Neutral Citation No.: [2009] NICA 29

Ref:	**GIR7488**
Delivered:	**06-05-09**

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

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED

BETWEEN:

SURESH DEMAN

Claimant/Applicant;

-and-

ASSOCIATION OF UNIVERSITY TEACHERS
AND OFFICERS AT QUEEN'S UNIVERSITY (AUT),
DUNCAN MERCER, RICHARD JAY,
MAX GOLDSTROM AND PAUL HUDSON

Respondents/Respondents.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ

Introduction

[1] This appeal comes before the court by way of a case stated from the Fair Employment Tribunal ("the Tribunal"). The appellant, Suresh Deman, alleges that the respondents discriminated against him on the grounds of sex, religion and political opinion and he also alleges unlawful victimisation by the respondents. After a 13 day hearing between 6 November 2007 and 25 January 2008 the Tribunal by its decision dated 21 March 2008 dismissed the appellant's claims. The appellant submitted a requisition to the Tribunal to state a case for the opinion of the court on 2 May 2008 and the Tribunal stated its case on 12 June 2008.

[2] The Tribunal formulated five questions of law for the opinion of the Court of Appeal:

(1) Whether the Tribunal erred in law in refusing to recuse itself;

(2) Whether the Tribunal erred in law in deciding that the correspondence from the respondents' solicitors dated 1 May 1996 constituted a valid appearance;

(3) Whether the Tribunal erred in law in making procedural rulings which no tribunal, properly directed, could have made;

(4) Whether on the facts proved there was sufficient evidence upon which a tribunal properly directed could conclude that there was not a continuing act and that the majority of the appellant's allegations were out of time; and

(5) If the answer to 4 is yes, whether on the facts proved in relation to the remaining issues, there was sufficient evidence upon which a tribunal properly directed could conclude that the appellant's claims of unlawful discrimination on the grounds of political opinion, religious belief, sex and or victimisation should be dismissed?

The appellant's claims

[3] The appellant presented his claims against the respondents to the Tribunal on 19 April 1996. The background to the claims emerges from the Tribunal's findings of facts which may be summarised thus:

(a) The appellant took up a position as a lecturer at Queen's University, Belfast on 14 February 1994. He is of Indian origin and is perceived to be a Hindu. He described his political opinion as left liberal. He was assisted by Mrs Beverly Carroll who provided research support to teaching staff. He became a member of the Association of University Teachers ("the Union") in October 1994.

(b) Between 1995 and November 2007 the appellant was involved in many disputes with past employers including the University of Pittsburgh, the University

of Greenwich, the Association of University Teachers and others and with Queen's University of Belfast against which he brought at least twenty claims. He had extensive experience in discrimination cases before tribunals in Great Britain and in Northern Ireland.

(c) The appellant was out of Northern Ireland between November 1994 until February 1995 when he returned to Queens. During this period he was successful in a racial discrimination case against the University of Pittsburgh.

(d) Before he left in November 1994, while staying with his wife at Queen's University Belfast Common Room a camcorder belonging to the appellant and his wife was stolen in February 1994. A dispute arose in relation to compensation for the theft of the camcorder. This involved Dr Mercer, the honorary secretary of the Common Room and Mr Jay. Dr Mercer was also the President of the local branch of the Union and Mr Jay was an officer of the Union.

(e) On his return to Queen's University Belfast in February 1995 problems began to occur in his relations with Mrs Carroll.

(f) The appellant alleged that his Director, Professor Moore, heard of the outcome of his Pittsburgh claim and a conspiracy against him arose involving Queen's University and the Union through its officers Mr Jay, Dr Mercer and Dr Goldstrom with Mrs Carroll being involved as, in the appellant's words, a scapegoat.

(g) Various meetings, telephone calls and exchanges of correspondence took place in relation to a dispute with Mrs Carroll before and after 9 March 1995 when Mrs Carroll became a member of the Union.

(h) The appellant was suspended from his employment at Queen's University on 6 June 1995. His employment was terminated on 29 June 1995. The appellant brought judicial review proceedings in relation to that termination.

