Neutral Citation No [2017] NICA 55 | *Ref:* **MOR10411**

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

Delivered: **26/09/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JAMES ROBERT PEIFER

Appellant

-and-

BELFAST MODEL SCHOOL FOR GIRLS AND OTHERS

Respondents

Before: Morgan LCJ, Gillen LJ and Weir LJ

MORGAN LCJ (delivering the judgment of the court)

[1] These appeals concern the appellant's failure to be appointed to a number of classroom assistant posts at 10 schools for which he applied in 2005. In all of these cases the appellant alleges that he was the victim of direct and indirect sex discrimination by reason of his gender. He also complains about the timescale within which each of these cases was listed before the industrial tribunal and maintains that additional parties should have been joined. In addition to these general complaints there are specific issues arising in relation to particular cases. This is the fifth occasion on which the appellant has brought proceedings before this court arising out of claims for sex discrimination as a result of his applications for employment as a classroom assistant. For ease of reference we set out in the following paragraphs the history of these claims by way of background.

Background

[2] On 18 August 2005 the appellant presented a complaint to the Office of the Industrial and Fair Employment Tribunal that he had been discriminated against in

recruitment for the post of special needs classroom assistant by three Education and Library Boards and 10 schools to whom he had made application for some 35 posts. Article 8 contained in Part III of the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order) makes such discrimination unlawful and provides the basis for these claims. All of the applications were made during 2005 and the letters advising him that he had been unsuccessful were received between 20 May 2005 and 17 August 2005. His claim to the industrial tribunal alleges that the letters of rejection constituted the start of his claim. He contended that he probably should have been appointed on every occasion but considered that he had been discriminated against because he had the impression that only females were allowed to take jobs as classroom assistants. His claim form indicated that the respondents were guilty of direct discrimination but he suspected that there was probably also indirect discrimination.

[3] The appellant complained in particular that the schools, Education and Library Boards and the tribunals before which he has presented his claim were engaged in a conspiracy to prevent him making his claim on indirect discrimination. It appears to be common case that approximately 98% of those employed within the state education system as classroom assistants are female. Criteria for the appointment of classroom assistants had been considered by the Joint Negotiating Council (JNC) which consists of representatives of the Education and Library Boards in Northern Ireland and trade unions. JNC Circular 34 advises that the first criterion is that classroom assistants should be required to hold a recognised qualification. Such a qualification can be obtained through a period of service as a classroom assistant and among the qualifications recognised are a number in relation to early years schooling. In relation to the posts with which this appeal is concerned the second criterion that was applied was the requirement for 12 months experience of work with special needs children as a classroom assistant. The applicant has developed his argument to contend that these criteria together with other aspects of the appointment process demonstrate a mind-set which is designed to secure the appointment of females to these posts.

[4] The industrial tribunal decided to deal with these cases by managing each claim separately in relation to each school. The tribunal dealt with the claims affecting the Western Education and Library Board first. The first claims, therefore, related to the failure of the applicant to obtain appointments as a classroom assistant at Castlederg High School. That claim was dismissed by the tribunal on 28 March 2008. The appellant applied to the Court of Appeal to require the tribunal to state a case. One of the issues in that case concerned the fact that the appellant had not signed his application to the school for the post. The school decided that it should not further consider his application and he was not, therefore, assessed for the post. The respondent suggested that this approach was consistent with the approach that they had taken in a previous competition in 2002. The appellant sought to persuade the tribunal that in that case the respondent had assessed the candidate. The tribunal rejected that argument and the Court of Appeal took the view that it was a conclusion that the tribunal was entitled to reach on the evidence. It is a continuing

theme of the appellant's representations to this court and to the tribunal hearing his subsequent cases that he was grossly dissatisfied with that outcome.

[5] The principal argument advanced by the appellant in his application for a case stated in respect of the first tribunal decision related to his claim for indirect discrimination. He contended that the two criteria requiring at least a recognised qualification and 12 months' experience as a classroom assistant were clearly to the detriment of a considerably larger proportion of men than women. He further submitted that the requirement within Article 3(2)(b) of the 1976 Order that he had to show that the criteria had operated to his detriment was contrary to European law and in particular to the terms of Directive 2002/73/EC which did not require a detriment or disadvantage to be established. The Court of Appeal rejected that submission and concluded that there was no question of law in respect of which the tribunal would have had jurisdiction that ought to be considered by that court. The applicant subsequently sought leave to appeal to the House of Lords in respect of that decision and leave was refused by the House of Lords on 9 March 2009.

[6] In respect of the second case against Limavady High School and the Western Education and Library Board 5 requisitions to state a case were lodged between 28 January 2009 and 29 April 2009 arising from Case Management Discussions. These applications were refused by the Court of Appeal on 2 June 2009 and leave to appeal in respect of them was refused by the Supreme Court on 9 June 2010. In large measure these applications retraced ground in relation to the question of indirect discrimination which had been the subject of the considered judgment of the Court of Appeal in the first case.

