

*Sex discrimination – victimisation - grievance and proceedings alleging sex discrimination - whether protected act – relevant comparator – gross delay by respondent in dealing with grievance – reason for different treatment of claimant compared to relevant comparator – relevant test of victimisation – whether Tribunal’s decision was perverse*

**Neutral Citation No. [2014] NICA 28**

Ref: **GIR9206**

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

Delivered: **25/03/2014**

**IN HER MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND  
ON APPEAL FROM THE INDUSTRIAL TRIBUNAL**

**BETWEEN:**

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**JILL SIMPSON**

**Appellant;**

**and**

**CASTLEREAGH BOROUGH COUNCIL**

**Respondent.**

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**Before HIGGINS LJ, GIRVAN LJ, COGHLIN LJ**

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**GIRVAN LJ (delivering the judgment of the Court)**

**Introduction**

[1] The appellant Jill Simpson instituted proceedings before an Industrial Tribunal claiming that she had been constructively dismissed, suffered a breach of contract, suffered discrimination on the grounds of sex and disability by reason of victimisation and suffered loss of outstanding monies contractually owed to her. In its decision given on 2 October 2012 the tribunal was satisfied that the appellant had been constructively dismissed and suffered an unfair constructive dismissal. It rejected her claim that she had been unlawfully victimised contrary to the Sex Discrimination (Northern Ireland) Order 1976 and the Disability Discrimination Act

1995. It did not deal with the question of the appropriate remedy at that stage and directed that the case be relisted to decide remedy.

[2] The appellant appealed against the Tribunal's decision to reject her victimisation claim on the grounds that -

(a) the tribunal failed to properly interpret and apply the relevant provisions of the Sex Discrimination (Northern Ireland) Order 1976 (in particular Article 6 and 63A thereof); and

(b) given its findings of fact including its finding at paragraph 9(12) of its decision, the Tribunal was perverse in concluding that the respondent did not victimise the appellant.

[3] Paragraphs 11 and 12 of the agreed terms of remittal provided -

"11. A tribunal determining the question of victimisation must inter alia address the following issues.

(a) whether the claimant suffered a detriment;

(b) whether the claimant was subjected to less favourable treatment as compared to an actual or hypothetical comparator; and

(c) whether the respondent subjected the claimant to less favourable treatment "by reason that the person victimised has" done a protected act.

12. Should the tribunal deem it necessary, a further submissions hearing can be convened in this matter."

[4] The Tribunal conducted a further hearing and heard further submissions from the parties. It issued a fresh decision on the victimisation claim on 8 January 2014. It dismissed the claim on the basis that the reason for the appellant's treatment by the respondent, namely the delay in dealing with the appellant's grievance, was not because the appellant did a protected act.

[5] The matter came back to this court on 5 March 2014. Mr Potter again appeared on behalf of the appellant and Mr Hamill on behalf of the respondent. Both counsel provided helpful submissions to the court. Mr Potter sought to persuade the court that the Tribunal's conclusion was unsustainable since its findings and analysis of the law should inevitably have led to the conclusion that the appellant had made out her case of unlawful victimisation. Mr Hamill sought to stand over the tribunal's reasoning and conclusions.

## **The factual context of the claim**

[6] The appellant was employed by the respondent as the Public Relations and Marketing Manager from 17 January 1991 until 28 June 2011. She claimed that between 2004 and 2008 a series of inappropriate incidents occurred as a result of which she was off work for 6 months in 2005 and 7 months between 2006 and 2007. On return to work she claimed that inappropriate treatment continued. In April 2008 she lodged a formal grievance claiming bullying, harassment and discrimination on the grounds of gender and disability. Further grievances were lodged on 25 April 2008 and 5 August 2008. The grievances amounted to some 130 allegations involving four Council officers. On 11 July 2008 she lodged a sex and disability discrimination claim in the Tribunal but withdrew it when she commenced High Court proceedings for negligence, breach of contract and under the Protection from Harassment (NI) Order 1997.

[7] She asked for an independent element in the grievance procedure. She took the view that the Chief Executive was not an appropriate person to conduct her grievance. The Council appointed Mr Alistair Joynes, an external consultant, to deal with the grievances. The objective of the report was to investigate all the grievances with a view to upholding or rejecting them.