(i) On 20 October 1995 Dr Paul Hudson, the treasurer of the Queen's branch of the Union, changed the status of the appellant's membership of the Union. The appellant claimed that his employment subsisted at that stage as the judicial review proceedings were ongoing.

(j) On 24 October 1995 Dr Mercer wrote to the appellant and his wife indicating that as he was no longer a staff member of Queen's University their staff common room membership had lapsed and this was terminated on 8 February 1996.

(k) Issues also arose involving correspondence by Mr Jay and Dr Goldstrom to the National Union officers in England in relation to the Union's legal aid committee proceedings in relation to the appellant's claim against Queen's University for religious and sex discrimination instituted on 12 May 1995.

[4] The appellant inspected documentation in relation to his case against Queen's University at the offices of the solicitors for the University some time in February or March of 1996. The appellant claims that he first knew about the alleged discrimination in or about February/March 1996 as a result of the discovery process. He claims that it was as a result of examining the documentation that continuing acts of discrimination by the Respondents against him crystallised.

[5] The allegations of alleged discrimination emerged from a document furnished by the appellant and called "Grounds in Support of the Originating Application". In essence the claims were as follows:

(a) In relation to Mr Jay, the local secretary of the Union, the appellant complained that Mr Jay refused to speak to him about his complaints about Mrs Carroll and failed to investigate his complaints. Mr Jay furthermore orchestrated a false and unsubstantiated complaint of sexual harassment against the appellant by Mrs Carroll. Mr Jay had been dealing with those issues from early 1995. His actions were alleged to have been motivated by religious, political and sexually discriminatory intentions.

(b) In relation to Dr Goldstrom it was alleged that he contacted the appellant to set up a meeting to discuss his complaint in his office. He advised Mr Deman not

to be raising issues of discrimination as these were very sensitive matters and people got very upset about them. He discouraged him from pressing his complaints and threatened that Mrs Carroll might accuse him of sexual harassment if he persisted. After a couple of days he was told by Dr Goldstrom that Mrs Carroll had become a member of the Union and that Mr Jay would be representing her.

(c) Dr Mercer, the president of the Union at Queen's University, sent copies of correspondence from the appellant and his wife to Queen's which were used by Queen's to dismiss him. This amounted to discrimination by victimisation. He also expelled the appellant from membership of the Queen's common room.

(d) Mr Paul Hudson changed the appellant's status from full member of the Union to an attached member without notice and wrongly described his termination as though the appellant had left the employment with Queen's of his own free will. Furthermore he and the local Union refused to give coverage to his case of discrimination victimisation in the Union's newsletter.

(e) It was the appellant's case that the appellant would not have been treated in this way if he had been a female or of Christian origin. Further he was victimised and treated in the manner he was by reason of the fact that he had made repeated complaints of religious, political and sex discrimination.

The recusal issue

[6] The appellant argued that the Tribunal should have recused itself. The appellant alleged that at the outset of the hearing on 6 November 2007 he had concerns as to whether he would receive a fair hearing by the Tribunal. He alleged that bias was apparent from the utterances and behaviour of the Chairman with the other members of the Tribunal acting in his words as "loyal dummies". He alleged that the Chairman allowed counsel and solicitors for the respondents to conduct their case in an unprofessional and unreasonable manner and that he condoned an alleged assault by counsel for the respondent on the appellant which he alleged took place in open court. The appellant complained of an institutionalised culture of general and global bias existing in

the tribunals in Northern Ireland and the judiciary was no exception. He made allegations of bias against the former President and Vice-President of the Tribunals and the current President and other full time members of the panel of Chairmen. He made 30 allegations of apparent bias against the Chairman in paragraph 8 of his skeleton argument. The appellant alleged that the Chairman browbeat him and instigated an assault on him. He claimed that the Chairman's apparent bias increased throughout the hearing and that he began to side with the respondent's counsel. The appellant accused the respondents' counsel of making mischievous submissions which the Tribunal equally mischievously mentioned in its decision. By way of an example of the Tribunal's partiality to the respondents and its bias against him Mr Deman cited the dispute which arose about the use of the word "ex-ante" (used in reference to the situation before the decision of an English tribunal in other proceedings in central London in which the appellant had alleged discrimination). He cited what he considered to be biased interventions by the Tribunal and the leading of witnesses.

