commission maintaining that the skills of the two posts were significantly different. The second claim brought in December 2003 related to the post of Director (Race Development Unit) within the Commission. The post was advertised in May 2002 but the appointment process was subsequently abandoned. The Commission sought to change the job specification. The applicant alleges that this represented further discrimination against him and that it was victimisation because of the previous application.

[3] In his claims the applicant did not particularise the religious belief or political opinion relied on. It appears that it was not until 15 January 2005 that the applicant claimed that the political discrimination was based on his Republican views and on his profile as an Irish language activist.

[4] On 19 April 2002 the applicant applied for funding assistance in relation to his first claim. On 9 December he made an application for such funding on his second application. These applications were considered on the basis of the Commission's Enforcement Policy for the Provision of Advice and Assistance 2000 ("the Enforcement Policy 2000"). The respondent in May 2000 granted assistance indicating the applicant could instruct counsel of his own choice to prepare an opinion. The respondent subsequently also agreed to bear the costs of the applicant's solicitors, Thompson McClure. Both awards were expressed to be "subject to review." The Legal Funding Committee ("the LFC") did not have before it any counsel's opinion on the merits of the application. It is not apparent from papers before the court how the Commission satisfied itself that there were reasonable grounds for believing that an act of unlawful discrimination may have been committed as alleged in relation to the two claims although at the stage of the initial granting of funding the Committee appears to have ticked the merits test box. At that stage it was considered that it was unreasonable to expect the applicant to proceed unaided because of his position in relation to the respondent.

[5] Under the Enforcement Policy 2000 as it then stood para. 4 provided that the Commission may grant any application for assistance received from an actual or prospective complainant or a complainant. Assistance could only be granted essentially on the grounds that:

(a) the case raised a question of principle; or

(b) it was unreasonable having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved to expect the applicant to deal with the case unaided; or

(c) by reason of any other special circumstances.

In reaching its decision whether it saw fit to grant assistance the Commission would first of all satisfy itself that there were reasonable grounds for believing that an act of unlawful discrimination may have been committed as alleged. Various factors to be taken into account were set out in para. 5. Under para. 7 the Commission might at any stage review the decision to offer assistance either in the circumstances listed in para. (a) to para. (l) or otherwise. The factors include any material change of circumstances in relation to guidance factors for which the grant of assistance was initially made; the applicant failing without just cause to co-operate with requests from the Commission or its appointed legal or other representative for information or comments; the failure of the applicant without just cause to attend interviews or consultations arranged by the Commission or its appointed legal representative; the applicant's failure without just cause to act in accordance with the advice given by the Commission or its appointed legal or other representative; and unreasonable conduct including unreasonable conduct towards the staff of the Commission or its appointed legal or other representative. The Committee might decide to discontinue the provision of assistance. Para. 16 of the policy headed "Variation of Policy" states clearly:

> "The Commission may, at any time and at its discretion, vary or amend this policy."

[6] Para. 12 of the Enforcement Policy 2000 is of particular significance in the present case. It provides:

> "In the circumstances where an application for assistance is made in respect of proceedings under any of the relevant statutory provisions … where the Commission is or is a proposed respondent such applicant will be dealt with in the following way:
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> - the applicant or his/her representative will be informed in writing that for the purposes of processing an application for assistance to the Commission the Commission will meet the reasonable fees of a solicitor and counsel of his/her choice;
> - the solicitor will be informed in writing of all those matters set out in paragraphs 4, 5 and 6 above and also that counsel's opinion should be sought in relation to the matters to be considered by the relevant Committee;
> - this opinion and any other representations made on the applicant's behalf will be submitted directly to the Committee which

will then consider the application in the normal way;

- if any member of the Committee is in any way implicated in the allegations made by the applicant or is affected by any other personal conflict of interest that person is replaced for the purpose of considering the application by another member of the Commission nominated for that person."

