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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

Between:

EUGENE GERAGHTY

Appellant/Respondent

and

ALONA FOROSE

Respondent/Claimant

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Mr Geraghty is a Litigant in Person
Ms N McGrenera KC with Mr P Ferrity BL (instructed by Equality Commission for NI) for the Claimant/Respondent

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Before: McCloskey LJ, Horner LJ and O'Hara J

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O'HARA J (*delivering the judgment of the court*)

Introduction

[1] This is an appeal by Mr Geraghty against findings made against him by an Industrial Tribunal and against the award which followed from those findings. The Tribunal decided that he had discriminated against Ms Forose, a part-time employee in his ice-cream shop. That discrimination was on the ground of sex in that he had unlawfully sexually harassed her. Having reached that decision, the Tribunal awarded Ms Forose £41,500 for injury to her feelings, £20,000 for psychiatric injury and £6,000 by way of aggravated damages. Interest on the award was £4,260, leading to a total of £71,860.

[2] Mr Geraghty did not have legal representation during the Tribunal hearing, nor did he have any before this court. He did, however, receive legal advice at different times which included the formulation of his grounds of appeal. As the court reminded Mr Geraghty, there is no right of appeal by way of a full rehearing to this court from a decision of an industrial tribunal. Accordingly, the court

considered his appeal by reference to the four points of law set out in his notice of appeal.

[3] In addition, the court had to consider whether Mr Geraghty's appeal had been brought in time and properly lodged in compliance with court rules. It was contended on behalf of the claimant that the appeal was out of time and that the proper procedure had not been followed. These various matters will be dealt with in turn below.

(1) Anonymity

[4] The claimant was born in 2001. The sexual harassment which she alleged, and which the Tribunal found proved, occurred between March and June 2017 when she was 15 years old. Her claim to the Tribunal was lodged in August 2017. At that time the relevant rule of procedure in the Tribunal was Rule 49 which is found in Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2005. Rule 49 made it mandatory to delete from any decision, document or record of proceedings any detail "which is likely to lead members of the public to identify any person affected by or making …" an allegation that a sexual offence had been committed.

[5] Since the case made by Ms Forose was that sexual offences had been committed against her by Mr Geraghty, both her name and his were anonymised in the documents recording what took place before the Tribunal and in the Tribunal's judgment. This was not as a result of any exercise of discretion on the part of the Tribunal – it had no alternative because of the wording of Rule 49.

[6] As matters developed the hearing of the case was delayed for various reasons including the processing of the criminal proceedings against Mr Geraghty in the Magistrates' Court and Covid-19. By the time the Tribunal came to hear the case in September 2021, Rule 49 of 2005 had been replaced by a new rule, Rule 44 in Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020. It is in very different terms to Rule 49 and provides as follows:

> "44.—(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances—
>
> (a) where the tribunal considers it necessary in the interests of justice;

(b) in order to protect the Convention rights of any person;

...

(2) In considering whether to make an Order under this Rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such Orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of Article 13 or 14 of the Industrial Tribunals Order."

[7] As is immediately apparent, this rule gives tribunals discretion which they did not previously enjoy in relation to orders for anonymity. The claimant, by now aged 20, asked the Tribunal to revoke the earlier anonymity order. She said she wanted the truth of what had happened to her at the hands of Mr Geraghty to be made public and that she wanted to empower other women. Mr Geraghty opposed the removal of anonymity, largely because he contends that the allegations against him are false and that he wants neither himself nor his family to receive further abuse as a result of adverse publicity.

[8] The Tribunal was concerned whether Ms Forose fully understood what the full consequences of removing her anonymity might be, but it recorded at para 126 of its decision that she had confirmed her desire to dispense with anonymity.

[9] The Tribunal then weighed up her wishes along with the important principle of open justice against Mr Geraghty's wish to preserve anonymity. Having done so,

it decided to remove anonymity. However, having been informed by Mr Geraghty that he intended to appeal against that decision, it preserved the order for anonymity until the hearing of the appeal by this court.