[7] The third appeal was concerned with 5 further requisitions to state a case which were lodged on 7 August 2009, 25 August 2009, 17 September 2009, 7 October 2009 and 29 October 2010 all arising out of Case Management Discussions in preparation for the hearing of the Limavady case. In his application lodged on 7 August 2009 the questions raised by the appellant arose from his contention that he has been the victim of indirect sex discrimination. He raised an issue as to whether domestic law complied with Directive 2002/73/EC and whether the case should be referred to the European Court of Justice. In his requisition lodged on 25 August 2009 he again returned to the question of indirect discrimination but in particular raised questions as to the adequacy of discovery by the respondent. This related in particular to classroom assistants who had been appointed on a temporary basis without apparently any open competition. The next requisition was dated 1 October 2009. The appellant again returned to the question of his entitlement to pursue an indirect discrimination case and in particular highlighted what he claimed to be the practice of allowing females to be selected without verifying their qualifications. A further requisition was lodged dated 7 October 2009 in which the appellant in particular claimed that the chairman dealing with his cases was biased because he had been a member of the General Teaching Council for Northern Ireland between 2002 and 2007. The Council is the independent professional body for teachers in Northern Ireland. It is dedicated to enhancing the status of teaching and promoting

the highest standards of professional conduct and practice. Those wishing to teach in a grant aided school in Northern Ireland must be registered with the Council. There are 33 members of the Council and the chairman was appointed as one of four appointments by the Department of Education. He resigned from the Council in 2007 when he was appointed a chairman of Industrial Tribunals. The last requisition in connection with the Limavady appeal was dated 29 October 2010. It repeated much of what had been included in previous requisitions and made the point that by restricting discovery in relation to indirect sex discrimination the Tribunal chairman offended the requirements of Rule 17 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 which prohibit the determination of a person's civil rights or obligations by way of case management discussion. In all the circumstances the applicant sought to prevent the full hearing of his second case proceeding on 10 January 2011.

[8] Since all of the applications to state a case arose from Case Management Discussions we declined to state a case on the basis that all of these issues could be revisited during the full hearing of the Limavady case. We rejected the allegation of bias for the reasons set out in our judgment dated 12 October 2011. The appellant sought leave to appeal to the Supreme Court in respect of our decision and this was refused on 23 February 2012.

[9] The hearing of the Limavady case took place on 10 January 2011. The appellant indicated at the outset that he did not intend to participate in the proceedings. He sought an adjournment. He explained that he was processing an appeal of our decision in December 2010 that the case should proceed and was also preparing appeals to the ECHR and the European Commission. He took the view that there had been inadequate discovery and that the Department of Education and the JNC should be joined as respondents as they had developed and promulgated the criteria which he sought to challenge. The adjournment application was opposed on the basis that the respondent's witnesses had come to the hearing and the case was more than 5 years old. The Tribunal decided that the hearing should proceed. It noted that the burden of proving facts from which sex discrimination could be established lay on the appellant and that no such facts had been established. There was no basis for a referral to the ECJ and the application was dismissed.

[10] The appellant appealed against the dismissal of the claim in respect of the Limavady case which was heard on 10 January 2011. The Court of Appeal dismissed the appeal. The date for the hearing had been set by the tribunal on 21 September 2010. That gave the appellant more than 3 months to prepare. The appellant was not proposing any alternative date for hearing. The application to adjourn had come on the morning of the hearing. The case was more than five years old. The appellant had indicated his intention to persist with his indirect discrimination case despite the views expressed by the Court of Appeal at paragraph 15 of his Castlederg case that such an approach was misconceived. The decision to adjourn was a discretionary decision and the refusal of the adjournment in those

circumstances was well within the area of discretionary judgment available to the tribunal even though the effect was to dispose of the appellant's case.

[11] The Tribunal next set about dealing with the claims arising from applications to St Patrick's and St Brigid's College Claudy (the Claudy case). Between 23 March 2011 and 6 December 2011 the appellant lodged five appeals in relation to Case Management Discussions concerning these applications and one appeal in relation to the decision of a Pre Hearing Review held on 2 September 2011. The Claudy case came on for hearing on 17 October 2011. The chairman recorded that the appellant gave disjointed evidence consisting of references to other claims, speculation and legal submissions. He was directed to deal with evidence in relation to his discrimination claim. He stated that he had concentrated on his various appeals and was not in a position to put a reasoned argument in respect of his current claim. The Tribunal rose to give the appellant some time to prepare himself but when it returned the appellant was still not in a position to proceed. In light of the fact that the case was now more than six years old the Tribunal considered that it should not further delay the case and the appellant indicated that there was no point in continuing. The case was dismissed.

[12] His appeal in respect of that dismissal largely concentrated on the argument that he was the victim of indirect discrimination. This court dealt with that submission between paragraphs [17] and [23]:

> "[17] At the time that the appellant presented these complaints the jurisdiction to do so was contained in Article 63(1) of the Sex Discrimination (Northern Ireland) Order 1976 as amended (the 1976 Order) which provided:
>
> > '63-(1) A complaint by any person ('the complainant') that another person ("the respondent")
> >
> > (*a*) has committed an act of discrimination … against the complainant which is unlawful by virtue of Part III … may be presented to an Industrial Tribunal.'
>
> Part III of the 1976 Order dealt with discrimination in employment. It must follow, therefore, that the only complaints with which the tribunals in these cases were concerned were those alleged acts of discrimination committed on or before 18 August 2005, which was the date on which the applications were lodged.

[18] The definition of discrimination in employment at the relevant time was contained in Article 3 of the 1976 Order.

