CARE3158 **25 February 2000**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN

VICTORIA PATEFIELD

(Applicant) Respondent

and

BELFAST CITY COUNCIL

(Respondent) Appellant

_____

CARSWELL LCJ

Introduction

This is an appeal by way of case stated from the decision of an industrial tribunal given on 7 September 1999, whereby it found that the respondent Miss Victoria Patefield had been discriminated against by the appellant Belfast City Council under Article 12 of the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order), by failing to make her former post available to her on her return from absence on account of maternity, and made an award of compensation in her favour. The appeal raises issues relating to the rights and remedies of temporary contract workers against the persons or bodies for whom they carry out work when sent by their agencies.

The Factual Background

The respondent commenced work with an agency called Grafton Recruitment in or prior to 1995. She was sent by them in February 1995 to a post with Belfast City Council, where she worked

as a clerical officer in the Cemeteries Department in an office located in the City Hall. She appears to have been very satisfactory in this post, and when Grafton Recruitment lost their contract to supply the Council with temporary staff in the summer of 1997 to another firm named Diamond Recruitment her line manager asked Diamond Recruitment to take her on to their books and keep her in the post. She stayed on in the Cemeteries Office of the Council and by March 1998 she was the longest serving person working in that office. The tribunal found that if she had not gone off work she would undoubtedly have remained in that post.

We were furnished by agreement with copies of the contract into which the respondent entered with the firm Diamond Recruitment. This is described in the text as a contract for services, but the tribunal held that the description was not conclusive and that it should look at the realities of the relationship between the parties. The essence of the arrangement was that the firm would endeavour to obtain suitable assignments for the respondent as a "temporary clerical officer/WPO" and would pay her at the rate of £4.00 per hour for all work done by her. She was entitled to that payment only when actually working and by clause 4 the respondent acknowledged that it was in the nature of temporary work that there would be periods when no suitable work was available and that the firm would not be liable to her if it failed to offer her work opportunities. Clause 6 provided that she was not entitled to any sick pay or holiday pay. Under clause 8 the respondent was not obliged to accept any assignment offered, though clause 9 gave the firm the option of terminating the contract if she declined to accept any offer of work. If she did accept an assignment, the respondent was obliged to accept the direct supervision and instruction of any responsible person in the client's organisation.

The tribunal held, relying on *McMeechan v Secretary of State for Employment* [1997] ICR 549, that the respondent's contract with Diamond Recruitment was a contract of service and not a

contract for services, notwithstanding the terms in which it was framed, and therefore she was an employee of that firm. We do not need in this appeal to express a view on that difficult issue, which is replete with fine distinctions. Diamond Recruitment did not appeal against the small award made against them by the tribunal for failure to pay the respondent during her absence for pre-natal check-ups. Counsel for the respondent, while contending as part of her case that the respondent was employed by the Council, did not seek to argue that her relationship with Diamond Recruitment was a contract for services, nor did the respondent ask the tribunal to include any question about that relationship in the case stated. The Council did not seek to challenge the tribunal's finding about the relationship by asking the tribunal to include a question about that, nor did it present any argument on those lines to this court. We shall therefore proceed on the assumption that the respondent was at all material times an employee of Diamond Recruitment.

The respondent discovered in September 1997 that she was pregnant. She informed her supervisor that she was expecting the birth of a baby in May 1998 and proposed to work on until March 1998. The Council brought in a permanent member of their staff to replace her when she went off, and the respondent assisted in training this person from January 1998. By a letter dated 16 February 1998 the respondent wrote to the Council giving formal notice of her intention to be absent for the birth of her baby and stating that she intended to return to work thereafter. She then asked for written confirmation that she might return to "my own job" following the birth. The Council's Head of Human Resources replied some time later, by a letter dated 19 May 1998, in which he stated:

> "I refer to Miss Eastwood's correspondence of 20 February 1998 and apologise for not having been in a position to respond to you sooner.
>
> In response to your request for written confirmation that you may return to your job I must advise you that I am unable to provide you with this, given that you did not work for the Council as an employee under a contract of employment.