[7] Mr O'Reilly on behalf of the respondents argued that the substance of the appellant's argument for recusal was that he alleged an institutionalised culture of general or global bias in Northern Ireland tribunals and the judiciary in general. Regardless of the identity of the Chairman and lay members of the Tribunal a similar complaint would have been made by the appellant with the probable prospect of establishing in terrorem a similar situation in respect of any tribunal. Counsel said that it was inappropriate and probably impermissible to comment on the appellant's allegations against the Chairman when the same had not been expressly set out in either the decisions of the Tribunal or the case stated. The Tribunal took time to consider the application for the Tribunal to recuse itself. If the Tribunal had terminated the proceedings at that stage it should have been on the basis that the claims of the appellant would have been struck out under rule 18(7)(c) of the Tribunal's Procedural Regulations 2005 on the ground that the manner in which the proceedings had been conducted by the appellant had been scandalous, unreasonable and vexatious.

[8] There were, thus, before the Tribunal two separate applications for consideration, one an application by the respondents to strike out the proceedings under rule 18(7)(c) of the 2005 Regulations and rule 17(7)(c) of the Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005 on the grounds of the alleged scandalous, unreasonable and vexatious conduct of the appellant and the other was a recusal application made by the appellant. These conflicting applications clearly illustrate the difficulties faced by this Tribunal in the proceedings in which the appellant represented himself in large measure save for a limited period when was represented by Mr Sharma. Faced with a claimant who was pursuing his claim in a vigorous, combative and at times very sententious manner without the benefit of dispassionate legal assistance the Tribunal had the extremely difficult task of

ensuring that the proceedings were conducted justly, expeditiously and in a cost effective way. As this court stated in Peifer v. Castlederg High School and Western Education and Library Board –

> "Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 ("the rules of procedure") is based on the provisions of Order 1 rule 1A of the Rules of the Supreme Court. The provisions of Order 1 rule 1A were intended to be exactly what they are described as being namely overriding objectives. The full implication of those rules identifying the overriding objectives have not been fully appreciated by the courts, tribunals or practitioners. These overriding objectives should inform the court and the tribunals on the proper conduct of proceedings. Dealing with cases justly involves dealing with cases in ways which are proportionate to the complexity and importance of the issues, ensuring that the case is dealt with expeditiously and fairly and the saving of expense. Parties and practitioners are bound to conduct themselves in a way which furthers those overriding objectives . . . The overriding objectives, which are of course always intended to ensure that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. Tribunals can expect the appellate and supervisory courts to give proper and due weight to the tribunals decisions made on the fulfilment of their duty to ensure the overriding objectives. The Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and a saving of cost."

[9] Though finding that the appellant did at times conduct his case in a disruptive and unruly manner and showed a blatant disregard of the Tribunal, the Tribunal concluded that a fair trial was still possible. It also concluded that the allegations of apparent bias were not substantiated and that a fair hearing could proceed in accordance with the Tribunal's overriding objectives.

[10] Any court or tribunal properly carrying out its functions, particularly in light of the overriding objectives, is bound to control the proceedings and to

seek to do so in a manner which is just to both parties and which takes account of the advice of the Court of Appeal in Peifer. It will inevitably have to give rulings on evidence, on how witnesses should deal with questions posed, and the formulation of questions posed by the opposing party and the conduct of the witnesses and their representatives. Any fair-minded observer would not draw inferences against a court or tribunal when it is conscientiously seeking to fulfil its adjudicatory duties give adverse directions against a party. In approaching the question of apparent bias it is necessary to bear in mind the classic test as formulated in Porter v. Magill [2002] 2 AC 357 -

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

In William v. Young [2007] NICA 32, having referred to that statement, this court said at paragraph 6 –

> "The notional observer must therefore be presumed to have two characteristics, full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision maker was biased. In this context it is pertinent to recall Lord Steyn's observation in Lawal v. Northern Spirit Limited [2003] UKHL 35 quoting with approval Kirby J's comment in Johnston v. Johnston [2000] 201 CLR 488 at 509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.""