> '3 - (2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if –
>
> (*a*) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or
>
> (*b*) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –
>
> (*i*) which is such that it would be to the detriment of a considerably larger proportion of women than men,
>
> (*ii*) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
>
> (*iii*) which is to her detriment.
>
> (3) Paragraph (2) applies to –
>
> (*a*) Any provision of Part III …'

It is clear from the definition that for indirect discrimination under Article 3(2)(b) the application of the provision, criterion or practice must cause a detriment to the claimant.

[19] The appellant disputes this. He relies on Directive 2002/73/EC which defines indirect discrimination as a situation where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The appellant argues, therefore, that although he satisfied the criteria that were used for the posts for which he applied the fact that less men than women would be

likely to satisfy those criteria was sufficient. Since those criteria were applied to him he submits that he is a victim of indirect discrimination without having to demonstrate any particular disadvantage suffered by him.

[20] The date for transposition of Directive 2002/73/EC was 5 October 2005. On 1 October 2005 the 1976 Order was amended to replace the definition of indirect discrimination by substituting the following for Article 3(2)(b):

> "(b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but –
>
> (*i*) which puts or would put women at a particular disadvantage when compared with men,
>
> (*ii*) which puts her at that disadvantage, and
>
> (*iii*) which he cannot show to be a proportionate means of achieving a legitimate aim."

[21] That transposition became the subject of a Reasoned Opinion from the European Commission dated 23 November 2009. The Commission concluded that the requirement in the transposition for actual damage did not reflect the intent of the Directive that hypothetical damage should also be covered. The Commission relied on the decision in the Feryn Case C-54/07 for the conclusion that where candidates were dissuaded from the labour market they were potential victims covered by the Directive. The Commission noted that a requirement that an alleged victim of indirect discrimination was put or would be put at a disadvantage would normally bring UK law into line with the Directive. On foot of this determination the Sex Discrimination (Amendment) Regulations (Northern Ireland) 2011 were made on 31 March 2011 and amended Article 3(2)(b)(ii) of the 1976 Order by inserting the words 'or would put' after the word 'puts'.

> [22] The effect of the 2011 amendment of the 1976 Order is to limit a claim for compensation under Part III of the 1976 Order to those who have been or would be disadvantaged by the application of the provision, criterion or practice. The appellant submits that in light of his submission set out at paragraph 19 above this transposition does not meet the requirements of the Directive. We do not agree. We consider that in the context of a claim for compensation the claimant must demonstrate that he has been or would have been put at a disadvantage. We consider that paragraph 24 of the Reasoned Opinion plainly supports this interpretation. For that reason we consider that the appellant's reliance on Mangold v Helm Case-144/04 [2006] IRLR 143 is of no assistance to him. Our conclusion is also consistent with the decision of the EAT in Villalba v Merrill Lynch & Co [2006] IRLR 437.
>
> [23] It follows, therefore, that we reject the appellant's submission that he can maintain an indirect discrimination claim based on Directive 2002/73/EC in circumstances where he is not contending that the provision, criterion or practice is one which puts or would put him at a disadvantage since his case is that he satisfies each criterion. We, therefore, reject the appeal in relation to the Pre Hearing Review on 2 September 2011."

[13] An application for leave to appeal this decision was dismissed by the Supreme Court on 21 December 2012. In its Order the Supreme Court stated that the application did not raise an arguable point of law and that it was not necessary to request the Court of Justice to give any ruling on the point of European Union law raised because the answer was so obvious as to leave no scope for any reasonable doubt. The appellant has sought to revisit this issue in his submissions in these appeals but in light of our previous judgments we do not consider that we need to deal with them. Those submissions also ground his argument that additional parties needed to be joined. Accordingly, those applications must also fall.

[14] The litigation in this court has been characterised by extensive, prolix submissions by the appellant. Since late 2010 the court has encouraged the appellant to focus on securing final decisions in relation to his claims. In particular he has adopted the practice of appealing as a matter of course every case management decision made in the course of a tribunal hearing. We have pointed out that such decisions do not have any binding effect and can be revisited by the tribunal in the course of the final hearing. The effect of such appeals has been to significantly delay

the proceedings in these cases, to promote entirely unnecessary litigation within this court and to cause the appellant to spend countless hours preparing appeals in relation to case management decisions which were pointless.

[15] On 4 October 2012 the Vice President of the Industrial Tribunal conducted a case management hearing at which he listed five of the cases which are the subject of these appeals. Each case was listed for between three and five days over a period that commenced on 3 December 2012 and finished on 12 April 2013. There was a one week gap between the first and second case, a five-week gap between the second and third case, a three-week gap between the third and fourth case. The second case was rescheduled with a further two week gap and there was a further three-week gap before the fifth case was scheduled.

[16] On 10 December 2012 the Vice President held a further case management discussion at which he scheduled five further cases. The first of those was scheduled for six weeks after the end of the fifth case. The second was scheduled for four months later, the third case was scheduled for nine weeks after the end of the second case, the fourth case was scheduled for 10 days after the end of the third case and the fifth case was scheduled for 10 days after the end of the fourth case.

[17] In light of the time which had expired since the events giving rise to these claims it was clearly necessary to impose a tight schedule in relation to the determination of all of the outstanding cases. All of the cases raised essentially similar issues and at the core of each case lay the proposition that there had been in direct discrimination on the grounds of sex. All of those matters would have been known to the Vice President who is experienced in relation to case management matters and in the absence of some indication of specific prejudice there is no proper basis upon which we could interfere with his discretionary judgement as to how these cases could be brought to a hearing.