[8] The respondent's Acting Chief Executive on 29 April 2009 informed the appellant that the report would be received by Councillor Walker who would write to the appellant setting out the procedure to be followed thereafter. The report from Mr Joynes presented on 13 May 2009 upheld 33 of the claimant's grievances, partially upheld 21 and rejected 76. A grievance panel was established. It met on 11 August 2009 and its records show that it reiterated that it would not reinvestigate the grievances and would accept the findings of the investigation based on the evidence which was available to Mr Joynes. During that investigation a number of persons against whom complaints were made and some councillors suggested that Mr Joynes was not impartial and was helping the claimant in the presentation of her grievance. However, the respondent, after taking advice from the Staff Commission and from its own solicitors, concluded that Mr Joynes' approach was reasonable. The respondent did not make any formal complaints about Mr Joynes' approach.

[9] On 13 August 2009 the respondent informed the appellant that the panel had met to consider the report; that it was seeking clarification on a number of points from Mr Joynes; that the process had been a lengthy and difficult one; and that the matter would require thorough examination. On 25 August 2009 Mr Joynes responded at length to each of the queries raised by the Council.

[10] By letter dated 28 October 2009 Councillor Walker informed the appellant that she would be given an opportunity to address the panel. The grievance hearing would focus on any concerns with the report. The appellant responded that her

grievance was and remained her grievance and not issues which she might or might not have with the investigator's report. The grievance procedure failed to produce any outcome until 20 November 2011 by which time the appellant had already resigned on 28 June 2011 in circumstances which, in the tribunal's view, gave rise to unfair constructive dismissal.

[11] The Tribunal in its decision went through the chronology of events surrounding the conduct of the grievance procedure which the Tribunal reasonably concluded was marked by a complete failure on the part of the respondent to progress the grievance with reasonable expedition. The Tribunal in paragraph 9(18) of its original decision concluded that the Council failed to address the claimant's grievances properly and constituted a course of conduct which included delay, lack of openness, failure to adhere to undertakings given and the adoption of an approach which was inevitably bound to lead to delay. If the respondent was accepting the Joynes' report (as it said it was in August 2009) then there was no reason not to conclude the grievance within a few months from 2009. If, on the other hand, it was rejecting the report there was no reason not to so inform the appellant that it was doing so and this should have resulted in an earlier determination. The Tribunal properly concluded that the respondent failed to adequately address the claimant's grievance. This was both a breach of an implied term of the contract of employment and a breach of the duty of trust and confidence implied by law. This went to the core of the appellant's contract of employment and justified her in treating the employer as constructively dismissing her. The respondent has not challenged the Tribunal's conclusions on that issue.

### **The victimisation claim**

### **The relevant statutory provisions**

[12] So far as material Articles 6 and 8 of the 1976 Order provide as follows:

"6(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 the Equal Pay Act or Article 62-65 of the Pensions (Northern Ireland) Order 1995, or

- (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Order or the Equal Pay Act or Article 62-65 of the Pensions (Northern Ireland) Order 1995, or
- (c) otherwise done anything under or by reference to this Order or the Equal Pay Act or Article 62-65 of the Pensions (Northern Ireland) Order 1995 in relation to the discriminator or any other person, or
- (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act or under Article 62-65 of the Pensions (Northern Ireland) Order 1995,

or by reason that the discriminator knows the person victimised intends to do any of those things or suspects the person victimised has done, or intends to do any of them.

(2) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.”

[13] Article 8 provides:

“8(1) It is unlawful for a person in relation to employment by him at an establishment in Northern Ireland, to discriminate against a woman -

- (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
- (b) in the terms in 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 Northern Ireland 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.”

## **Conclusions**

[14] As the agreed terms of the remittal of the Tribunal show a Tribunal determining the question of victimisation must address the issues, firstly, whether the claimant suffered a detriment and, secondly, whether she was subjected to less favourable treatment as compared to an actual or hypothetical comparator by reason of the fact that she had done a protected act.

[15] The appellant has not sought to pursue an argument that she was discriminated against on the grounds of disability and the case thus turns on whether she was victimised on the grounds of having brought a sex discrimination claim or grievance. The Tribunal properly concluded, as the respondent has accepted, that the lodging of proceedings in July 2008 and the submission of the grievance on 3 April 2008 constituted protected acts. The case turned on whether the doing of the protected acts was the cause of the alleged victimisation.

[16] The Tribunal concluded that the relevant comparator would be a person who lodged a grievance and had not carried out a protected act. The respondent did not challenge that decision. It was satisfied that the appellant suffered less favourable treatment than such a hypothetical comparator would have received. In the case of individual employees instituting grievance procedures, such grievances were normally dealt with within 1 or 2 months, one grievance taking 4 months. The respondent had decided to accept the findings of the Joyne’s report on 11 August 2009. It did not allude to any factual matter or evidence or reason to cause the Tribunal to change its finding on that fact. The Tribunal’s conclusion that the grievance should have been concluded within a matter of months from August 2009 was not challenged. The Tribunal concluded, rightly in light of the evidence, that the delay until the claimant resigned in June 2011 was inordinate and unjustified. The Tribunal was satisfied that the claimant had established less favourable treatment. That conclusion was not challenged.

