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Judgment: approved by the Court for handing down | *Delivered:* **17/5/06**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

FIDELMA SHEERIN

Applicant/Appellant

-AND-

DONAL GALLAGHER

Respondent

_____

Before Kerr LCJ, Sheil LJ and Higgins J

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of an industrial tribunal holding that the applicant was not entitled to pursue a complaint that a former fellow employee, the respondent Donal Gallagher, had been guilty of discrimination in the form of victimisation because the alleged act occurred outside the jurisdiction in Lifford, County Donegal.

Background

[2] Ms. Sheerin was employed by Mr. Frank Sumner at Strabane Garden Centre between 12 March 2001 and 30 May 2001. During that time she claims that she was subjected to sexual discrimination by both Mr Sumner and Mr Gallagher, who was also employed at the garden centre. She made complaints to the industrial tribunal in relation to these incidents of sexual

discrimination but they are not relevant for present purposes other than as setting the background to the present appeal.

[3] On 22 September 2001, after her employment with Mr Sumner had ended, the appellant was working at McBrearty's public house in Lifford when Donal Gallagher and his sister entered the bar. After having a drink Mr Gallagher took a number of photographs of Ms Sheerin at her work station behind the bar. She believed that this was done because she had made a complaint to the industrial tribunal alleging that Mr Gallagher had been guilty of unlawful discrimination by sexually harassing her. She therefore made a further complaint on 28 September 2001 claiming that the taking of photographs amounted to victimisation contrary to article 6 (1) (a) and article 43 of the Sex Discrimination (Northern Ireland) 1976.

[4] Article 6 (1) (a) provides: -

> "(1) A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—
>
> (a) brought proceedings against the discriminator or any other person under this Order or …"

[5] Article 43 (1) and (2) are in the following terms: -

> "(1) A person who knowingly aids another person to do an act made unlawful by this Order shall be treated for the purposes of this Order as himself doing an unlawful act of the like description.
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> (2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under Article 42 (or would be so liable but for Article 42(3)) shall be deemed to aid the doing of the act by the employer or principal."

[6] The tribunal found as a fact that Mr Gallagher had taken the photographs of Ms Sheerin because he believed that she was working while drawing benefits (which was not in fact the case) and because "he was annoyed at the

fact that the appellant had commenced [sex discrimination proceedings] against him". On the basis of this finding Ms Sheerin would have been entitled to pursue a complaint against Mr Gallagher under articles 6 and 43 but the tribunal found that article 43 could not be construed as being applicable to the act complained of because it had occurred outside Northern Ireland. In so deciding the tribunal had followed and applied the decision of this court in *Clydesdale v Driver and Vehicle Testing Agency* [2002] NI 42. The net issue in this appeal is whether this court is bound by the decision in that case.

[7] After the decision was promulgated on 11 August 2005 the appellant applied to the tribunal to state a case for the opinion of the Court of Appeal. The tribunal modified the question raised in the requisition and in the case stated posed the following: -

> "Was the tribunal correct in law in deciding that it had not jurisdiction to entertain the appellant's claim against Mr Gallagher, in circumstances where she had been employed at an establishment in Northern Ireland alongside Mr Gallagher and the act which constituted the subject-matter of the complaint was an act which was carried out in the Republic of Ireland?"

The decision in Clydesdale

[8] In the case of *Clydesdale* the applicant was employed by DVTA, a Northern Ireland government agency. She complained of unlawful discrimination on grounds of sex (including unlawful victimisation) by the third respondent, the DSA, an agency of a United Kingdom government department in contravention of articles 16 and 43 of the 1976 Order. The alleged acts or omissions all took place in England in connection with training courses organised by the DSA and undertaken by the applicant in her capacity as a Northern Ireland civil servant.

[9] Article 16(1) provides:

> "It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman—(a) in the terms on which it is prepared to confer on her that authorisation or qualification; or (b) by refusing or deliberately omitting to grant her application for it, or (c) by

> withdrawing it from her or varying the terms on which she holds it."