[18] We now turn to the individual cases.

Belfast Model School for Girls (decision 6 March 2013)

[19] Among the complaints made by the appellant is a submission that the Vice President erred in ordering that this was not a case where written statements were required. He formed the view that the tribunal's directions were not likely to be followed to the letter and that unusually, therefore, the case would be best dealt with by oral evidence. That was clearly a discretionary decision for the VP and there was no basis for us to interfere with it.

[20] The post in question was advertised on 14 June 2005. It required candidates to have a minimum of one year's experience working with a child/children with special educational needs as an essential criterion. The preferential criterion was the holding of relevant qualification. The letter issued with the application packs indicated that it was the responsibility of each candidate to ensure that all necessary relevant information was included in the application to enable the Board to assess eligibility for consideration of appointment.

[21] The shortlisting panel established without looking at the names that if they applied the essential criterion 8 of the 14 applicants would get through. If they applied both the essential and preferential criteria six applicants would come through to the next stage. They decided that they should apply both the essential and preferential criteria. No complaint has been made about that. The approach of the panel was to leave out of consideration any person who did not satisfy the essential criterion.

[22] The dispute in the case was whether the information supplied by the appellant on his application form demonstrated that his relevant experience amounted to a minimum of one year. The tribunal concluded that he was unable to point to any information which he had supplied on his application form which quantified the length of his experience working with children with special needs. The appellant contended that the shortlisting panel members should have inferred that he had worked with children with special educational needs for a minimum of one year.

[23] In his application form he quantified the length of time that he had taught regularly as a teacher and supply teacher but in relation to children with special educational needs he said that he had done a considerable amount of work and that he had taught "Downs Syndrome Groups" on several occasions. He had also tutored two statement of special needs students in numeracy and literacy. The tribunal accepted the evidence from the shortlisting panel members that the information supplied by the appellant on his application form in relation to the length of his experience was ambiguous and that it was not possible for the shortlisting panel to quantify the length of it or to determine that it amounted to a minimum of one year.

[24] The tribunal then went on to consider submissions by the appellant suggesting that the six females who were shortlisted had failed to meet one or other of the criteria. The tribunal in each case satisfied itself that the shortlisting panel had properly asked itself the right questions in relation to each of the criteria and were satisfied that the criteria had been properly applied. The appellant in fact satisfied the necessary and preferential criteria but had failed to express that in his application form. There was no discrimination against the appellant. In our view on the findings of the tribunal this was an inevitable conclusion. There is no basis for complaint in this case.

Refusal of witness summons (decision 4 April 2013)

[25] In relation to his industrial tribunal applications against St Gabriel's College and Grosvenor Grammar School the appellant sought a witness summons in relation to the secretary of the Joint Negotiating Counsel for the Education and Library Boards ("JNC"). In particular he wished to call this witness as part of his case that he was indirectly discriminated against as a result of JNC Circular 34 which is used throughout Northern Ireland as the basis for the determination of eligibility. The Circular identifies a teaching qualification as sufficient for appointment as a

classroom assistant and the appellant has that qualification. He objects to the inclusion of an "early years NVQ" as an eligibility criterion claiming that it disproportionately disadvantages men because of the smaller number of men who will have experience teaching children up to 8 years old.

[26] In each of the applications with which the request for a witness summons was concerned it was common case that the appellant had satisfied the eligibility criteria. He was shortlisted and interviewed. The indirect discrimination claim pursued by the appellant was without foundation. The Vice President concluded that the witness summons should not issue as the evidence was not material to the issues in these cases and his conclusion in that regard cannot be faulted.

De La Salle School for Boys (decision 7 April 2013)

[27] In June 2005 the school were aware that three children with statements of special educational needs were due to start, including one child with a physical disability and two children with autistic spectrum disorders. There was also a possibility that a fourth such child might start and that up to 4 classroom assistants might be required. The essential criteria were a relevant qualification under JNC 34 and one year's experience of special educational needs in the school setting. There were 17 applications and 10 shortlisted candidates of whom the appellant was one.

[28] Seven of the shortlisted candidates attended for interview. Two of the questions concerned qualifications relating to reading recovery and phonics. The appellant asserted that experience of phonics reading recovery required the undertaking of a relevant course and that such a course could only be taken if someone was in post. The tribunal did not accept his evidence and was satisfied that such a course could be undertaken whether or not a person was working in the school environment. The appellant could have done the relevant course in preparation for the application.

[29] The tribunal noted the evidence that the appellant's performance at interview was poor in that he did not appear to be flexible and his answers were very black-and-white. He did not have an empathetic approach which was important in relation to these children. His answers were rambling and hesitant and he tended to tail off in the sentences and skip to another thought. There was limited factual evidence in relation to the criteria. The tribunal was satisfied that it should accept that evidence and that he failed to obtain an appointment because he had performed poorly.

[30] The tribunal correctly rejected his indirect discrimination case which we have discussed at paragraphs [2] to [13] above. The appellant did not prove facts from which the tribunal could conclude that an act of discrimination had occurred and the decision was entirely correct on their findings.