[10] This court approached the issue in a similar, but not identical way, to the Tribunal and decided to revoke anonymity with the result that the parties can now be named and the full details of the case reported. There were three principal reasons for this decision:

(i) The strength of the principle that justice should be open and public, both at common law and in accordance with Article 10 of the European Convention on Human Rights. There are many illustrations of this principle including *Scott v Scott* [1913] AC 417 and *Attorney General v The Leveller Magazine* [1979] AC 440.

(ii) The fact that there have already been reports in the local media of the prosecution of Mr Geraghty in the Magistrates' Court for the same conduct which is dealt with in the Tribunal claim.

(iii) The desire, still strongly maintained by Ms Forose, to remove anonymity.

[11] The court's view was that to the extent that Mr Geraghty and/or members of his family have a right to privacy within Article 8 ECHR, that right is qualified and is significantly outweighed by the three factors identified above. Accordingly, anonymity was removed at the outset of the hearing before the court.

(2) Was the appeal to the Court of Appeal lodged in time?

[12] The judgment of the Tribunal was issued to the parties on 1 October 2021. As documents helpfully sent to the appellant along with the judgment make clear, he had six weeks from the date on which he received the judgment to serve a notice of appeal on all parties and on the Tribunal. Within a further seven days he was required to enter the appeal for hearing by lodging specified documents in the Central Office of the Royal Courts of Justice. These requirements are imposed by Order 60B of the Rules of the Court of Judicature (NI) 1980.

[13] The appellant contends that he received the judgment on 6 October. He served notice of his appeal on 17 November which would be the last day if the six weeks run from 6 October. He did not, however, lodge any papers with the Central Office until 3 January 2022 (well beyond the prescribed seven day period) and only paid the relevant court fee in April 2022.

[14] The claimant's representatives, quite properly, raised with the court this imperfect or non-compliance with the rules relating to appeals. Having considered that submission, the court decided to allow the appeal to proceed for the following reasons:

(i) The time limits are fixed by court rules rather than by statute and the court retains a discretion under Order 3 Rule 5 of the 1980 Rules to extend time if it deems it appropriate.

(ii) In this case the unrepresented Mr Geraghty clearly made some effort to comply with the rules and thereby put the claimant on notice of the appeal.

(iii) No prejudice of any significance was identified by the complainant as having been suffered by her as a result of the imperfect way in which the rules were complied with.

(iv) As will appear below, there is merit in at least one of the grounds of appeal.

(3) Did the Tribunal err in law, and deny the appellant a fair hearing, by requiring the appellant's cross-examination of the respondent to be conducted via the Employment Judge?

[15] The complainant's case against the appellant was that when she worked part-time for him in his ice-cream shop he sexually harassed her. In part this harassment was physical, but it also involved him making sexualised comments about her body and questioning her about her boyfriends. It was made even worse by the discrepancy in their positions and ages. She was a schoolgirl working part-time – he was the employer and more than 40 years older than her.

[16] When the claimant's mother learned about what was going on, she reported the matter to the police. This resulted in the appellant being prosecuted for a series of offences, contrary to the Sexual Offences (NI) Order 2008. Ultimately, the defendant pleaded guilty to a single charge of common assault, contrary to section 42 of the Offences against the Person Act 1861. The District Judge imposed a suspended sentence on him, four months suspended for two years.

[17] The exact sequence of events which followed is somewhat unclear, but it appears that a Sexual Offences Prevention Order (SOPO) was also imposed on the appellant before it was later realised that such an order can only be made where there has been a conviction for a sexual offence. In the present case there were charges of sexual offending but no convictions. Accordingly, on 28 May 2019 an alternative order was imposed, a Risk of Sexual Harm Order (ROSH). Among the restrictions imposed on Mr Geraghty in that order was:

> "Prohibited from approaching, seeking to approach, communicating or seeking to communicate by whatever means, either directly or indirectly, with the victim and her family unless approved in advance by his designated risk manager."

