Neutral Citation no. [2006] NICA 44 | *Ref:* **KERF5690**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **08/11/06**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEAL BY WAY OF CASE STATED FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

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PAUL COSGROVE

Appellant;

-and-

NORTHERN IRELAND AMBULANCE SERVICE

Respondents.

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Before Kerr LCJ, Nicholson LJ and Sheil LJ

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of an Industrial Tribunal whereby it held at a preliminary hearing that the respondent had not discriminated against the appellant contrary to section 1 of the Disability Discrimination Act 1995.

[2] The opinion of this court was sought on three questions: -

1. Did the tribunal err in law in deciding that the essential feature of the appellant's disability, namely his physical impairment, was his severe disfigurement and not [his] psoriasis …?

2. Did the tribunal err in law in deciding that the appellant's claim under the Disability Discrimination Act 1995 must fail because the reason for his failure to obtain the post was in no way related to the severe disfigurement aspect of his condition?

3. Did the tribunal err in law in failing to consider whether the appellant was unlawfully discriminated against by reason of the fact that he suffered from psoriasis, in circumstances where, by reason of the severe disfigurement of the psoriasis and not the skin condition itself, he thereby had a disability and was a disabled person under the Disability Discrimination Act 1995; and which severe disfigurement was not related to his failure to obtain the post?

The facts

[3] On 1 May 2001 the claimant/appellant applied (in the event, successfully) for a post described as 'an emergency ambulance person (relief)' with the respondent organisation. On 11 February 2002 he attended a pre-employment medical with Dr Martin Tohill at the Royal Victoria Hospital. Dr Tohill found that he suffered from psoriasis of such severity as to render him unfit for the post. He gave three reasons, based on National Health Service Guidelines, for this conclusion: -

1. Exposure to allergens or irritants (*e.g.* latex) in the course of the employment could aggravate the skin condition.

2. There would be a cross-infection hazard for patients (especially of wounds) due to colonisation of abnormal skin (which sheds more skin cells) by bacteria (*e.g.* MRSA).

3. A substantially increased risk of infection would arise for the appellant by penetration of microbiological agents through broken skin (*e.g.* blood borne infections like hepatitis B or C or HIV).

[4] On 21 February 2002 a second opinion was obtained and Dr Tohill's conclusion was confirmed by Dr Lorna Rogers at Belfast City Hospital. On 4 March 2002, the appellant was informed by letter that he had been found unfit but that Dr Rogers believed he might be fit in the future and that he had been placed on a waiting list for one year. In the event no employment opportunities arose from this waiting list.

[5] On 20 May 2002, the appellant presented an originating application to the Industrial Tribunal claiming discrimination under the Disability Discrimination Act 1995 (the DDA). By a decision of 21 October 2005, the Tribunal found that the appellant was not the victim of discrimination under the DDA.

The statute

[6] The DDA has been amended with effect from 1 October 2004. The law that is to be applied on this appeal is that which pertained before the amendments were introduced.

[7] Section 1 (1) of DDA provides: -

> "**1.**—(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

[8] Section 4 (1) provides: -

> "**4.**—(1) It is unlawful for an employer to discriminate against a disabled person—
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> (a) in the arrangements which he makes for the purpose of determining to whom he should offer employment;
>
> (b) in the terms on which he offers that person employment; or
>
> (c) by refusing to offer, or deliberately not offering, him employment."

[9] Section 5 (1) provides: -

> "**5.**—(1) For the purposes of this Part, an employer discriminates against a disabled person if—
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> (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
>
> (b) he cannot show that the treatment in question is justified."

[10] Paragraph (3) of Schedule 1 to the Act deals with circumstances in which a person is to be treated as suffering from a substantial adverse effect

on his ability to carry out normal day to day activities. Paragraph 3 (1) provides: -

> "**3.**—(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities."

The tribunal's findings

[11] The tribunal concluded that the impairment protected by paragraph 3 of the First Schedule was one which *consists* of severe disfigurement but which would not otherwise satisfy the relevant definition of disability (*viz* one which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities).

[12] The parties had agreed before the tribunal that the appellant's psoriasis was a physical impairment which did not have the substantial adverse effect required by the statute. They further agreed that the applicant's skin condition included an aspect of severe disfigurement. It was therefore accepted by the respondent both before the tribunal and this court that where Schedule 1 (3) (1) of the DDA applied, there was no requirement to prove substantial adverse effect. It was the respondent's case, however, that the impairment referred to in this paragraph was the disfiguring aspect of the condition and not the psoriasis in all its aspects. This argument was accepted by the tribunal. In effect it held that the element of the skin condition that had led to the refusal of employment was not the disfigurement but the propensity of that condition to become infected or to cause cross infection.

[13] Ms McGrenera QC (who appeared with Mr Sands for the appellant) pointed out that in its case stated the tribunal had recorded that "the respondent had at all times accepted that the appellant had a disability and was therefore a disabled person under the DDA". On foot of this acceptance, the tribunal found that "the appellant had a disability as defined under section 1 of the DDA, and was a disabled person thereunder". Ms McGrenera argued that the tribunal was wrong to go beyond that finding. As soon as that conclusion was reached, it was, she said, inescapably clear that the appellant had been treated less favourably because of his disability and the tribunal ought to have proceeded to examine whether the respondent could justify this under section 5 (1) (b).

Conclusions

[14] The central issue in this case is whether paragraph 3 of Schedule 1 to the Act covers the appellant's psoriatic condition in all its forms or whether it should be confined to the severe disfigurement that it causes.

[15] Not every form of disability is protected by the legislation. It must either be of sufficient severity to cause a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities or it must consist of a severe disfigurement. The reason that disfigurement is given access to the protected category by the device of the deeming provision is that those who are at risk of being refused employment or disadvantaged in relation to employment arrangements because of their appearance form a group that require equivalent protection to those who cannot carry out normal day-to-day activities. It appears to us that this special status reflects the increased consideration that it is felt should be accorded this group *on account of their disfigurement*.

[16] It is clear that the differential treatment of the appellant did not arise as a result of his disfigurement. He was not employed because it was judged that he was at risk of infection and that his condition carried the danger that he would infect others. These considerations have nothing to do with his being disfigured. We have concluded therefore that the impairment referred to in paragraph (3) relates solely to a condition of disfigurement and not to a condition, one aspect of which is disfigurement. This conclusion accords with an interpretation of the provision which gives effect to its ordinary and natural meaning. An impairment 'consisting of' disfigurement means, in common parlance, that the impairment relates solely to the cosmetic aspect of the condition. If it had been intended that someone such as the appellant ought to be included within the embrace of the paragraph, a phrase such as 'includes severe disfigurement' could have been used.

[17] We do not consider that it is necessary to examine the questions in the case stated seriatim since the approach of the tribunal was founded on its conclusion that paragraph 3 (1) of Schedule 1 should be confined, in the appellant's case, to that aspect of his condition that related solely to his severe disfigurement. We shall therefore substitute for the tribunal's three questions the compendious question, 'was the tribunal correct in law to conclude that the impairment referred to in paragraph 3 (1) of Schedule 1 to the DDA, as it applied to the appellant, was confined to the severe disfigurement aspect of his psoriatic condition?' We shall answer that question in the affirmative and dismiss the appeal.