[10] The tribunal in that case held that there was a presumption that the 1976 Order was concerned with conduct only within the territory of the legislature and that this had not been displaced by anything in domestic law. It acknowledged, however, that it was necessary to comply with the provisions of article 6 of Council Directive (EEC) 76/207 (Equal Treatment), and for that purpose to construe legislation in such a way as to accord if possible with the interpretation given to the directive by the Court of Justice of the European Communities. It appears to have been conceded that if an act were done in England by a Northern Ireland employer in contravention of article 16, the complainant could pursue a complaint before an industrial tribunal in England under section 13 of the Sex Discrimination Act 1975. The tribunal therefore held that to confine the reach of the Order to events occurring in Northern Ireland would not involve a breach of the directive and it was unnecessary to construe article 16 as having extraterritorial application.

[11] Article 6 of the Equal Treatment Directive provides: -

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of [relevant articles of the directive] to pursue their claims by judicial process after possible recourse to other competent authorities."

[12] As this court observed in *Clydesdale,* national courts must construe domestic legislation in the light of the wording and the purpose of a directive in order to achieve the result referred to in the third paragraph of article 189 of the EEC Treaty (that a directive is binding as to the result to be achieved upon each member state): *Von Colson v Land Nordrhein-Westfalen* Case 14/83 [1984] ECR 1891. Significantly the tribunal in *Clydesdale* held that it was necessary to construe article 43 so as to give it extra-territorial effect since the equivalent provision in England (section 42 of the Sex Discrimination Act 1975) did not afford the applicant a remedy in England. This court considered that the tribunal had erred in this conclusion because it held (contrary to the finding of the tribunal) that the applicant could have pursued a remedy in England but it did not suggest that, if no remedy was available to the applicant in England, it would not have been necessary to construe the legislation as the tribunal had done. This issue is dealt with in paragraph 12 of the judgment of Carswell LCJ as follows: -

> "[12] The tribunal came to a different conclusion, however, in respect of article 43. It held that if it did not construe that provision so as to give it extra-territorial effect there would be a gap in the legislative protection afforded by the 1976 Order. That conclusion was based on the inability of the complainant to invoke the equivalent of article 43 if she had to bring proceedings in England. The tribunal appears to be right in its opinion that she could not bring such proceedings under section 42 of the Sex Discrimination Act 1975, the analogue of art 43 of the 1976 Order, because it refers to aiding another person to do an act 'made unlawful by this Act'. It is not necessary, however, for the complainant to resort to section 42. If DSA discriminated against her or victimised her, she would have a direct remedy under section 13 (the equivalent of article 16) or section 4 (which corresponds to article 6). Neither provision is confined to acts made unlawful by the Act and no restriction appears in section 13 concerning the location of the profession or trade for which the qualification is needed. It follows that if DSA discriminated against the appellant or victimised her in respect of conferring the qualification upon her, she could obtain a remedy in England. This equates the case in respect of article 43 with that in respect of article 16. We therefore consider that the tribunal was in error and that it is not necessary to construe article 43 so as to have extraterritorial effect."

[13] From this passage it appears clear that, if the Court of Appeal in *Clydesdale* had concluded that no remedy was available to the applicant in England, it would have been necessary to construe the legislation in a way that would allow her to rely on acts of discrimination that had occurred outside this jurisdiction. The first issue which arises in this appeal, therefore, is whether the court in *Clydesdale* was correct in concluding that the applicant in that case had a direct remedy under sections 4 and 13 of the 1975 Act. The second issue is whether, even if such a remedy was available, it was nevertheless open to the appellant to rely on the behaviour of Mr Gallagher at the public house in Lifford as an instance of victimisation even though it occurred outside Northern Ireland. Consideration of this issue will require an examination of the decision of the Court of Appeal in England in the case of *Saggar v Ministry of Defence* [2005] ICR 1073 and a determination whether the decision in *Clydesdale* was *per incuriam*. Finally, it will be necessary to explore

whether a remedy is available to Ms Sheerin in the Republic of Ireland and, if not, whether that impels an interpretation of the 1976 Order so as to give articles 6 and 43 extra-territorial effect.

Did Ms Clydesdale have a direct remedy under the 1975 Act?

[14] Since it had been conceded before the tribunal and the Court of Appeal in *Clydesdale* that the applicant had a remedy under the Sex Discrimination Act 1975 in respect of one of her claims the provisions of that legislation did not receive particular scrutiny in that case. In order to consider whether Ms Clydesdale did indeed enjoy a remedy under that legislation it is perhaps necessary to look rather more closely at some of its provisions. Sections 1 to 4 describe various types of discrimination. Section 5 provides assorted definitions relevant to those sections. Section 6 is the provision which makes the different forms of discrimination unlawful in the employment context. Sub-sections (1) and (2) are the relevant provisions for present purposes. They provide: -

> "(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—
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> (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
> (b) in the terms on which he offers her that employment, or
> (c) by refusing or deliberately omitting to offer her that employment.
>
> (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her—
>
> (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
> (b) by dismissing her, or subjecting her to any other detriment."