[17] The Tribunal was not satisfied that the reason for the delay was because the appellant did a protected act. Having confirmed that it was adhering to its reasons for rejecting the respondent's explanation for not accepting the Joyne's report (a view not challenged at the remitted hearing) the Tribunal went on in paragraph 16(5)-(7) to set out its reasoning for concluding that the cause of the delay was not attributable to the fact that the appellant did the protected acts.

"(5) The Tribunal's conclusion is that the respondent was seeking to overturn the adverse findings in the Joyne's report. The arranging of further hearings with other persons and inviting the claimant to participate in this approach was designed to enable it so to do. The claimant did not have direct experience of that. Her direct experience of the Council treatment was the delay. However, she believed, as she set out in her witness statement at paragraph 94 "that the reason that the grievance took so long to complete was the improper interference with the investigation and a determination to ensure no significant prejudicial findings were reached.' The claimant believed that this amounts to victimisation.

(6) Having considered the evidence afresh the tribunal adheres to the view set out at paragraph 9(12) of the original decision namely:

'The tribunal concludes that on balance the explanation for the delay is that the respondent did not wish to accept the findings of the Joyne's report because some of them related to sex discrimination; involved a number of senior council officers; and thereby raised questions about how the respondent conducted its workplace and work environment.'

(7) The reason for the treatment (the delay) was not because the claimant did a protected act. The reason for the treatment (the delay) was the efforts made by the respondent to overturn the adverse findings against the respondent and its senior officers in the Joyne's report. Those efforts caused the delay in dealing with the claimant's grievance."

[18] A person discriminates against the person alleged to have been victimised if he treats the person less favourably "by reason that the person victimised" has (inter

alia) done anything under or by reference to the 1976 Order or the Equal Pay Act. "By reason that" simply means "because" (see Lord Neuberger in Derbyshire v St Helen's Metropolitan Borough Council [2007] ICR 841 at 865 paragraph 76). As Mr Potter pointed out in argument, in determining whether an act is done because the party victimised did one or some of the things set out in Article 6(1)(a)-(d) the test to be applied may be expressed in somewhat different ways though it should lead to the same answer. The tribunal can ask the question "why did the respondent act as it did?" See, for example, Nagarajan v LRT [1999] IRLR 57 at paragraphs [13] and [18]. In Derbyshire Lord Neuberger put the matter thus:

"The words 'by reason that' require one to consider why the employer has done the particular act ... and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused a detriment, one must view the issue from the point of view of the alleged victim."

Alternatively the tribunal may pose the question "Would the respondent have acted as it did but for the fact that the victimised party did what he or she did acting under Article 6(1)(a)-(d)". (See for example Lady Hale in R v Governing Body of JFS [2010] IRLR 136 paragraph [58] and Lord Clarke (ibid.) at paragraphs [131]-[134]). Alternatively, it may pose the question, as Lord Mance did in JFS, whether the impugned act was inherently discriminatory.

[19] The Tribunal's conclusion was that the council was seeking to overturn the adverse findings in the Joyne's report and the delay flowed from the efforts made by the respondent to overturn those adverse findings. The central question was why the respondent failed to get on with and determine the grievance in a timely way as it was obliged to do and as it would otherwise have done in a case of a grievance brought by a person who was not pursuing a sex discrimination claim. If this had not been a case involving allegations of sex discrimination then, according to the Tribunal's findings, the respondent would have dealt with the grievance in a much shorter timeframe. This would have spared the appellant the frustrations to which she was subjected by the "inordinate and unjustified delay" as found by the Tribunal. In paragraph 16(6) of its decision, as it was entitled to do on the evidence, the Tribunal reached the conclusion that the delay was explained by the fact that (inter alia) the respondent did not wish to accept the findings of the Joyne's report "because some of them related to sex discrimination". It must logically follow that one of the effective causes of the delay was the fact that the appellant was pursuing a grievance alleging sexually discriminatory acts on the part of the respondent. The "why question" or the "but for" test lead to the conclusion that, contrary to its decision, the Tribunal should inevitably have found victimisation.



[20] In the result it must be concluded that the appellant did establish her victimisation claim under Article 6. The case, accordingly, must go back to the Tribunal to conclude the remedies hearing in relation to both the unfair constructive dismissal claim and the victimisation claim.

[21] We will hear counsel on the question of costs.