St Louise's Comprehensive College (decision 1 June 2013)

[31] On 31 May 2005 the school advertised for two classroom assistant posts. There were 16 applicants for the first post. The essential criteria were those set out in JNC Circular 34 and the applicant satisfied the shortlisting criteria. 14 applicants were called for interview of whom 10 attended. The tribunal identified the five questions asked of the interviewed candidates and concluded that the appellant had performed poorly. He had not given a specific answer in relation to the question about classroom experience, he did not identify his personal qualities in the context of the post applied for, he did not appear to appreciate the difficulties that he might encounter with such children and did not address the importance of keeping daily records. There was no discrimination.

[32] There were 21 applicants for the second post. The same criteria for appointment were used but only five people were shortlisted. It is common case that the appellant and two other female applicants ought to have been shortlisted. The appellant and one of the female applicants both had the PGCE qualification identified in JNC Circular 34. There were four applicants shortlisted who held NVQ qualifications including one male. A further female with a pending NVQ qualification was shortlisted but it is accepted that she should not have been.

[33] The appellant made the case that the selection committee had been biased against him because it was aware of claims presented by the appellant to the industrial tribunal but the tribunal was satisfied that there was no evidence that any of those on the selection committee had knowledge of any such matters. In the event there was no appointment to the post as only one person attended for interview and was not considered appointable. It was common case that the selection process and shortlisting had been defective. The tribunal considered it improbable on the facts that this was as a result of sex discrimination. One male had been shortlisted and a person with similar qualifications to the appellant who was female had not been shortlisted. The tribunal was not satisfied that the failure to shortlist the appellant had unlawfully discriminated against him on the grounds of his sex.

[34] The tribunal's decision was based upon its assessment of the witnesses who give evidence before it. There is no reason to call into question their conclusions. In those circumstances there is no basis for this appeal in relation to direct discrimination. The indirect discrimination claim fails for the reasons set out earlier.

Grosvenor Grammar School (decision 30 July 2013)

[35] On 14 June 2005 the school advertised for a temporary classroom assistant. The essential criterion was one of the qualifications set out in the JNC Circular 34. Thirteen applications were received of which 12 were female and one male. Eight candidates including the appellant were deemed eligible for appointment and six attended for interview. The tribunal noted that eight years after the event the parties had limited recollection of the candidates and their answers. The teacher governor was considered an impressive witness and he recollected that there was a significant

contrast between the performance of the appellant and the successful candidate and that he had in particular inadequately discussed leadership/motivation. He relied principally on his notes for this. One of the issues concerned the appellant's experience and in particular the fact that he had had no full-time teaching experience in the 25 years preceding his applications for these posts.

[36] The tribunal noted that there were elements of the recruitment process which caused concern. The initial letter inviting candidates to interview suggested that there was going to be a word processing test at the start. Each of the candidates was advised thereafter that this was not going to happen. The questions posed lacked objectivity. One of the interviewers failed to mark the appellant under two categories. The procedure for taking up references was vague. The tribunal concluded that most of these defects impacted on all of the candidates called to interview. They considered that the interview panel were entitled to probe the experience of the respective candidates and that it was decided not to appoint the appellant because he performed poorly at interview and did not provide evidence as to how he would perform the duties associated with the post or explain how his limited teaching experience fitted him for the role of classroom assistant. These were conclusions that were entirely within the ambit of the tribunal's enquiry and there is no basis for us interfering with them.

St Colmcille's High School (decision 25 June 2013)

[37] At the end of May 2005 the post of classroom assistant was advertised at the school. The essential criterion was that the candidates must have qualified/recognised status and the desirable criterion was that they should have six months minimum experience of working with 11 – 16-year-olds in a formal setting such as a school. There were 12 candidates of whom five, including the appellant, were shortlisted for interview. One did not attend for interview. The appellant raised issues in relation to one of those who was not shortlisted and the other shortlisted candidate who did not attend for interview but the tribunal considered that the issues raised were irrelevant. There was no criticism of the questions which were put by the panel to the various candidates and the conclusion of the panel was that the appellant was the fourth of the four candidates interviewed.

[38] The successful candidate was a qualified teacher who had four months experience teaching in a school and then did teacher training during which she had been involved in special needs teaching. At interview one reference was available from her tutor which was very positive. Following the interviews a second reference was received on 8 July 2005. It does not appear that this reference was made available to the selection committee but stated that although she had been employed as a teacher from September 2004 to December 2004 she had been absent for the second two months of that period due to illness. That may have impacted on the candidate's length of experience working with teenagers in a formal school setting.

[39] The tribunal accepted that the second reference should have been drawn to the panel's attention subsequent to the interview and before the offer of the job was

made. The tribunal was satisfied that the interview panel was not aware of the content of this reference and genuinely believed that the successful candidate met the experience criteria both at shortlisting and interview stage. Any inconsistencies in her appointment were not evidence of sex discrimination. Even if the successful candidate had not been appointed there were two others who were clearly ahead of the appellant after the interview process. There is no basis upon which this court could interfere with the conclusion that the claim for direct discrimination failed.

St Gabriel's College (decision 16 July 2013)

[40] On 24 May 2005 the school advertised for the post of classroom assistant. Eleven applications were received and seven, including the appellant, were considered to have met the shortlisting criteria. Five applicants attended for interview. A female candidate secured the highest mark and was selected for the post and the appellant was the first reserve. The panel also selected the second reserve who was also male.