> However that does not preclude you from taking a placement with us, should one arise, through Diamond Recruitment Services and you are available. (Mr Holmes has advised that you indicated you would not be available for work after 27 March 1998)."

After initially refusing to accept that the respondent was entitled to statutory maternity pay, Diamond Recruitment eventually agreed in March 1998 to make such payments to her. These ran until 14 August, and shortly before that the respondent wrote to the Council stating that she would be available to return to work on 17 August. She received a reply dated 14 August in which the writer stated:

> "While recognising your right to return to work after maternity leave, it is not possible for the Council to arrange for you to return to the Cemeteries Office as the duties of that post are now undertaken by a permanent Council employee.
>
> To allow us the opportunity to find a suitable post for you, we are postponing the date of your return to work until 7 September 1998."

The respondent was then offered a post at the City Cemetery in Falls Road, Belfast. She was unwilling to accept this post, because she considered that the conditions were materially inferior to those in which she had worked in the Cemeteries Office, and she sought and obtained a job with a different body. The tribunal found that on the facts the post offered was not suitable alternative employment, and the appellant Council did not attempt to challenge that finding in this court.

European and National Legislation

The 1976 Order was passed in order to fulfil the Government's obligations under the Directive 76/207, commonly known as the Equal Treatment Directive. Other provisions designed to protect the health of workers who are pregnant, have recently given birth or are breast-feeding were subsequently enacted in Directive 92/85. A considerable part of the argument before us centred round the applicability of these provisions contained in these Directives and the way in which the

national legislation should be construed in order to fulfil their objects. In view of the conclusions which we have reached upon the meaning and application of Article 12 of the 1976 Order, however, it is not necessary for us to deal in any detail with the Directives or the arguments based upon them.

Article 2 of the 1976 Order defines "employment" as meaning –

> "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly."

Article 3(1) provides that a person discriminates against a woman in any circumstances relevant for the purposes of any provision of the Order if –

> "(*a*) on the ground of her sex he treats her less favourably than he treats or would treat a man."

Article 8 goes on to prohibit discrimination by an employer in a number of ways. For present purposes the material portion is Article 8(2)(*b*):

> "It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her –
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> * * * * *
>
> (*b*) by dismissing her, or subjecting her to any other detriment."

Part IX of the Employment Rights (Northern Ireland) Order 1996 confers specific rights upon an employee in respect of maternity leave and returning to work, Article 111(2) requiring the employer to secure that the terms and conditions of her resumed employment are not less favourable than those which she would have enjoyed had she not been absent on maternity leave. Again, however, this only applies to a woman who is employed under a contract of service.

Article 12 of the 1976 Order makes provision for contract workers, giving them specific rights against the principals in whose establishment they are engaged. Article 12(1) and (2) provide:

> "12(1) This Article applies to any work for a person (`the principal') which is available for doing by individuals (`contract workers') who

are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.

(2) It is unlawful for the principal, in relation to work to which this Article applies, to discriminate against a woman who is a contract worker -

(*a*) in the terms on which he allows her to do that work, or

(*b*) by not allowing her to do it or continue to do it, or

(*c*) in the way he affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or

(*d*) by subjecting her to any other detriment."

The Issues on the Appeal

The arguments presented on appeal centred round the applicability of Article 12 of the 1976 Order, though Miss Higgins for the respondent submitted in the alternative that the respondent was properly to be regarded as an employee of the Council (and so entitled to return to her old job), or had a remedy under the European Directives to which we have referred. In view of our conclusions under Article 12, we shall not require to deal with these alternative submissions.

The tribunal based its decision on the similarity between the instant case and that reported in *BP Chemicals Ltd v Gillick and Roevin Management Services Ltd* [1995] IRLR 128, which it regarded as indistinguishable. In that case Ms Gillick was a contract worker on the books of Roevin, an employment agency which had a contract to provide BP Chemicals Ltd (BP) with staff for consideration. In accordance with the usual arrangement in such cases, the staff taken on were paid by the agency, which invoiced BP for their pay plus a commission. Ms Gillick worked for three years in BP's offices as a project accountant, then went off for a few weeks for the birth of a baby. She approached BP with a view to resuming her old work, but was told that she could not take up her

old job, and was offered another post at a lower rate of pay. She declined this offer, but Roevin did not offer her any further work and in due course dismissed her.