The notional observer would appreciate that the type of decision making which the Tribunal has to carry out in the conduct of a hearing was, in the words of Kerr LCJ in Director of Assets Recovery Agency v. Lovell "the stuff of everyday ad hoc assessments that a judge is called on to make in the course of many forms of litigation." He went on to point out in that case:

> "The observer would also be required to bear in mind that judges are well accustomed to reaching adverse views about a witness but in the same proceedings finding in their favour on other issues where the evidence warrants it."

[11] The appellant's generic attack on the independence and impartiality of the tribunals in Northern Ireland is not one which a fair-minded and informed observer would conclude established that there was a real possibility of bias in

the Tribunal. Rather a fair-minded and informed observer would conclude that it represented a view indicating an inability on his part of the appellant to take a fair and dispassionate view on the fairness of the Tribunal procedural system which is subject to rules and practices designed to achieve a fair system of adjudication. In the result a fair-minded observer would view the more specific allegations made by the appellant with considerable scepticism. The appellant's generic criticism is so lacking in justification and expressed in such unfairly trenchant terms that it seriously calls into the question the balance and fairness of his other criticisms. In any event, on a case stated this court is bound by the findings of fact of the Tribunal as set out in the case stated. Unless the conclusions are manifestly perverse, illogical and against the weight of the evidence there is no material on the case stated on which to conclude that the Tribunal erred in law in refusing the recusal application.

[12] Where a party seeks to challenge the decision of a Tribunal refusing to recuse itself on the grounds of bias or apparent bias, the case stated procedure is ill-adapted to enable such a challenge to be made. Having regard to the nature of a case stated and the difficulty for an appellate court in going behind the findings as recorded in the case stated, the case stated could itself be the product of the Tribunal's bias or apparent bias. For this reason the aggrieved party's proper course would be to seek to quash the decision in judicial review proceedings on the ground of bias or apparent bias. If it is shown that the Tribunal is biased or should not have heard the matter because of apparent bias the Tribunal lacks proper jurisdiction to hear the case. Judicial review would provide a workable mechanism for a determination whether the decision making process was indeed flawed by reason of bias or apparent bias. In the present instance the appellant did not seek to challenge the Tribunal's decision to refuse the recusal application nor has he sought to quash the substantive decision on the grounds of apparent bias.

[13] This is not to say that there may not be cases in which the question of bias or apparent bias may not arise in a case stated, for example where ex facie from the case stated the Tribunal has manifested apparent bias in the case stated.. This, however, is not the case in the present appeal.

[14] Mr Deman raised the point that Dr Mercer and Mr Jay are or were lay members of the Tribunals. He also suggested that a Professor Crothers who was a namesake of the Chairman of the Tribunal was a member of the AUT-QUB Executive Committee. This, he suggested, raised an appearance of bias and called for an explanation. The fact that Dr Mercer and Mr Jay were lay members of the Tribunal could not preclude some independent panel adjudicating in the case. The parties were entitled to a hearing before the properly constituted tribunal established by statute to resolve such disputes, in this case the Fair Employment Tribunal. There was no evidence that Mr Crothers had sat with Dr Mercer or Mr Jay in other unrelated matters. The fact that a namesake of the Chairman was a member of the AUT-QUB Executive

Committee would not of itself raise an appearance of bias since a fair-minded person would not assume a relationship merely because of a common name. There was no evidence to suggest any connection between the two.

[15] For these reasons the appellant has failed to persuade us that the Tribunal erred in refusing to recuse itself. Accordingly we answer the first question in the case stated "No".

Did the respondents enter a valid appearance?