[7] A new policy was introduced in January 2003 to make specific provision in relation to cases in which the Commission had a conflict of interest because the Commission was a respondent or proposed respondent or the applicant was an officer of the Commission. In that situation the applicant falls to be dealt with in the following way:

- "The applicant or his/her representative will be informed in writing, that for the purposes of processing an application for assistance to the Commission, the Commission will instruct a suitably trained practitioner to assess the application on the same basis as that employed by officers of the Commission in relation to other applications for assistance under the Enforcement Policy;
- this practitioner will be given suitable training on all those matters set out in paragraphs 4, 5 and 6 of the Enforcement Policy and the manner in which they are applied by officers of the Commission;
- a suitable report and recommendation by the said practitioner would be submitted directly to the Committee which will then consider the application in the normal way;
- if any member of the Committee is in any way implicated in the allegations made by the applicant or is affected in any other personal conflict of interest that person should be replaced for the purpose of considering the application by another member of the Commission nominated for that purpose;
- the instructed practitioner should play no further part in the case in question, expect to the extent that assistance is subject to review of assistance, in which case either the same

practitioner (or an equivalent person) should act in the same matter as an officer of the Commission would act;

- any opinion obtained by the Commission for the purpose of assisting an LFC on such an application shall be solely for the benefit of the Commission and any counsel so instructed shall also play no further part in the case except as so required for a similar purpose."

[8] The applicant's solicitor was advised in December 2003 that the applications would be reviewed and the applicant was advised that the case would be reviewed by the Commission on 15 January 2004. He was invited to make representations and to provide the LFC with an indication of counsel's opinion on the prospects of success. The applicant's counsel has never produced a written opinion on the merits of the case although verbally it appears that he has indicated the claim has a reasonable prospect of success. An external solicitor prepared documentation for the LFC which reviewed the decision to grant funding. In considering the first claim the LFC decided that assistance should be withdrawn. The reason in relation to the withdrawal was thus stated:

> "The Committee carefully considered this case and decided that the law was generally well settled in the area of failure to appoint. There was nothing distinctive in this case and the cost of supporting this case to hearing would not be commensurate with the strategic benefit to be gained."

In relation to the second grant of assistance the reason for withdrawal was stated thus:

> "The Committee carefully considered this case and decided the law in the areas of recruitment, selection and victimisation was generally well settled. There was nothing distinctive in this case and the cost of supporting this case to hearing would not be commensurate with the strategic benefit to be gained."

The applicant was informed of the outcome of the review on 24 February 2004. Although the applicant's solicitor wrote to the Commission stating that the applicant intended to appeal against the decision and a written appeal would follow as soon as possible an application for a re-examination of the LFC decision was not made until 15 January 2005. This is notwithstanding

that the chief commissioner in a letter of 19 May 2004 replying to a letter from Mr Adams MP pointed out that it was open to the applicant to seek a review of the decision to discontinue funding. Such correspondence as took place in 2004 emanating from the applicant's side challenged the Commission's procedure but no judicial review was brought in respect thereof.

[9] On 5 April 2005 the LFC met to consider the application for re-examination. The LFC considered reports on the two cases prepared by the external consultant who recommended modifications on some of the scores on the evaluation form. The LFC concluded that:

> "It carefully considered all of the representatives and concluded that it would be cost commensurate with strategic benefit to obtain an opinion for the purposes of assisting the LFC (as in the Enforcement Policy) in respect of the political opinion – gender point and the prospect of success if the case went to hearing."

Steps were taken to instruct Ms Suzanne Bradley of counsel to prepare an independent opinion for the benefit of the LFC. She provided an opinion on 4 May 2005 on one aspect of the case namely in respect of the political opinion – gender point but was unable to provide an opinion on the merits of the case as the applicant had not provided copies of the relevant pleadings. Although it is not currently relied upon by the Commission or LFC the failure of the applicant to co-operate with requests to disclose material information or documentation to the Commission's appointed legal representative could itself justify the withdrawal of funding. The matter went back before the LFC on 19 May 2005. The LFC concluded that:

> "The Committee carefully considered counsel's opinion on matters of legal uncertainty and concluded that it would be cost commensurate with strategic benefit to obtain an opinion on the prospect of success in this case if it went to hearing and in this opinion it should be solely for the purpose of helping LFC to arrive at a decision."

The LFC directed the obtaining of an opinion on the merits of the applicant's case to assist them in making a final decision providing assistance. It was this decision which the applicant impugns in the present application.

[10] The applicant was asked to supply relevant pleadings to facilitate counsel's opinion on the merits of the benefit of the LFC again but the applicant did not comply with the request. On 18 July Mr Thompson of

NIPSA, the union now representing the applicant, offered "inspection of at least seven files of relevant information."