[41] The hearing of this case was originally listed for 17 December 2012 but after the appellant's evidence it appeared that there was a conflict-of-interest with one of the panel members. She had to recuse herself. The following day it was proposed to start again with two of the original panel members and one new member. The appellant objected, apparently being assisted by an authority given to him by counsel for the respondent. The panel decided that the case should be heard by a completely different panel.

[42] The case was heard by a completely different panel commencing on 14 March 2013. There is nothing in the preceding events to indicate any unfairness to the appellant. At the interview the allocation of marks was based upon three headings: qualifications, experience and presentation. Each interviewer marked each candidate individually. The scoring for each of the candidates was such that the successful candidate was one mark ahead of the appellant. Of the three interviewers one had both candidates on the same mark, one had the appellant ahead and the other had the successful candidate ahead.

[43] The appellant noted that a candidate who was female and unsuccessful obtained 10 marks for a postgraduate qualification relating to special education needs whereas the appellant and the other interviewees were awarded eight marks. The appellant held a PGCE which is the equivalent of a Masters' degree and he contended that he also should have received those extra marks. The tribunal was satisfied that the interview panel members were unaware that the guidance issued by the Board indicated that a PGCE was also a postgraduate qualification and should have secured additional marks. The tribunal was satisfied that the closeness of the marking did not indicate that the panel was trying to discriminate on the ground of gender. It seemed improbable on the facts that the reason for the appellant's non-appointment was his gender or the gender of the successful candidate. The application based on direct discrimination was dismissed and there is no basis upon which we could properly intervene.

Drumglass High School (decisions 9 September 2013 and 10 September 2014)

[44] The appellant applied for a classroom assistant post at the school with a closing date for applications of 19 July 2005. He was invited to attend for interview on 1 September 2005. A female applicant was selected for the post. The appointment was audited by the Southern Education and Library Board as a result of which a letter was sent to the school on 16 September 2005 indicating that the recruitment exercise contravened good practice. First, the selection panels were not quorate which meant that the processes for shortlisting in interview were not valid and secondly the criteria on the shortlisting document were not discernible from those stated in the advertisements for the post. The school was advised to recommence the recruitment and selection processes from the receipt of applications stage.

[45] When the competition was recommenced the appellant was considered not to have met the shortlisting criteria which included evidence that the candidate had received training in autism, ADHD or dyslexia. That process was again audited on 21 November 2005. The SELB concluded that only two applicants met all the criteria which the panel used for the shortlisting. One of those withdrew from the process and the other was not recommended for appointment. The recommended appointee and the reserve candidates did not meet the criteria applied in shortlisting and were not regarded as suitable candidates. In those circumstances it was considered that no appointment should be made.

[46] That case was listed for hearing before the tribunal on 2 September 2013. On the morning of the hearing counsel for the respondent admitted liability for unlawful discrimination on the ground of sex. There was no written basis submitted to the tribunal for that finding. The tribunal then decided to adjourn the hearing of the appropriate remedy.

[47] The appellant was not satisfied with this outcome. He considered that he had been deprived of the opportunity to demonstrate the extent to which the respondent had discriminated against him. In particular in his IT1 he had raised the issue of victimisation. A case management discussion was held on 10 December 2012 to identify legal and factual issues. The papers show that the issue of victimisation because he had made previous complaints of sex discrimination was identified as a factual issue but was not set out as a specific legal issue.

[48] The appellant accordingly complains that he has been deprived of the opportunity to present his victimisation claim and thereby deprived of the opportunity to pursue thereafter his remedy in respect of it. At the remedy hearing he was apparently cross-examined about the issue of victimisation but he was the only witness to give evidence at that hearing. The written decision of the remedy hearing indicates that the articulated admission of liability made at the hearing on 2 September 2013 was:

> "The Respondents admitted liability on the basis for the post of classroom assistant at Drumglass High School that two female candidates in the second recruitment exercise were shortlisted on 6 October 2005 when neither candidate had received training in autism, ADHD or dyslexia whereas the claimant was not shortlisted against that criterion. After a period of eight years the Respondents are not in a position to offer any explanation as to why this happened and therefore the Respondents admit liability on the grounds of sex discrimination"

[49] In our view the appellant had asserted the claim in victimisation before the tribunal. The hearing on 2 September 2013 did not deal with the claim. The remedies hearing listed on 18 August 2014 did not purport to deal with that claim albeit that the appellant was cross-examined in respect of it. The circumstances of the admission by the respondent on 2 September 2013 without any written basis of the reasons for the admission were unsatisfactory. In our view the appellant was deprived of the opportunity of pursuing his victimisation claim and we direct, therefore, that his victimisation claim should be heard by a fresh tribunal.

Oakgrove Integrated College (decisions on 23 December 2013 and 24 March 2014)

[50] This school advertised for classroom assistants on 8 July 2005. There were 36 applicants for the teaching assistant posts. The job advertisement had specified a minimum of five GCSEs at A to C level in English and Maths or the equivalent. The shortlisting panel knew that the school would require several teaching assistants and they concluded that they should also interview those who had experience as a teaching assistant.

[51] The panel was chaired by the Vice President. He had dealt with the case management of a number of the appellant's earlier claims. In particular at the case management discussion on 10 December 2012 the appellant had sought to ensure that the 13 claims associated with these appeals should be heard together. The Vice President concluded that since these involved multiple respondents, multiple appointment panels, separate decisions and differing circumstances that it was not appropriate to take that course. Each of the cases was listed separately. This claim was the final claim to be heard in the series of 13 and the date for the hearing had been fixed approximately one year beforehand.