[16] The appellant argued that the respondents had not entered a valid appearance to the appellant's claim. The respondents contended that their letter to the Tribunal dated 1 May 1996 constituted a valid appearance within rule 3 of the Schedule to the 1989 procedural regulations. There was within it a deemed application for an extension of time under the relevant rules. The Tribunal accepted the respondent's argument and, for the avoidance of doubt, it extended time so as to constitute the letter a valid notice of appearance.

[17] The letter of 1 May 1996 was in the following terms –

> "Dear Sir
>
> Re: Mr Suresh Deman v. Association of University Teachers
>
> We write to advise you that we have been instructed on behalf of the Association of University Teachers in respect of the above applications.
>
> We understand that in addition to naming the Association the applicant has also named a number of the officers of the Association at paragraph 3 of the originating applications. We can confirm that we are also instructed on behalf of the individual officers that have been named.
>
> We are writing to you at this time to ask you to let us have a copy of the applicant's applications together with a number of blank appearance forms to enable us to formally respond on behalf of the various respondents. In order to avoid any possible future confusion I would ask you to let us have details of all persons or bodies who have been registered as respondents in these matters.

We would also ask you to treat this letter as the appearance of each of the respondents pending submission of the formal appearance form. Please note that the respondents on each of them intend to vigorously defend these proceedings and therefore deny each and every allegation made by the applicant in his applications both expressed and implied.

We have in our possession a faxed copy of the applicant's applications which is extremely difficult to read and we suspect therefore that before we are able to properly respond we may require the applicant to provide a typed transcript of paragraph 13 of his applications. In any event in view of the number of the respondents involved in this matter we will require some time to take instructions before we can file a detailed defence.

In the circumstances we look forward to hearing from you with the copy applications as soon as possible.

Yours faithfully

Francis Hanna & Company"

[18] The appellant argued that the respondents had not provided any explanation as to why it was not reasonably practicable for them not to provide grounds for resisting the claims with duly completed forms within 14 days of receiving the originating application. There was no notification from the Secretary to the Tribunals accepting the notice of appearance. It was submitted that because of the allegations by the appellant of bias on the part of the Tribunal the Chairman could not have exercised his discretion judiciously to extend the time.

[19] As of May 1996 the procedural regulations did not require an appearance to be entered in any particular form. By rule 13 a notice of appearance presented to the Secretary after the 14 day period appointed is deemed to include an application for an extension of time. The appellant's claim was received by the Tribunal's office on 19 April 1996 and , if it was an appearance, the letter was in time. The letter made clear that the respondents were intent on resisting the appellant's claims and the appellant could have no doubt that the respondents had in reality entered an appearance.

[20] We are satisfied, accordingly that the Tribunal was correct in concluding that the respondents had entered an appearance on 1 May 1996. We therefore answer the second question "No".

Procedural Rulings

[21] The appellant challenged the legality of two procedural rulings made by the Tribunal. The first related to the admission in evidence of a written statement by Dr Goldstrom signed by him on 21 May 2007. The second related to an alleged failure to give a ruling on the admissibility in evidence of a decision given by the Central London Employment Tribunal in connection with proceedings brought by the appellant against the Union in England.

[22] In relation Dr Goldstrom's statement the appellant objected to its admission in evidence and to the Tribunal giving any weight to its contents. He alleged that the general practitioner who had given the letter expressing the opinion that he was not medically fit to attend worked in Queen's University health centre and thus could not be regarded as independent. The GP's note simply said he could not attend. It did not say that he was physically or mentally unfit ever to give evidence or when he would be fit to do so. There was no detail or history of his condition. Dr Goldstrom had been on medication for the last 18 months for an Alzheimer type illness. Since Dr Goldstrom was a key witness his evidence without cross examination and taking account of his illness should have been wholly discounted.