[11] Mr Scoffield in his skeleton argument in paras. 5 and 6 highlights what he argues is the legal impasse between the parties:

> "5. The present impasse is a result of competing approaches to the instruction of counsel to provide an opinion on the merits of the applicant's claims. The LFC's approach is to brief a counsel solely of its choosing and instructed by the LFC, to provide an opinion on the merits. The LFC relies on the final bullet point at para. 2 of the 2003 Conflict of Interest Policy in this regard;
>
> 6. The approach for which the applicant contends – that a counsel of his choice should be permitted to provide an opinion on the merits of his application, at the Commission's expense, in order to assist the Commission in its funding decision – is essentially the approach adopted by the Legal Services Commission in determining applications for civil legal aid. The respondent has not explained clearly why this approach is unacceptable to it."

[12] Counsel contends that the approach for which the applicant contends is that contemplated by the Commission's 2000 Policy before its amendment. He contends that he has a legitimate expectation that the Commission would adopt the approach set out in the unamended para. 12 of the Commission's Enforcement Policy 2000 and/or para. 6.4 of the Commission's Equal Opportunity Policy. In addition the Commission itself and it's predecessor adopted such an approach. Para. 12 of the 2000 Policy should be applied because this was the policy which applied at the time when the applicant made his applications for funding; the applicant was informed by letter that this was the applicable policy; even after the policy had changed and the 2003 Conflict of Interest Policy came into force the applicant was informed that the 2000 Enforcement Policy was applicable. He relied in particular on letters from Mr Fitzpatrick including that of 22 December 2003. The applicant was told that the Committee would take into account the Commission's Enforcement Policy for the provision of advice and assistance as pertaining at the time of the complaint (counsel referred to Mr Fitzpatrick's letter of 24 February 2004.

[13] Para.6.4 of the Commissions Equal Opportunity Policy provides:

> "Staff who feel they have been discriminated against … and who wish to pursue their claim to an industrial tribunal or the Fair Employment Tribunal may apply to the relevant committee of the Commission with a view to obtaining a independent legal opinion as to the merits of their claim. Both parties should agree the person chosen."

[14] Mr Scoffield argued that the applicant's claim against the Commission is a human resources and personnel matter falling clearly within the Equal Opportunities Policy. The Equal Opportunities Policy is designed to combat discrimination within the Commission. There would inevitably be some overlap were an employee of the Commission alleged discrimination and sought funding to bring proceedings in the Tribunal. It was no self-evident that the Enforcement Policy and the Conflict of Interest Policy took precedent over the Equal Opportunities Policy as Mr Fitzpatrick alleged in para. 27 of his first affidavit. Counsel contended that it was now well established that an individual has an legitimate expectation that his case would be examined in the light of the decision makers applicable policy. The view expressed that the Commission would inhibit itself in its statutory functions and require it to act in conflict with his Conflict of Interest Policy by applying para.6.4 of the Equal Opportunities Policy was incorrect and a misdirection. There was nothing in permitting the applicant to choose the counsel to provide an opinion on the merits of this case which would inhibit the Commission in carrying out its statutory functions. The applicant has a de facto right to select a counsel of his own choice to represent him. It was an unwarranted interference with the applicant's right to select counsel of his choice and a breach of the equality of arms principle or it was Wednesbury unreasonable. Mr Scoffield also relied on the Wednesbury unreasonable argument. It was irrational to consider the funding of counsel of the LFC's own choosing as the giving of assistance to the applicant.

[15] The applicant's contention that he had a legitimate expectation at para. 12 of the Enforcement Policy 2000 should continue to be applied in his case overlooks the fact that within the terms of the Enforcement Policy 2000 itself it is expressly provided that the policy may be varied or amended in the Commission's discretion. The applicant was initially granted funding "subject to review" and accordingly he was aware that the decision to provide funding would be subject to review under a policy which was variable in the discretion of the Commission. His legitimate expectation was that the question of funding would be properly considered in accordance with the prevailing policy applicable at the relevant time. In Findlay v Secretary of State [1984] 3 All ER 801, having regard to the substance and purpose of the legislative provisions governing parole, the House of Lords held that the most a convicted prisoner could legitimate expect is that his case would be