[18] It is clear that the appellant understood the impact of that order because in a letter which he wrote to the Equality Commission on 4 August 2021 he stated he had been unsuccessful in his attempt to have the ROSH order removed or lifted. He continued:

> "As the order stands, I am unable to take part in any way with this Tribunal case as I would be in breach of (the ROSH order). I do look forward to May 2024 when I will have no restrictions and I will proceed with full strength and without fear of PSNI calling at my door for breach of order."

[19] In order to avoid such delay the Tribunal considered how the sex discrimination claim before it could be progressed without the ROSH order being contravened. It decided that:

(i) The Tribunal panel, the claimant and Mr Geraghty would be in separate rooms, the three rooms being connected by video link.

(ii) There would be staggered arrival and departure times for the claimant and Mr Geraghty to ensure that they were separated at all times in the course of the hearing.

(iii) Mr Geraghty was required to provide his questions for cross-examination of the claimant in advance of the hearing. It was directed that any questions, and to the extent only that they were appropriate, would be put to the claimant by the Vice President hearing the case (rather than by the appellant himself). It was also directed that once that procedure was finished, if Mr Geraghty wanted any additional questions to be put to the claimant, he should make that application directly to the Vice President at that point in the hearing. It was stressed that Mr Geraghty would not speak directly, at any point, to the claimant.

[20] The Tribunal finding records that within those restrictions it made sure that Mr Geraghty had a full opportunity to challenge and test the evidence given by and on behalf of the claimant and to make submissions. He was also free to call his own witnesses but chose not to do so.

[21] From the Tribunal judgment it appears that Mr Geraghty provided 24 pages of handwritten questions. Some of those questions were more in the form of submissions and others were repetitious, but such questions as were deemed to be appropriate and relevant were asked by the Vice President of the claimant. While the appellant objected to this whole process and believes that the Tribunal was far too accommodating to the claimant, it is not apparent from the Tribunal's judgment or even his submissions to this court what issues he was wrongly prevented from pursuing in cross-examination.

[22] This court accepts that this was not the traditional or established way of cross-examination before any court or tribunal. In the circumstances of this case, however, it was an appropriate and structured way forward. It is not apparent that the Tribunal erred in law in adopting this procedure. On the contrary, it devised and managed a special procedure which allowed the case to be heard. In circumstances where the appellant was subject to (and, indeed, had consented to) a ROSH order, the Tribunal's approach cannot be faulted. Fundamentally this court is satisfied that the appellant received a fair hearing.

(4) Did the Tribunal err in law by admitting or taking account of similar fact evidence in respect of previous allegations made against the appellant in 2013?

[23] While he was being questioned by the police in 2017 on foot of the claimant's allegations against him, the appellant was also asked about the fact that in 2013 he had been arrested and interrogated about very similar allegations made by equally young girls. This was considered to be potentially so significant that in the context of the criminal prosecution the Public Prosecution Service applied to adduce evidence of the appellant's bad character under the provisions of the Criminal Justice (Evidence) Order (NI) 2004. The basis of the application was that the 2013 evidence demonstrated a propensity on the part of the appellant to commit sexual offences.

[24] In the end, as appears above, the proceedings in the Magistrates' Court were disposed of by a plea of guilty to a single charge of common assault rather than sexual assault. Contrary to the appellant's contention, that does not in itself amount to evidence that he did not sexually assault or harass the complainant, though it was obviously a matter for the Tribunal to take into account.

[25] On the question of admissibility, it is the view of this court that the admission of evidence about alleged harassment in similar circumstances in 2013 was comfortably within the discretion of the Tribunal. The allegations made by the girls in 2013 were in the Tribunal's words "strikingly similar" to those made in 2017 by the claimant. On no view did the Tribunal err in law in admitting that evidence. If anything, it would have been irrational to exclude them.

(5) Did the Tribunal err in law in respect of quantum, in particular:

(a) Was the award of £41,500 for injury to feelings manifestly excessive?

(b) Was there an element of double counting as between the awards of £41,500 for injury to feelings, £20,000 for personal injury and £6,000 for aggravated damages?