[23] Paragraph 13(2) of the Schedule to the Fair Employment Tribunal (Rules of Procedure) Regulations 2005 provides that the Tribunal shall not be bound by any statutory provision or rule of law relating to the admissibility of evidence in proceedings before the courts. Paragraph 13(3) requires the Tribunal to conduct the hearing in such manner as it considers most appropriate for the clarification of issues and generally for the just handling of the proceedings. The Tribunal was thus empowered to admit the written statement of Dr Goldstrom if it considered it just to do so As hearsay evidence the Tribunal would be free to give such weight to it as it considered appropriate having regard to the circumstances surrounding the making of a statement, its contents, other evidence in the case and the medical evidence and bearing in mind that the witness was not subject to cross examination.

[24] There is nothing in the Tribunal's decision that suggests that it did not take account of the proper considerations in deciding to admit the evidence or that it failed to take account of the relevant matters in giving to it such weight as it merited. Dr Goldstrom was a named respondent. It would have been manifestly unfair to exclude any evidence from the respondent in defence of the claim against him. Faced with that difficulty the Tribunal had to consider how the situation could be met justly. Its decision to admit the evidence and to give it such weight as it considered appropriate was clearly a decision which

the Tribunal could reasonably take. In fact, in reaching its conclusion about the case against Dr Goldstrom the Tribunal did so largely by reference to documentation and evidence emerging from other material outwith the statement itself.

[25] Mr Deman's challenge in relation to the alleged failure to rule on the admissibility in evidence of the Central London Tribunal's decision must likewise fail. In its case stated the Tribunal stated that the appellant objected to the Tribunal considering the London Tribunal's decision. The Tribunal stated that the decision was not referred to or considered by the Tribunal. There is no reason to question the Tribunal's statement in the case stated to that effect and the course adopted by the Tribunal was in accordance with what the appellant was asking it to do. The appellant's challenge, thus, has no substance. His complaint that the Tribunal did not give a ruling on the point in its decision does not affect this conclusion. A tribunal is not expected to deal with every point and line of argument raised before it provided it makes clear the legal approach which it has adopted and gives adequate reasons for its decisions.

The out of time issue

[26] According to its decision the Tribunal focused on the substance of the complaints made by the appellant that the respondents were responsible for an on-going situation or a continuing state of affairs in which the appellant was treated less favourably on the grounds of religious belief, political opinion and sex and/or that he was also victimised. It also concluded that there was not a continuing act ending with Dr Goldstrom's correspondence to Dr Talbot on 30 March 1996. It rejected the argument that the acts complained of crystallised in March 1996 as the appellant claimed. It refused to exercise its discretion to extend time on just and equitable grounds. It considered that the appellant was well aware of the issues as they arose except for his claim that he discovered in February/March 1996 that correspondence had been forwarded by Dr Mercer to Queen's in June 1995. The Tribunal concluded that Dear Mercer did so in his capacity as honorary secretary of Queen's Common Room and not as president of the local Union. The appellant had produced no credible explanation for his delay in presenting his claims to the Tribunal on 19 April 1996. The Tribunal therefore only considered his complaints from 19 January 1996 as being in time. The Tribunal was satisfied that the appellant was a very experienced and intelligent litigant who had brought numerous proceedings in Great Britain (where he has been declared a vexatious litigant) and in Northern Ireland and that he had brought at least 20 cases against Queen's University itself.

[27] The appellant in his submissions sententiously argues that the Tribunal had adopted a mischievous approach to the time issues. He argued that any person with slight common sense would come to the conclusion that all the relevant events "were a series of the same acts i.e. the same sequence". Each

case is fact specific and to answer the questions whether there is a continuing act of discrimination must depend on the findings of fact made in each case and the inferences which may reasonably be drawn from those facts. The Tribunal should have considered the extent to which the complaint was out of time if it was to exercise its discretion in accordance with principles stated in British Coal Co-operation v. Keeble [1997] IRLR 337.

[28] Mr O'Reilly contended that with the exception of three matters (the termination of the appellant's membership of the common room by the respondent, Dr Mercer, on 8 February 1996, the letter written by the respondent, Mr Jay, in May 1996 to the National Union and the letter of 30 March 1996 from the respondent, Dr Goldstrom, to the same organisation) all other acts and omissions of the respondents were rightly found to have occurred and to have terminated more than three months before the date on which the appellant lodged his application in the Tribunal Office. There was sufficient evidence on which the Tribunal properly directing itself was entitled to conclude that there was not a continuing act and that the majority of the appellant's allegations were out of time. The facts as found by the Tribunal clearly led to a conclusion that there was not a continuing act and thus all allegations relating to the period prior to 19 January 1996 were out of time.

