Neutral Citation no. [2003] NICA 36(1)

Ref:	**CARC3993**

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

Delivered:	**29/9/03**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN

PATRICIA ANN JONES

(Complainant) Respondent

and

FRIENDS' PROVIDENT LIFE OFFICE

(Respondent) Appellant

———

Before: Carswell LCJ, Nicholson LJ and Kerr J

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CARSWELL LCJ

[1] This is an appeal by way of case stated from a decision of an industrial tribunal on a preliminary issue that it had jurisdiction to hear and determine the respondent's complaint of discrimination by the appellant on the ground that she was a contract worker supplied by her employer to the appellant, within the meaning of Article 12 of the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order).

[2] The respondent brought a complaint against the appellant by an originating application dated 15 June 2000, whereby she claimed compensation for sex discrimination and unfair dismissal. The appellant entered an appearance by notice dated 30 June 2000, denying any discrimination or unfairness and claiming that it was not liable on the ground that the respondent was never employed by the appellant. The tribunal heard a preliminary issue on 7 March 2001, whether it had jurisdiction to entertain the claim, and decided in favour of the respondent. The respondent

advanced her claim under three heads (a) that she was an employee of the appellant, in the sense that she did work for them under a contract personally to execute work or labour (b) that she came within Article 12 of the 1976 Order as a contract worker (c) that the appellant had unlawfully withdrawn authorisation which it had given to the respondent within the meaning of Article 16 of the 1976. The tribunal by a written decision issued on 10 April 2001 found against the respondent's claim under heads (a) and (c), but in her favour under head (b). The correctness of the decision under heads (a) and (c) was not in issue on this appeal, but the appellant applied to the tribunal by requisition dated 18 May 2001, requesting it to state a case for the opinion of this court on two questions. The tribunal stated and signed a case on 30 July 2001 on one question, which was:

> "Was the tribunal correct in law in holding that it has jurisdiction to hear the respondent's complaint by virtue of Article 12 of the Sex Discrimination (NI) Order 1976 by finding that she was a `contract worker' supplied by her employer, Walter Jones the business, to the appellant?"

The respondent subsequently sought to include in the appeal further questions which were not contained in the requisition or any cross-notice and were not dealt with in the case stated. The court refused leave to amend and the appeal eventually proceeded on the issue contained in the case stated.

[3] The supply of financial services was at all material times governed by the Financial Services Act 1986, section 3 of which prohibits the carrying on of investment business in the United Kingdom except by authorised persons under Chapter III or exempted persons under Chapter IV. The appellant is an authorised person, and was entitled under section 44 to appoint an appointed representative under a contract for services which requires or permits him to carry on investment business, defined by subsection (3) as consisting of –

> "(a) procuring or endeavouring to procure the persons with whom he deals to enter into investment agreements with his principal or (if not prohibited by his contract) with other persons;
>
> (b) giving advice to the persons with whom he deals about entering into investment agreements with his principal or (if not prohibited by his contract) with other persons; or

(c) giving advice as to the sale of investments issued by his principal or as to the exercise of rights conferred by an investment whether or not issued as aforesaid."

The principal of an appointed representative is by section 44(6) vicariously liable for that representative's acts or statements.

[4] The following facts were found by the tribunal, as set out in paragraph 7 of the case stated:

"(1) The respondent's husband Walter Jones had an Estate Agency.

(2) The respondent worked for him in this business as a secretary and personal assistant.

(3) In 1995 Walter Jones trading as Wynchester Investments applied to the appellant to become and Appointed Representative. His application was granted and Walter Jones t/a Wynchester Investments became an Appointed Representative (hereinafter called `an A.R.') from 20 April 1995 for the purpose of sale of the appellant's products. This conferred `tied agency' status on his business ie to sell only products of Friends Provident and the authority to do so derived from Friends Provident's membership of the Personal Investment Authority. Walter Jones personally was also appointed an Introducer Representative entitling him to introduce clients to a Company Representative.

(4) The respondent applied to the appellant and became a Company Representative (hereinafter called `a C.R.') for the appellant from 20 April 1995. Her appointment was as an employee of Walter Jones t/a Wynchester Investments to do the selling of Friends Provident products ie she was to advise and to sell investment business to clients of her husband's estate agency.

(5) She attended a training course with the appellant in April 1995.