examined individually in the light of whatever policy the Secretary of State saw fit to adopt policy was a lawful exercise of the discretion conferred on him by statute. In the present context the Commission was subject to certain constraints under the legislation in relation to the provision of funding, constraints of both a legal and practical nature. It was accordingly entitled to adopt policies as to how it should approach the question of determining applications for funding. Its policy could be subject to evolution and review in the light of practical and legal development. The evolution of the Conflict of Interest Policy was an entirely legitimate one and the applicant could point to no reason in law why the Conflict of Interest Policy would in itself be a legally flawed policy. The policy is based on a sensible and practical approach to providing for the difficulties that arise in practice in conflict of interest situations. The engagement of a suitably trained practitioner to assess the application outside the Commission but applying the same basis as that employed by officers of the Commission in relation to other applications made under the Enforcement Policy 2000 (as amended) is an entirely sensible solution to the problem. The prohibition on that consultant playing any further part in the case is likewise entirely rational and justifiable, the independent practitioner having to perform a function normally carried out by an officer of the Commission. In this instance the independent external consultant was Catherine Williamson. As a result of considering the recommendation from her the LFC considered that the Committee would benefit from obtaining counsel's opinion on the issue of the prospects of success and in respect of the political opinion that gender issue. The LFC were entitled to conclude that they would benefit from an opinion furnished by counsel acting independently and instructed to advise it. Such a viewpoint was rational and tenable. The LFC would be freed to reach that conclusion unless there was a restraint imposed on them in this instance by the Equal Opportunities Policy itself. The Enforcement Policy both in 2000 and its current form clearly envisaged that the Commission might appoint its own legal or other representative in connection with funding applications was an obligation on the applicant to co-operate (see para. 7(f) to (j) and (h) to (l)). This would have been known to the applicant and formed part of the background of the expectations which he could legitimately have in the circumstances.

[16] The Equal Opportunity Policy in para.6.4 set in its proper context appears to address a different issue to that raised in the present context where the LFC is reviewing the question of the funding of a claim which the applicant has decided to actively pursue. Para. 6.4 appears to address a stage before the applicant has committed himself to pursuing a claim in the tribunal. It relates to a situation were an employee feels he has been discriminated against and wishes to pursue a claim. In an effort to resolve the matter before the claim is activated an independent legal opinion may be obtained on the merits from a jointly agreed legal advisor. The policy does not in fact make provision for the circumstances where the parties cannot

reach a consensus on the appointment of an advisor. The appointment by the LFC of a counsel to advise the Committee on the merits of a claim in the context of deciding whether funding should be provided is a quite different situation. Accordingly, I do not consider there is anything in the Conflict of Interest Policy that subjects its provisions to para. 6.4 of the Equal Opportunities Policy. It seems to be accepted by the parties that the applicant's own counsel's opinion in full should not go to the LFC in full since it could reveal points adverse to the applicant or would in any event reveal the legal advice given to the applicant in relation to the dispute between him and the Commission.

[17] It would be open to the LFC to seek to agree with the applicant the identity of counsel to be instructed albeit that that counsel would be independent. Since counsel would be advising the LFC independently on the question of the merits of the claim the counsel could not also later act for the applicant there being the potential for an actual or apparent conflict of interest. The LFC, however, is not under the terms of the Conflict of Interest Policy, bound to seek the agreement of the applicant. As I have held the Equal Opportunities Policy para. 6.4 does not apply in this situation. Accordingly the applicant has no legal grievance arising from the approach adopted by the LFC.

[18] I have resolved this application against the applicant on the merits of the argument. The applicant's claim also fails on the basis of delay. In reality the applicant is challenging the Conflict of Interest Policy of which he was aware since February 2004. Even if one were to accept the argument of the applicant that it was not until the decision was made to instruct independent counsel without any input from the applicant that there was an actual challengeable action on the part of the LFC he was aware of the decision to approach the matter in that way in April 2005 or, at latest, in May 2005. Judicial review proceedings were not launched until 25 November 2005. I accordingly accept Mr McGleenan's argument that the applicant's case should fail on the basis of a lack of promptitude on the part of the applicant in bringing the judicial review challenge.

[19] Accordingly I dismiss the application.