[15] Employment in an establishment in Great Britain is defined in section 10 as follows: -

"(1) For the purposes of this Part and section 1 of the Equal Pay Act 1970 ("the relevant purposes"), employment is to be regarded as being at an establishment in Great Britain if—

(a) the employee does his work wholly or partly in Great Britain, or

(b) the employee does his work wholly outside Great Britain and subsection (1A) applies.

(1A) This subsection applies if—

(a) the employer has a place of business at an establishment in Great Britain,

(b) the work is for the purposes of the business carried on at that establishment, and

(c) the employee is ordinarily resident in Great Britain—

(i) at the time when he applies for or is offered the employment, or

(ii) at any time during the course of the employment"

[16] What is made unlawful, therefore, in the employment context, is discrimination of whatever stripe where that has occurred in relation to employment in an establishment in Great Britain. Of course discrimination other than that which arises as between employer and employee does not have to satisfy the requirement that it occur in an establishment in Great Britain. So it is at least tenable that victimisation under section 4 of the 1975 Act does not have to take place in the employment context. (Section 4 (1) (a) is, for all intents and purposes, in identical terms to article 6 (1) (a) of the 1976 Order, set out at paragraph [4] above). Likewise section 13 does not necessarily require that the discrimination occurs in the context of an employer/employee relationship. On that basis the finding of this court in *Clydesdale* that the appellant had a direct remedy in Great Britain cannot be questioned.

Does the existence of a direct remedy in GB preclude reliance in proceedings in NI on an incident outside this jurisdiction?

[17] In *Saggar v Ministry of Defence* the applicant, a consultant anaesthetist with the Royal Army Medical Corps, was posted to Cyprus in 1998, after 16 years primarily based in England. In 2000 he brought a complaint against the Ministry of Defence in an employment tribunal in England, alleging that he had been subjected to racial discrimination by his commanding officer during his posting in Cyprus. The employment tribunal held that, because at the time of the alleged acts the applicant was on a posting in an area which was not part of Great Britain, he worked "wholly or mainly outside Great Britain" within the meaning of section 8 of the Race Relations Act 1976 (which is in broadly similar terms to section 8 (1) of he Sex Discrimination Act) and, accordingly, his employment was not "at an establishment in Great Britain" for the purposes of section 4, and the tribunal dismissed the complaint for lack of jurisdiction. He appealed to the Employment Appeal Tribunal, which dismissed his appeal.

[18] The Court of Appeal held that although the question of the jurisdiction of an employment tribunal and the right to present a complaint of discrimination under the Race Relations Act had to be considered as at the time of the alleged unlawful discrimination, the relevant period for deciding whether an employee did his work "wholly or mainly outside Great Britain" within the meaning of section 8 (1) was not solely the period of employment to which the complaint related but was the whole period of employment, including the earlier history of the applicant's employment at establishments of the employer in Great Britain. At paragraph 1077, paragraph 11 Mummery LJ said: -

> "In some respects territory is irrelevant to the question whether an employee is protected by Part II of the 1976 Act. The fact that, for example, an act of race discrimination is alleged to have been committed by an employer against an employee outside Great Britain does not of itself deprive the employment tribunal of jurisdiction to determine the complaint. If the employment of the employee is regarded as being at an establishment in Great Britain, Part II of the 1976 Act applies. It does not cease to apply simply because the employee was outside Great Britain, either at work or even away from work, at the time when the alleged racial discrimination occurred or because the alleged acts of discrimination took place outside Great Britain."

[19] Clearly, the Court of Appeal in *Saggar* did not consider that the question whether a remedy was available outside Great Britain was relevant to the issue of the extra territorial effect of the Act. Applying this reasoning Ms Clydesdale would have succeeded in the complaint that she had made in

Northern Ireland against her employer, DVLA. This circumstance alone does not render the *Clydesdale* decision *per incuriam*, however. In *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 the Court of Appeal held that it was bound to follow its own previous decisions. The only exceptions were those summarised by Lord Greene MR (at 729–730):

> "(1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*."