[29] The words "an act extending over a period" were considered by the Court of Appeal in Hendricks v. Metropolitan Police Commissioner [2002] EWCA 1686 in which Mummery LJ stated –

> "(The claimant) is entitled to pursue her claim beyond the preliminary stage on the basis that the burden is on her to prove either by direct evidence or by inference from primary fact that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period . . . The question is whether there is an act extending over a period as distinct from a succession of unconnected and isolated specific acts for which time would begin to run from the date when each specific act was committed."

[30] If the acts subsequent to January 1996 were not acts of discrimination then it would be logically impossible to consider them as part of a continuing discriminatory state of affairs and the acts prior to January 1996 would be clearly out of time (subject to any question of extending time). The Tribunal concluded that the events after 19 January 1996 were not acts of discrimination or victimisation. This was a conclusion which, for the reasons set out below, it was fully entitled to reach. Accordingly, there was no evidence of continuing

discriminatory acts after 19 January 1996 and within the three month period before 19 April 1996. The Tribunal reached the conclusion that there was no evidence of a continuing act and that in effect that there was a succession of unconnected and isolated specific acts. For the acts to be viewed not as separate acts but as part of a continuing discriminatory state of affairs it would have been necessary for the Tribunal in effect to have accepted the case made by the appellant that the respondents were conspiring to discriminate against him or victimise him, a conclusion which the Tribunal did not accept.

[31] On the question whether the respondent was wrong in law in failing to extend time the appellant must establish that either the Tribunal decided against an extension of time because of actual or apparent bias (a proposition which we have rejected) or because it erred in law in failing to exercise its discretion in favour of an extension. No such error can be detected from the decision. The Tribunal found no credible explanation for delay. It was entitled to find as it did that the appellant was particularly well informed on the mechanisms of bringing discrimination claims.

[32] For these reasons we answer question four "Yes".

Was there evidence of discrimination after 19 January 1996

[33] Three matters after 19 January 1996 were alleged to have been discriminatory acts (termination of the appellant's membership of the common room by Mr Mercer, the letter from Mr Jay and the letter from Dr Goldstrom).

[34] The Tribunal properly recognised that the allegations which were ruled out of time potentially constituted evidential material relevant to the remaining issues of the alleged discrimination/victimisation. It also properly recognised that the appellant relied on events subsequent to 19 April 1996 as relevant to the question of a discriminatory intent.

[35] In relation to the question of the termination of the appellant's membership of the common room Dr Mercer wrote to the claimant and his wife on 24 October 1995 –

> "Dr Black has asked me to write to you to clarify your position with regard to membership of the common room as you are probably aware the membership year ends on 30 August and we are now advised you are no longer a current member of the Queen's academic staff. Indeed at the recent hearing in the Small Claims Courts you stated that you had decided to leave QUB. In the circumstances I am writing to inform you that your membership has lapsed and that you should at the earliest convenience return your membership

> cards to the office and the common room. To avoid embarrassment you should make no further attempt to enter or use the facilities provided by the club for its members".

That letter is signed by Dr Mercer as Honorary Secretary.

[36] The appellant in his complaints against Dr Mercer complained of the action of Dr Mercer in the expulsion of the appellant and his wife on 8 February 1996. It does appear from the Tribunal's finding of fact that Dr Mercer "forwarded" further correspondence regarding termination of the claimant's membership of the common room on 8 February 1996 though the letter recording the expulsion was dated 24 October 1995.

[37] The Tribunal concluded on the evidence that Dr Mercer was acting in relation to the expulsion from the common room solely in his capacity as Honorary Secretary of the common room.