(6) The respondent was sent a letter by the appellant dated 3 May 1995 confirming her appointment as a C.R. and outlining her authority. The letter also said `The authorisation is automatically withdrawn should you cease to be a Company Representative of Friends Provident Life Office'.

(7) The respondent sold insurance policies and pensions to clients of her husband's business. All commission was paid to Walter Jones. Walter Jones had an Indemnity agreement with the appellant. The respondent was entitled to receive remuneration only from Walter Jones although in fact she did not. All commission earned went into her husband's business.

(8) Walter Jones, the business, (the title `Wynchurch Investments' having been dropped sometime previously) ceased to be an A.R. from 22 March 2000 and became an Introducer Representative.

(9) The respondent's status as a C.R. was taken away and she also became an Introducer Representative entitling her only to introduce business to another A.R.

(10) Because she could no longer sell the appellant's products the amount of commission she could generate was greatly reduced.

(11) While Walter Jones the business, was an A.R. he was not licensed to sell investment business for the appellant. He had to have a C.R. to sell for him. He could have been an A.R. and a C.R. in which case he could have sold investment business for the appellant. A C.R. must either be also an A.R. or be employed by an A.R."

The tribunal also stated in paragraph 8:

"8. The tribunal concluded that the respondent was a C.R. employed by Walter Jones, the business, ie by him in his capacity as an A.R. Therefore when he ceased to be an

> A.R., she could no longer be employed by him as a C.R. The A.R. status of Walter Jones, the business, was taken away because the business was unable to meet the required target which in turn was because of the respondent's low sales performance, performance being monitored against the A.R. The respondent's sex discrimination claim was that the appellant discriminated against her on grounds of her sex when it reduced her status on the basis of her poor sales performance which she alleged was as good or better than that of some of the males working in the regional area."

[5] The issue in the present appeal is whether the tribunal was correct in holding that the respondent's case came within the terms of Article 12 of the 1976 Order. Paragraphs (1) and (2) of Article 12 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 –
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> (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."

[6] The tribunal set out in paragraph 17 of the case stated its conclusion on the applicability of Article 12:

> "17. The tribunal was satisfied that Walter Jones as an A.R. had a contract with the appellant and

> pursuant to that contract employed the respondent as a C.R. to sell the appellant's products to his customers. The selling of the appellant's products was work done by the respondent pursuant to her contract of employment with Walter Jones, A.R., but it was also work done for the appellant. She was described by the appellant at all times as a C.R. for Friends Provident Life Office. Following the decision in Harrods Ltd –v- Remick and C.J. O'Shea Construction Ltd –v- Bassi the tribunal was satisfied the respondent fell within the provisions of Article 12 and was entitled to bring a sex discrimination claim against the appellant."

The court made a request to the tribunal by letter dated 22 January 2003, in relation to the contents of paragraph 17, that –

> "… if there are any facts upon which it based this finding which are not set out in the case, or if it relied upon any inference or presumption of law in determining that Walter Jones employed the respondent for this purpose *pursuant to a contract with FPLO*, it should set such matters out in a supplementary case and forward it to the court."

The tribunal replied by letter dated 25 February 2003 in the following terms:

> "The tribunal found as a fact that Walter Jones as an AR had a contract with the appellant to sell the appellant's products. It did not find as a fact that the contract contained a provision, which imposed a legal obligation on Walter Jones to employ the respondent to sell FPLO products to his customers. By the use of the phrase `pursuant to that contract' in this part of paragraph 17 of the Case Stated the tribunal was setting out its finding that Walter Jones, in carrying out his contract with the appellant to sell its products, did in fact employ the respondent to sell the appellant's products to his customers."

[7] The arguments presented to this court on behalf of the appellant fell under two heads:

(a) the work carried out by the respondent as a CR whilst employed by Walter Jones was not work for the appellant, the "principal" for the purposes of the definition in Article 12(1);

(b) the respondent was not supplied by her employer under a contract made with the principal.

[8] Counsel for the appellant submitted on the first issue that although a benefit accrued to the appellant from the respondent's work, in that its policies were sold to customers, she was working for Walter Jones in order to earn commissions for his business. He pointed to the analogy of a car dealership, in which a sales representative may properly be said to be working for the dealer and not the manufacturer whose products he is selling.