[20] The *per incuriam* rule was explained in *Morelle Ltd v Wakeling* [1955] 2QB 379. At page 406 Sir Raymond Evershed MR said: -

> "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene MR, of the rarest occurrence."

[21] In *Leppington v Belfast Corporation* (18 March 1969, unreported) Lord MacDermott CJ said this about *stare decisis*: -

> "Heretofore this Court has accepted and respected the doctrine, and as matters stand, I see no reason why, with one possible reservation, we should change the position even if, as a court, we were free to do so. The reservation I would make refers to cases—such as the present—where there is no appeal from this Court to the House of Lords. In such a case where the *ratio* of the earlier decision (1) cannot be found with certainty, or (2) is plainly

> wrong and it would be unjust or unfair to act upon it, I consider that this Court should then be at liberty to disregard the earlier decision and to reach an independent conclusion"

[22] In *Re Rice's application* [1998] NI 265 this court held that in order to reverse an earlier relevant decision of the Court of Appeal "the applicant would have to demonstrate to us that the court went seriously wrong in its reasoning and that we could only sensibly reach the opposite conclusion if the matter were *res integra*." In the present case, if unconstrained by previous authority, the members of this court would have been disposed to follow the reasoning of Mummery LJ in *Saggar* but we would not be prepared to hold that the conditions necessary to reverse the decision in *Clydesdale* are present.

Does the appellant have a remedy in the Republic of Ireland?

[23] The Employment Equality Acts 1998 and 2004 deal with discrimination within employment in the Republic of Ireland. The Employment Equality Act 1998 came into force on 18 October 1999, and was amended on the 25 October 2004 by the Equality Act 2004**.** The Acts deal with discrimination related to any of the following nine grounds: gender, marital status, family status, age, race, religion, disability, sexual orientation, membership of the traveller community**.** The aspects of employment covered are advertising, equal pay, access to employment, vocational training and work experience, terms and conditions of employment, promotion or re-grading, classification of posts, dismissal and collective agreements.

[24] The Equality Tribunal, the Labour Court and the Circuit Court all have roles in relation to discrimination claims. All claims (except for gender discrimination claims) must be referred at first instance to the Equality Tribunal. Gender discrimination claims may proceed in the Circuit Court. The Acts apply to full-time, part-time and temporary employees. In respect of discrimination of employees, the interpretation section of the 1998 Act, defines an "employee" as 'a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment'.

[25] The Acts do not expressly state that employment must be within Republic of Ireland in the same way that, for example, is provided for in sections 6 and 10 of the 1975 Act but all references to the jurisdiction of the Circuit Court in respect of the various claims that can be made are expressed in terms of the circuit where the respondent or the person on whom notice is served etc. ordinarily resides or carries on any profession, business or occupation. The respondent is defined as the person who is alleged to have discriminated against the complainant or, as the case may be, who is responsible for providing the remuneration to which the equal remuneration term relates or

who is responsible for providing the benefit under the equality clause or who is alleged to be responsible for the victimisation. It appears to be clearly implicit, therefore, that claims under the Acts are confined to employment in the Republic of Ireland and may only be directed to those who reside within that jurisdiction. This position was reflected in the case of ED/00/12, Determination No 014, a decision of the Labour Court under section 77 of the Employment Equality Act 1998 which was handed down on 5 September 2001. The court dismissed the applicant's claim because he had not shown that he had habitually carried on his work in the Republic of Ireland. It is clear that the appellant in the present case would likewise fall foul of the requirement that she should habitually have carried on her work in that jurisdiction.

[26] Because the appellant could not maintain a claim in the Republic of Ireland, her case is obviously distinguishable from the decision in *Clydesdale*. As we have said above (at paragraph [13]) if this court had concluded in that case that no remedy was available to the applicant in England, it would have felt it necessary to construe the legislation in a way that would allow the applicant to rely on acts of discrimination that had occurred outside this jurisdiction. Given that the appellant in the present case will not have a remedy in the Republic of Ireland, we consider it necessary in her case to so construe articles 6, 8 and 43 of the 1976 Order. We will therefore answer the question posed in the case stated, "No", allow the appellant's appeal and remit the case to the tribunal to proceed with the appellant's complaint according to law.