The industrial tribunal held that Ms Gillick was not employed by either Roevin or BP but was in an "employment" relationship with both because of the definition of "employment" in section 82 of the Sex Discrimination Act 1975 (in the same wording as Article 2(2) of the 1976 Order). On an appeal by BP the Employment Appeal Tribunal held that the industrial tribunal's conclusion on section 82 was incorrect, but that the case could fall within section 9 of the 1975 Act, the same provision as Article 12 of the 1976 Order. Mr Hanna pointed out, however, that it was specifically found by the EAT that BP had work available to be done by individuals employed by Roevin, which was sufficient to distinguish the case from the present one.

We are not clear ourselves on what basis the EAT found that Ms Gillick was employed by Roevin, a necessary condition to trigger the operation of section 9, notwithstanding the contrary finding of the industrial tribunal. Be that as it may, Mr Hanna submitted that the *Gillick* case could be distinguished on the ground that in the present case there was no work "available for doing" by contract workers when the respondent asked for her old job back in August 1998. He pointed out that the Council would have been able quite lawfully at any time when the respondent was occupying her post in the Cemeteries Department to replace her with a permanent employee of the Council, and the respondent would have had no redress in such circumstances. He then put forward his proposition in the form of a syllogism which he submitted formed a conclusive argument against the respondent:

(a) When the respondent went off work in March 1998 there was a job available for a contract worker, but the Council did not do anything which came within Article 12(2)(*b*). That provision made it unlawful for the Council not to allow her to do the work or continue to do it, which is the

equivalent in Article 12 of refusing to offer employment or dismissing an employee. The Council did not do either to the respondent at that time.

(b) When the respondent asked for her job back in August 1998, there was no work available for contract workers, as the post had been filled by a permanent employee, and in failing to reinstate her in her old post the Council was not in breach of Article 12.

We agree that the availability of work for contract workers in *Gillick's* case is a possible distinguishing feature and that the tribunal may have assumed too readily that the situation in the two cases was identical and that *Gillick's* case could not be distinguished. The argument for the appellant hinges on the case being governed by Article 12(2)(*b*), whereas in our opinion it can come within Article 12(2)(*d*). We accept that the Council could have lawfully replaced the respondent with a permanent employee at any time while she was in post, and that it might appear somewhat paradoxical to hold that it was unlawful to do so when she went off for maternity reasons. We consider, however, that we are compelled so to hold by the decision of the European Court of Justice in *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482.

It seems to us that the following propositions are established on the particular facts of this case:

1. When the respondent went off work in March 1998 there was then a job available for a contract worker.

2. When the respondent went off work for maternity reasons, Belfast City Council replaced her by a permanent employee, although it knew that she wanted to return to her post after the birth of her child. If she had not gone off work at that time, the Council would have kept her indefinitely in her post.

3. Replacing her by a permanent employee subjected her to a detriment at that time, for it effectively removed the possibility of her returning to her post after the birth of her child.

4. In so acting the Council treated her less favourably than they would have treated a man, who would not have become unavailable for work because of pregnancy.

5. By this action therefore the Council discriminated against the respondent.

We referred above to the particular facts of this case, for it should be emphasised that the facts were somewhat unusual particularly in respect of the tribunal's finding that the respondent would have remained in her post if she had not been off work for maternity reasons. Replacement of a contract worker may well be within the law in many other circumstances.

We accordingly answer the first question, posed in paragraph 9.3.1 of the case, and the third question, posed in paragraph 9.4, in the negative. The second question, set out in paragraph 9.4, is a step in the reasoning leading to the conclusion on the first question, rather than a separate issue, and we do not find it necessary to answer it. The appeal will be dismissed.

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JUDGMENT

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