

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

Delivered:	12/10/11
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JAMES ROBERT PEIFER
FOR AN ORDER COMPELLING THE INDUSTRIAL TRIBUNAL TO STATE A
CASE FOR THE OPINION OF THE COURT OF APPEAL IN NORTHERN
IRELAND IN ACCORDANCE WITH THE PROVISIONS OF ORDER 62 RULE 4
OF THE
RULES OF THE SUPREME COURT (NORTHERN IRELAND) 1980

BETWEEN:

JAMES ROBERT PEIFER

Applicant;

AND

LIMAVADY HIGH SCHOOL

AND

WESTERN EDUCATION AND LIBRARY BOARD

Respondents.

Before: Morgan LCJ, Higgins LJ and Sir John Sheil

MORGAN LCJ

[1] On 18 August 2005 the applicant presented a complaint to the Office of 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. 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 indicates that the respondents are guilty of direct discrimination but he suspects that there is probably also indirect discrimination.

[2] The applicant complains in particular that the schools, Education and Library Boards and the tribunals before which he has presented his claim are 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 which consists of representatives of the Education and Library Boards in Northern Ireland and trade unions. JNC Circular 34 advises 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.

[3] The industrial tribunal decided to deal with these cases by managing each claim separately in relation to each school. 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 applicant then 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 applicant 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 applicant sought to persuade the tribunal that in fact 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 continuing theme of the applicant's representations to this court and to the tribunal hearing his subsequent cases that he is grossly dissatisfied with that outcome.

[4] The principal argument advanced by the applicant 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 Sex Discrimination (Northern Ireland) Order 1976 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.

[5] In respect of the second case against the respondents in this appeal 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.

[6] This appeal is 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 second case. In his application lodged on 7 August 2009 the questions raised by the applicant arise from his contention that he has been the victim of indirect sex discrimination. He raises an issue as to whether domestic law complies 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 is dated 1 October 2009. The applicant again returns to the question of his entitlement to pursue an indirect discrimination case and in particular highlights what he claims 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 applicant in particular claims that the chairman dealing with his cases is 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 with which this appeal is concerned is dated 29 October 2010. It repeats much of what had been included in previous requisitions and makes the point that by restricting discovery

in relation to indirect sex discrimination the Tribunal chairman offends 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.

[7] This litigation has been proceeding before the Tribunal in this court for six years now, in its decision delivered on the applicant's application to require the Tribunal to state a case in respect of the final determination of his first case the court referred to the need to ensure that cases are dealt with in ways which are proportionate to the complexity and importance of the issues and that they should be dealt with expeditiously and fairly in order to save unnecessary expense. One of the features of this appeal is the multiple lodging of requisitions to state a case in respect of interlocutory decisions made at Case Management Discussions. The pursuit of such interlocutory appeals inevitably increases expense and introduces delay to the determination of the issues which the parties need to have resolved. It is often to the considerable benefit of all of those involved for such matters to be reserved until a final decision has been made on all of the issues within the case. We were in no doubt that this was the course which was appropriate in relation to these appeals and we indicated at the hearing that the case should proceed on the appointed date in January 2011.

[8] There are a number of discrete points to which it is helpful to refer. Case management discussions are mechanisms by which the Tribunal chairman can regulate the procedures in any given matter so as to ensure that there is the just and expeditious determination of the issues between the parties taking into account the provisions of Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 which set out the overriding objectives of the management of the litigation. The purpose is to ensure that the parties focus on what appear to be the relevant issues in the case and to ensure that there is an appropriate and proportionate disclosure of materials and statements to ensure that the litigation can be conducted fairly. The decisions made at such discussions cannot be final because the run of a case may require further steps to be taken, but the case management discussion is an important tool in ensuring that the Tribunal maintains control of the litigation.

[9] In this case the applicant has persistently maintained that he is entitled to pursue a case based on indirect discrimination without having to demonstrate that he himself has suffered a detriment as a result of the application of relevant criteria. He maintains that he is entitled to do so by virtue of the relevant provisions of European Law. The issue of principle was considered by this court in his first case and was rejected. The Tribunal has faithfully and properly followed that decision within the case management discussions which are the subject of this appeal. If that decision in principle is to be overturned it can only be achieved if the applicant

persuades this court that there is some basis upon which it can depart from its previous decision or by a successful appeal to the Supreme Court. We do not consider, therefore, that there was any basis upon which we could interfere with the approach which the Tribunal took on the basis of the materials available to us.

[10] We have considered the question of bias as a result of the chairman's previous membership of the General Teaching Council for Northern Ireland. The appropriate test for bias was approved by the House of Lords in Porter v Magill [2001] UKHL 67 where the House held that the test was whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the Tribunal was biased. We can conceive of no possibility of that test being satisfied as a result of the chairman's membership of the Council. This is a case concerned with the employment of classroom assistants and the objects of the Council are not concerned with such employment. We also do not consider that any concern is raised by reason of the fact that the chairman had sisters who were employed as teachers. Such matters raise only the most tenuous connection with the respondents and would not cause any concern to a fair-minded and informed observer.

[11] Many of the issues raised in these requisitions were repetitive and it seemed to us likely that they were going to arise within the Tribunal's final decision on the applicant's case. We could see no benefit in preventing that case proceeding and any issues arising from the determination of that case being dealt with if necessary within one hearing. In the circumstances, therefore, we refuse the application to state a case on any of these interlocutory decisions.