[9] This issue was considered by the Court of Appeal in *Harrods Ltd v Remick* [1998] ICR 156, in which the court considered whether the employees of franchise holders in Harrods' store were covered by the equivalent of Article 12. The basic facts of their employment were summarised by Sir Richard Scott V-C at pages 158-9:

> "Put very shortly, the system in operation at the Harrods store is this. Harrods grants licences under which the licensee becomes responsible for a particular department at which its, the licensee's, goods will be sold. The licensee must provide the sales force at the department in question. The members of the sales force will be the licensee's employees, hired and remunerated by the licensee. Each member of the sales force must, however, be approved by Harrods and must observe Harrods's rules regarding dress, deportment and behaviour. He or she must wear a Harrods uniform and will be indistinguishable to the public eye from Harrods's employees. Harrods may withdraw its approval of any such individual at any time. The goods on sale at the department, although provided by the licensee, are sold by the licensee to Harrods immediately before their sale to the public.
>
> The price at which this somewhat artificial sale by the licensee to Harrods takes place will be the price at which the goods are sold to the public less a percentage. The percentage will constitute Harrods's commission. These contractual arrangements have the result that the members of

> the sales force, each of whom will necessarily have been approved by Harrods, will be employees of the licensee but will be selling to the public goods that belong at the moment of sale to Harrods, not to the licensee."

[10] The court held that the tribunal was entitled to reach the conclusion, which the Court of Appeal regarded as correct, that the work done by the licensees' employees, while done for their employers, was also work for Harrods. At page 162 Scott V-C enumerated the factors which pointed to this conclusion:

> "Under Harrods's contractual arrangements with its licensees the members of staff will be selling goods that at the moment of sale belong to Harrods. They will be receiving from customers the price for the goods. The gross sums they receive will be paid over to Harrods, leaving Harrods to account to the licensee after deducting its commission. All of this work of selling Harrods's goods and of receiving the purchase money for the goods is work required by Harrods, under its contractual arrangements with the licensees, to be done by staff employed by licensees. And the contractual arrangements entitle Harrods to impose rules and regulations governing the conduct of staff members in the course of carrying out this work. Against this background, the work done by the staff members can, in the ordinary use of language, properly be described as work for Harrods."

The court rejected the construction proposed by Harrods' counsel that those doing the work must be under the managerial power or control of the principal. To limit the application of the legislation in this way would be to read into it words which were not there, and would deprive persons of a remedy when they had no redress under any other provision for discrimination exercised against them. It not clear, however, whether it is sufficient for the complainants to establish merely that the principal benefited from the work done by them. As the Employment Appeal Tribunal pointed out in *CJ O'Shea Construction Ltd v Bassi* [1998] ICR 1130 at 1137, that is a doubtful proposition and in *Harrods Ltd v Remick* there were indications beyond that fact and the matter was left as one of fact and degree. Bearing in mind this caveat, I do consider that although there are several factual distinctions between the present case and *Harrods Ltd v Remick,* the tribunal

must be regarded as having been entitled to reach the conclusion that the respondent's work was done for the appellant.

[11] It was submitted on behalf of the appellant on the second issue that the tribunal had applied an incorrect test and, further, that there was no evidence upon which it could properly find that Walter Jones supplied the respondent under a contract made with the appellant. The tribunal's finding set out in paragraph 17 of the case stated, echoing the language of paragraph 5.2 of its decision, was that –

> "Walter Jones as an AR had a contract with the appellant and pursuant to that contract employed the respondent as a CR to sell the appellant's products to his customers."

If the tribunal intended by this finding to hold that a complainant can succeed under Article 12 if she can show that (a) her employer had a contract with the principal to have certain work done for the latter and (b) the complainant did that work as an employee of the former, I am unable to agree that this is the correct application of Article 12(1). I am not satisfied, however, that the tribunal did interpret the provision in this way. It seems to me more likely that it was using a rather less than precise paraphrase of the statutory wording and intended to apply the proper test.

