Neutral Citation no. [2003] NICA 36(2) | *Ref:* **NICF4016**

Judgment: approved by the Court for handing down | *Delivered:* **29/09/2003**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

PATRICIA ANN JONES

Applicant/Respondent;

-and-

FRIENDS' PROVIDENT LIFE OFFICE

Respondent/Appellant.

NICHOLSON LJ

[1] I respectfully agree that Article 12 should receive a broad construction which has the effect of providing the statutory protection to a wider range of workers. For this reason, I am reluctant to define the limits to which it should be allowed to extend. It seems to me that its extent should not be confined by constructing limits which turn out to be unjustified. I believe that the cases covered by the Article should be developed incrementally and that they will be determined by the facts of each which cannot be anticipated.

[2] Article 1 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 according." Article 12 applies to any work for a principal which is available for doing by individuals who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal. The description in brackets of these individuals as "contract workers" does not assist me in determining who is employed or who is supplied under a contract.

[3] These individuals will include self-employed persons who have made a contract with an "employer" and who may be supplied by the "employer" under a contract made by him with the principal.

[4] The decision in Harrods v Remick which was concerned with the Race Relations Act 1976 indicates that a broad approach should be given to the question whether the individual does work for the principal as well as for his "employer" and to the question whether he is supplied to the principal under a contract made between the principal and his employer. In the Harrods case Sir Richard Scott VC (as he then was) rejected the contention that the work to be done for the principal must be work in respect of which managerial powers are exercised by the principal: see Harrods Ltd v Remick (1998) 1 ICR 156 at 158, 159. At p. 159 there are helpful references to the wide interpretation of that legislation which applies with equal force to sex discrimination.

[5] Lord Scott also rejected the submission that the supply of workers should be the primary purpose or the dominant purpose of the contract made between the principal and "the employer". I have put "the employer" in inverted commas in paragraphs 3, 4 and 5 by reason of the wide definition of "employment" in Article 1 of the 1976 Order.

[6] In C J O'Shea Construction Ltd v Bassi (1998) 1 ICR 1130 the EAT held that it was open to the industrial tribunal to hold that the applicant, Bassi, was contracted "personally to execute any work or labour" within the meaning of section 78(1) of the Race Relations Act 1976 and the fact that the contract between Pioneer and the applicant did not require Pioneer to give him any work at all did not preclude there being such a contract in respect of work he was given; that the question whether the applicant did any work for O'Shea was a matter of fact and degree depending on the surrounding circumstances. There is a helpful discussion of what is meant by "employment under a contract personally to execute work" at pp. 1136, 1137 of the judgment.

Mr Bassi was subject to the instructions of O'Shea's employee when he arrived on site. This was the banksman who controlled access to the site by Mr Bassi, directed him where to discharge his load of concrete and in what quantity from time to time. He was also empowered to refuse to accept his load of concrete and to send him off the site if instructed to do so. He was in a position to make Mr Bassi's working conditions intolerable.

The E.A.T. therefore upheld the decision of the industrial tribunal that Bassi was doing work for O'Shea as well as for Pioneer. I can find no error of law in this finding by the E.A.T. and I do not have any reservation about the correctness of the decision.

[7] If, as a result more people are able to complain of discrimination in relation to their work than had been earlier thought, I, like the E.A.T. can "bear with equanimity" this consequence, having regard to the purpose of the legislation: see p 1139 of the judgment of Lindsay J.

[8] It does not follow that every delivery driver or every employee of a sub-contractor has a claim for discrimination against the main contractor. But I am not impressed by the "floodgates" argument advanced in Bassi's case and dismissed by the Tribunal. If the principal is not in a position to discriminate against an "employee" of the person who supplies that individual under a contract with the principal, any claim brought against the principal must inevitably fail and, it seems to me, that an industrial tribunal should be able to deal with claims of discrimination without limitation on the construction of the Article and thus ensure that a genuine case of discrimination can be redressed.

[9] Apart from these reservations I respectfully agree with the reasoning of the Lord Chief Justice in dismissing this appeal.