(c) Was it wrong in principle to make an award for aggravated damages separate from the award for injury to feelings?

(d) Was the total award of £71,860 for non-pecuniary loss manifestly excessive and/or perverse?

[26] In considering the award of damages the court reminds itself that the Tribunal had a significant advantage in that it saw and heard the claimant give her evidence. It is apparent from para 88 of the Tribunal's findings that she impressed as a "calm, consistent and truthful witness." It is also clear that the Tribunal believed all of her allegations about how she had been repeatedly and grossly harassed by the appellant. To make matters worse, he defended a case by accusing her of making everything up and of just being out to make money. On his version, everyone including the girls in 2013, the District Judge and the claimant's witnesses were either wrong or lying or both.

[27] This led the Tribunal to conclude:

> "In short, everyone apart from him, had been in the wrong. The respondent's attitude to all these individuals is, again, disturbing and indicates at best a significant degree of delusion on his part."

The Tribunal continued:

> "115. It is clear that each and every incident as alleged and as determined by the Tribunal amounted to unwanted conduct. It is also clear that that conduct had been of a sexual nature.
>
> 116. That conduct had the effect of violating the dignity of the claimant and of creating an intimidating, hostile, degrading, humiliating and offensive environment for her while working in the respondent's shop.
>
> 117. It is also the unanimous decision of the Tribunal that the respondent's purpose in perpetrating the conduct as alleged and as determined by the Tribunal had been to both violate the claimant's dignity and to create an intimidating, hostile, degrading, humiliating and offensive environment for her."

[28] The Tribunal then turned to consider the appropriate award for injury to the claimant's feelings. It set out the Presidential Guidance issued in September 2017 from which it drew the point that the most serious cases should attract awards in the upper band between £25,200 and £42,000.

[29] The Tribunal considered a January 2020 report from Dr Best, Consultant Psychiatrist, who had diagnosed what he described as "an adjustment disorder, prolonged depressive reaction". Dr Best's report continued:

> "I feel that the cluster of symptoms reported was anxiety, depression, sleep disturbance and fear of others. It is best described by the term an adjustment disorder and stress reaction. I feel that the symptoms were intensive enough to be considered a mental disorder for over two years and there is likely to be further recurrence of some symptoms as this Tribunal takes place. I feel that the whole condition will lead to a mental disorder lasting for approximately 3-4 years following this unpleasant experience from this girl who was a teenager at the time of the abuse."

[30] On this analysis of the claimant's evidence and that of Dr Best (which included oral evidence) the Tribunal awarded £41,500, stating:

> "It is difficult to conceive of a more serious injury to feelings than the present case."

[31] Having done that, it then considered whether to make an additional award for what was described as the moderate psychiatric damage which the claimant had suffered as a result of the appellant's conduct. By reference to Dr Best's report, it awarded £20,000.

[32] Finally, it awarded £6,000 for aggravated damages, focusing on the appellant's conduct after the sex harassment, that is during the criminal prosecution and Tribunal litigation. This was a reference to such matters as his claim that she was a "scam artist", his threat to re-open his criminal conviction and his assertion that the claimant would be at risk of some form of legal action by the police and by the health service.

[33] This court has no hesitation in agreeing with the award for aggravated damages. In our view, that element of the total award is unimpeachable.

[34] Where the court has much greater difficulty is with the awards for injury to feelings and psychiatric damage as well as the simple addition of the sums awarded under those two headings. While the Tribunal acknowledged at para 41 of its decision the risk of double counting by awarding damages under different headings and then simply calculating the total, that appears to the court to be what it in fact did.

[35] At paras 137-140 of its decision the Tribunal considered that on the basis of Dr Best's report, and by reference to a recent High Court award of £10,000 for psychiatric injury, the appropriate award to the claimant was £20,000. Regrettably, it did not then stand back and reflect on the fact that Dr Best's report had already been considered at length and quoted in the context of the injury to feelings award. That has led this court to conclude that there has been an element of double counting.