[12] The issue of construction which we have to decide is the meaning of the words in Article 12(1) "supplies them under a contract made with the principal". Counsel for the appellant submitted that they mean that the respondent must establish that the supply of her services to the appellant to do work for him was under a contract made by her employer with the principal in the sense that the employer was bound by contract to supply those services and did so in fulfilment of that contract. It was submitted on behalf of the respondent, however, that Article 12 covers some situations such as that in the present case, where the employer has not specifically contracted with the principal that he will supply a particular worker, but where it is contemplated that in the process of carrying out their contract the worker in question will do work for the principal under his direction and to some degree under his control.

[13] Article 12 was designed to prevent an employer from escaping his responsibilities under anti-discrimination legislation by bringing in workers on sub-contract (see *Allonby v Accrington and Rossendale College* [2001] IRLR 364 at paragraph 4, per Sedley LJ). The respondent would be covered by Article 12 if its operation is not confined to the case of workers whom the employer has specifically contracted to supply to the principal, like agency nurses or temporary typists. In my opinion Article 12 should receive a broad

construction which has the effect of providing the statutory protection to a wider range of workers.

[14] The limits to which it should be allowed to extend require careful definition. Counsel for the respondent, in arguing for a broad construction, relied upon the decision of the Employment Appeal Tribunal in *CJ O'Shea Construction Ltd v Bassi* [1998] ICR 1130. In that case the complainant Mr Bassi was a carrier who contracted with Pioneer Concrete (UK) Ltd to deliver Pioneer's ready-mixed concrete to building sites in his vehicle. In pursuance of this contract he made deliveries to the respondent's site, where, he claimed, he suffered racial abuse and discrimination. The contract between Pioneer and O'Shea was comprised in the former's standard conditions of sale, which were not set out in the report, but apparently did not refer in specific terms to the identity of the personnel making the deliveries or the means by which delivery was to be effected. The EAT rejected the suggestion that the supply of the individual worker should be the primary or sole purpose of the contract under which he or she is supplied, following on this point the conclusion reached by the Court of Appeal in *Harrods v Remick* at page 163. It went on to hold at page 1138 that because Pioneer had contracted to deliver concrete by means of a vehicle, complete with a driver able to unload and deliver it, the tribunal was entitled to hold that Pioneer had "supplied" Mr Bassi under a contract.

[15] This decision can be contrasted on its facts with that in *Harrods Ltd v Remick.* As the Court of Appeal set out in the passage from the judgment at page 158 which I quoted, the licensees undertook by contract to supply staff to operate the franchise in Harrods' store. The court also referred at page 162 to the Moyses Stevens contract, which it regarded as representative of the contractual arrangements made by the other licensees, and which obliged the licensee to "ensure that the department is adequately staffed with suitable qualified employees."

[16] I have some reservations about the correctness of the decision in *CJ O'Shea Construction Ltd v Bassi,* which seems to me to open the way to a wide variety of possible claims. If it is right, a delivery driver could in very many instances claim under Article 12 against the consignee of the goods delivered by him or an employee of a sub-contractor might claim likewise against the main contractor. I do not consider that the statutory provision can have been intended to extend so far, and am of the view that it must be restricted in some fashion if the respondent's contention is accepted.

[17] The purpose of Article 12 is to ensure that persons who are employed to perform work for someone other than their nominal employers receive the protection of the legislation forbidding discrimination by employers. It is implicit in the philosophy underlying the provision that the principal be in a position to discriminate against the contract worker. The principal must

therefore be in a position to influence or control the conditions under which the employee works. It is also inherent in the concept of supplying workers under a contract that it is contemplated by the employer and the principal that the former will provide the services of employees in the course of performance of the contract. It is in my view necessary for both these conditions to be fulfilled to bring a case within Article 12.

[18] In the present case the respondent's employer entered into a contract with the principal, the appellant, to sell the principal's products. Mr Jones was not himself entitled to sell those products, being an AR but not a CR. The only way in which he could fulfil the contract was by employing a CR or CRs to make the sales, and accordingly it was contemplated that he would employ the respondent to do that work. The respondent was trained and authorised by the appellant, who had a large say in how she was to carry out the work, and the appellant was in a position to withdraw her authority to make the sales by ending her status as a CR. In these circumstances I consider that the conditions were satisfied and that the case was covered by Article 12.

[19] It follows that the conclusion reached by the tribunal was correct, but only because the respondent on the facts contained in the case stated satisfied the conditions which I have set out. I would therefore answer the question posed in the affirmative and dismiss the appeal.

Kerr J

I agree.