[38] The Tribunal properly rejected the allegation of discrimination in relation to the sending of the correspondence on 8 February 1996. The sending of such correspondence could not constitute an act of discrimination. If the appellant's case was that he was wrongly deprived of membership of the common room on discriminatory grounds, that had occurred on 24 October 1995 and the appellant's claim in that regard would lie against the entity in control of membership of the common room which was not the Union. There could be nothing discriminatory in forwarding further correspondence about the termination in February 1996. In any event the conclusion that the appellant was no longer a current member because he was no longer a current member of the academic staff was inevitably correct. The mere fact that a judicial review had been brought by the appellant to challenge the termination of his employment did not result in his employment being deemed in law to continue. Even if such a proposition were corrrect, there was no evidence justifying the conclusion that Dr Mercer was purporting to exclude him on discriminatory grounds. There is no evidence that any other person female or non Hindu, would have received different treatment in such circumstances. The Tribunal was thus correct to reject a discrimination claim in respect of that allegation. Nor was there any evidence that forwarding the letter was evidence of victimisation.

[39] In relation to Mr Jay's sending of the letter of 6 March 1996 to Dr Talbot, Secretary to the Union's legal aid committee, the content of the letter makes clear that Mr Jay was criticising the Union's handling of the matter. The letter reads –

> "I understand from informal remarks that the legal aid standing appeal committee has referred Mr

> Deman's claim for legal assistance back to the legal aid committee. I also understand that some of the reasons behind this are based upon claims made by Mr Deman about the way in which the legal aid handled its relations with him and with Mrs Carroll at an early stage in this business. May I say that, in general terms, I find it bizarre that the appeal committee should have acted as if it accepted Mr Deman's version of events without cross checking these with other relevant parties. As one of the relevant legal aid officers, who is currently being subject to a scurrilous and possibly defamatory public campaign of abuse by Mr Deman, I take great personal and professional exception to the implication that the legal aid appeal committee is taking Mr Deman's account on trust and that it is not worthy even of consulting myself or my colleagues.
>
> If I have misunderstood the nature of this decision then I should be grateful for your help in correcting the error. In case there should be any doubt I have provided my own account on my entire dealings with Mr Deman for the record and the immediate matters raised by his allegations about Mrs Carroll."

[40] The contents of that letter showed that Mr Jay was being critical of the way in which the appeal committee had acted in not consulting him. The Tribunal considered that there was nothing out of the ordinary in relation to the correspondence. It concluded there was nothing that indicated discrimination or victimisation on the part of Mr Jay. Its conclusion in this regard was entirely correct. There is nothing in the reverse onus of proof provisions of the Sex Discrimination (Northern Ireland) Order 1976 or the Fair Employment (Northern Ireland) Order (as amended) that assists the appellant in this regard. For the purpose of sex, religious and political discrimination what is forbidden in the present context is for a trade union to subject a complainant to a detriment. Mr Jay's letter setting out his own views in relation to the matters referred to in the letter could not constitute unlawful discrimination as statutorily defined. Nor is there any evidence that the letter was written by way of victimisation of the appellant because he had done one of the protected acts. The Tribunal's assessment of the letter was entirely correct.

[41] Dr Goldstrom's correspondence to Dr Talbot dated 30 March 1996 was likewise an attempt by him to correct statements made by the appellant to the Union's legal aid appeal committee which he considered to be untrue or misleading. He furnished a chronological account of how the legal aid

committee dealt with the appellant's case. The Tribunal was satisfied there was nothing out of the ordinary in relation to that correspondence given the context in which it was written. The same comments apply in relation to Dr Goldstrom's letter as apply in relation to Mr Jay's letter in paragraph [39] above.

[42] Mr O'Reilly helpfully suggested that the final question in the case stated could be recast to read as follows –

> "If the answer to 4 is yes, whether on the facts proved in relation to the remaining issues there was sufficient evidence arising from those facts upon which the Tribunal properly directed could conclude that the respondents had committed acts of discrimination against the claimant on the grounds of political opinion, religious belief, sex and/or victimisation?"

We answer that question "No".

[43] Accordingly we dismiss the appeal.