[52] The appellant accepted that he had met the shortlisting criteria, he had been interviewed and he had been unsuccessful at interview. The cut-off point which the panel used as the appointable line was 60 marks. The appellant achieved 42 marks so that he was considerably below the appointable level. The tribunal accepted that this interview was weak and that he had lacked particulars. At interview he had not mentioned the statement of special educational needs, the education psychologist's report, the school strategy or targets for the student. The panel appointed five

persons of whom one was male and two reserves who were female. All achieved the appointability level and all were eventually employed.

[53] At the start of the hearing the appellant objected to the participation of the Vice President on the panel. He maintained that the Vice President was biased because there were outstanding appeals in relation to some of his decisions in case management discussions. The Vice President rejected that as a basis for a finding of bias and noted that the appellant had appealed a large number of tribunal Chairmen or tribunal panels. Applying the test in paragraph 25 of Locabail (UK) Ltd v Bayfield Properties [2000] QB 451 the previous decisions of the Vice President did not require him to recuse himself. The appellant applied for permission to digitally record the hearing which was granted. He then applied for a postponement of the hearing but since the claim had been in existence for approximately 8 years, the date having been set approximately one year beforehand, the tribunal was ready and the respondent was ready there were no grounds for yet further delay.

[54] The tribunal noted that the appellant insisted on pursuing his indirect discrimination claim despite the fact that it was pointed out to him that as a result of the Court of Appeal decisions the tribunal was not in a position to go behind its conclusions on the question of indirect sex discrimination. The tribunal considered whether this attitude was the result of a genuine mistake and understanding of the legal position in respect of his claims but it became apparent that the appellant fully understood the significance and importance of the Court of Appeal decision. He had simply chosen to ignore the impact of the Court of Appeal decision and the tribunal concluded that he chose to deliberately waste the time of the tribunal for as long as he possibly could. In the course of the hearing the appellant accepted that he and other candidates who had scored higher than him in the interviews had also been assessed as unsuitable for appointment and this list of the candidates had included female candidates.

[55] The tribunal accepted that the shortlisting panel had not been quorate according to the rules of the scheme of management. This occurred because of time pressures in the midst of the holiday season. There was a need to have relevant and important staff in place for the start of the school term on 1 September 2005. The school would not have known at an earlier stage which new pupils would attend that school and therefore which pupils would be statemented and need assistance. The departure from the appropriate quorum was a technical breach which impacted equally on males and females.

[56] The tribunal examined the issues raised by the appellant in relation to certain candidates meeting the shortlisting criteria. They were satisfied that the criteria were properly applied in all except one. In relation to Candidate 25 the respondent's witnesses were not at this stage, eight years later, in a position to meaningfully explain what the reasoning was at the particular time in respect of the allegation that she did not meet the minimum requirement. That allegation was first made eight years after the event. Whatever the position the appellant could not have derived

any benefit given his marks in the interview and his relatively low standing in the interview results.

[57] The tribunal considered that either a relevant qualification or experience as a teaching assistant was sufficient to proceed to an interview. The appellant's responses and interview clearly lacked detail compared to other higher mark candidates. The appellant did not allege that he had given detailed answers. He accepted that he had not done so. The facts established did not shift the burden of proof to the respondent and the tribunal accepted the clear and consistent evidence of the respondent's witnesses. The tribunal again noted that in his closing remarks the appellant based himself almost entirely on the claim of indirect discrimination which he knew could not be pursued. The conclusions of the tribunal had not been shown to be wrong in law in any respect.

[58] Subsequent to the handing down of the decision in this case the respondent applied for a costs order on 20 January 2014. The application was in accordance with the Industrial Tribunals Rules of Procedure on the basis that first, in continuing the proceedings and in conducting the proceedings the appellant had acted vexatiously, abusively, disruptively or otherwise unreasonably and secondly, that the bringing and conducting of the proceedings had been misconceived.

[59] The tribunal noted the reference to costs penalties in earlier litigation concerning the appellant and that his repetitive pursuit of the indirect discrimination case was taking on an abusive character. It noted that in the course of the hearing he had obviously not prepared for any direct discrimination case and had not examined the interview documentation which had been disclosed to him. His sole interest was to rehearse an argument in relation to what he termed "institutionalised discrimination". He maintained that he was entitled to pursue this allegation irrespective of the earlier decisions on appeal which he contended were wrong. The tribunal concluded that his conduct of the litigation was misconceived and unreasonable.

[60] The tribunal properly considered the case law noting the considerable latitude that should be so shown to a personal litigant who may not fully understand that his case is unreasonable or misconceived. That was not the position here. The tribunal took into account the appellant's means. It noted the costs of the respondent were in or about £11,000. It concluded that it was appropriate to make the costs order of £2000 which was not to be enforced until the hearing of any appeal. We have noted the limited means of the appellant and his limited income. We are unable to find any error in the approach of the tribunal that this was a case requiring a costs order but in light of the appellant's circumstances we reduce the award to £500.

Rathmore Grammar School (decision 21 January 2014)

[61] On 21 April 2005 the school advertised the post of classroom assistant in respect of a child with Asperger's syndrome who was due to join the school in September 2005. Each applicant was required to complete an application form

having been given details of the school profile, the special educational needs policy of the school, a profile of the subject pupil, an outline of the post, a job profile, a candidate profile and other relevant information. Applicants were required to specify personal and educational details of qualifications, employment or work experience and other relevant information.