[36] The court's difficulty does not end there. With all due respect to the Tribunal's experience, and acknowledging again that it saw and heard from the claimant, we find it impossible to view the awards for injury to feelings and psychiatric damage as anything other than excessive. The court would not interfere if the awards were high or generous but in this case the court has concluded that they are excessive.

[37] The following points, in particular, have led the court to that conclusion:

- The court has been assured by the Equality Commission that when Dr Best was engaged to provide his report on the claimant, he was provided with the unexpectedly limited medical records which were then put before the Tribunal and this court. Those records are not relied on or even referred to at any point in his report. Notwithstanding that fact Dr Best made the diagnosis referred to at paragraph 29 above. The court finds that surprising. No member of the court would have relied on Dr Best's report to make an award of £20,000 for psychiatric injury over and above the award for injury to feelings nor should the Tribunal have done so.

- The claimant worked for the appellant on a part-time basis for less than three months. While the harassment was gross and involved a schoolgirl and a much older man, it is difficult to agree with the Tribunal's finding that "it is difficult to conceive of a more serious injury to feelings than the present case."

- The Tribunal accepted the claimant as a credible witness, in part because she admitted to a matter which on one view did not reflect well on her. That matter was not shared with Dr Best and is not referred to in his report. To this court it appears that it was a matter which suggests that there was significantly more going on in the claimant's life than Dr Best was aware of when he gave his diagnosis of her condition, something which was not relevant to the appellant's gross harassment but which was relevant to the question of how much that harassment had contributed to her condition.

- Further, in the same context, Dr Best's report records that the claimant alleged that she found it difficult to attend school because of what the appellant had put her through. This in turn was said by her to have affected her performance in her GCSEs. But the only evidence which the Tribunal had of her education was her GCSE results. It had no information about her attendance at school or whether her results reflected a downturn compared to

earlier projections or expectations. This was an issue which the appellant had tried to explore at the pre-hearing stage with requests for discovery of her school reports. The response he received, dated 9 August 2021, from the Equality Commission was that:

> "… the claimant instructs us that she did not have school reports in her possession. So, in that circumstance we are unable to comply with your request for these."

That is an entirely unsatisfactory response. It was the claimant who was advancing the case that her education had been adversely affected by the appellant's conduct. She must have had access to her own school reports and other records, at the very least by asking her old school for them or by authorising her representatives to do so. The appellant's entirely legitimate request to be provided with information which he could use to explore this issue was wrongly rejected by the Equality Commission. As a result, potentially important evidence was not before the Tribunal and no meaningful scrutiny was possible of this aspect of the claim for damages.

[38] In the court's opinion the Tribunal should have probed further into the issues of the test which was paid for by the appellant, the claimant's use of alcohol and drugs and her absences from school when considering her alleged disappointing GCSE results. This would have left it in a much better position to assess the extent to which her sexual harassment at the hands of Mr Geraghty explained her mental health condition and any downturn in her education. It is the court's view that the awards made by the Tribunal are vulnerable to appeal because these important issues were not sufficiently explored or analysed.

[39] Even without these regrettable gaps in the evidence, the court's view is that the total award of £61,500 for injury to feelings and psychiatric damage is clearly excessive. The court has the power to overturn the award and substitute it with one which it thinks is appropriate rather than refer the case back to the Tribunal for reconsideration. In this case the court has decided to exercise that power.

[40] In light of the court's serious concerns about the level of the awards and the evidence upon which the awards were based, it has decided to award a total for injury to feelings, including psychiatric injury, of £40,000. It is the court's view that this remains a significant award and is one which adequately reflects the injury to feelings which must inevitably have been suffered by the claimant. However, it is also the court's view that, especially given the limitations in the evidence before it, no higher award could properly have been made.

[41] As already indicated the award of £6,000 is untouched by this judgment so the total award will be reduced to £46,000. That brings with it an award for interest which can be calculated by the parties on the same formula as was set out by the Tribunal in its findings.