[62] The school received seven applications including the appellant and six females. All were invited to interview. The questions for interview had been prepared by the school SENCO. In the first draft the first question had been about experience working with children in an educational environment. This was changed to experience working with children with Asperger's syndrome in an educational environment.

[63] The scoring scheme was that 10 marks were awarded for each question and in an additional 10 marks for each of "Personal Presentation and Communication Skills" and "Application Form". The total possible marks were, therefore, 240 being 80 from each interviewer. The successful candidate achieved a mark of 223. The appellant was last with the total mark of 57 with the next lowest being 104. In respect of each question a model answer was provided incorporating suggested answers or information to be elicited from the candidates. Details of these were given within the tribunal decision. The remaining factors required assessment of how each candidate completed their individual application forms and how they responded to the information provided by the school.

[64] The tribunal accepted that the evidence indicated that the appellant displayed a significant lack of comprehension of the role and lacked insight into the role of classroom assistant. His attitude was inappropriate and unsatisfactory. He did not appear to have conducted an appropriate amount of preparation and research in order to enable a competent performance at interview. His performance at interview fell very far short of what had been expected. There was nothing to indicate any form of discrimination on the ground of gender and in our view the tribunal was inevitably driven to dismissing the claim.

Sullivan Upper School (decision 29 January 2014)

[65] On 7 June 2005 the school advertised for a temporary one-year term time classroom assistant with a view to appointment in September 2005. The recruitment panel comprised the then Principal, the Bursar and the school SENCO. The job description, shortlisting criteria and interview questions were drawn up and agreed by the Principal and the Bursar before the post was advertised. Those who applied were sent a copy of the job description, a pro forma standard application form and an equality monitoring form. There was no person specification information about the shortlisting criteria included in the information about the post. The form required candidates to provide personal information and complete details of their academic and vocational qualifications, their last employment and employment history. Eight applications, six females and two males including the appellant, were submitted.

[66] The shortlisting exercise was carried out by the Bursar and the SENCO on the basis of the application forms. The shortlisting criteria adopted were: General Educational Qualifications, Relevant Vocational Qualifications, Appropriate Experience and Other Relevant Experience. Candidates were awarded marks from 1 to 4 against each criterion with 4 exceeding requirements and one being unacceptable. Each criterion was then weighted with Appropriate Experience gaining a weighting of 3, General Educational Qualifications gaining a weighting of 1 and the other criteria a weighting of two. The maximum number of marks achievable by any candidate was 32.

[67] The candidate who was appointed scored 24 points and there were three other candidates including one male who each scored 23 points. The claimant was in fifth position with 19 points. The remaining three candidates were all female and scored either 15 or 16 points. Only the top four candidates were called to interview. The Bursar wrote to the appellant on 20 June 2005 to inform him that his application had been unsuccessful. He requested reasons as to why he had not been shortlisted on 27 July 2005.

[68] The Bursar spoke to the appellant by telephone on 27 September 2005. Due to the lapse of time she could not remember the conversation verbatim however her recollection was that she explained to him the shortlisting process and how the candidates were scored against each of the four categories. She advised that the main difference between him and the shortlisted candidates was that they had demonstrated special educational needs experience and classroom assistant experience which were important.

[69] The marks for each candidate indicated that the appellant obtained a score of one in respect of Appropriate Experience whereas the appointed candidate obtained a score of three on the basis of her experience as a classroom assistant. When the weighting was applied the appointed candidate gained nine marks for that criterion and the appellant three. It is apparent, therefore, that this accounts entirely for the difference of five marks between the appellant and the successful candidate and demonstrates that apart from this criterion the appellant was in fact one mark ahead of the successful candidate.

[70] The appellant submitted that the Appropriate Experience criterion was indirectly discriminatory because it was common case that the number of females employed as a classroom assistants overwhelmingly outnumbered the number of males employed as classroom assistants. The tribunal did not appear to take issue with the proposition that in those circumstances it constituted a criterion which applied to both men and women but which was such that it would be to the detriment of a considerably larger proportion of men than women. Accordingly, the test in article 3(2)(b)(i) of the Sex Discrimination (Northern Ireland) Order 1976 was engaged.

[71] The tribunal accepted the submission on behalf of the respondent that experience as a classroom assistant was a relevant criterion to adopt just as teaching

experience would be a relevant consideration for a teaching post. It then asserted that the tribunal considered that it would have been justifiable to use such a criterion irrespective of the sex of the candidates. The manner in which the decision was couched suggests that the discrimination caused by the criterion was justifiable because it was relevant. That is the only rationale contained within the written decision. We do not accept that conclusion. The question of suitability which lies behind the criterion could equally well have been addressed through appropriate questions at interview about the candidate's approach to the post. We do not accept that the tribunal has justified the use and weighting of this criterion at the shortlisting stage. Accordingly, the appeal is allowed and this claim should be reheard before a different tribunal. There were a number of other points raised by the appellant but we did not consider them of significance and it is not necessary to deal with them further.

Conclusion

[72] We allow the appeals against Sullivan Upper School and that against Drumglass High School in respect of remedy. We also reduce the costs award in the Oakwood Integrated School case to £500. Otherwise the appeals are dismissed.