Neutral Citation No: [2021] NICA 39	*Ref:* **McC11519**
	ICOS No:
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **08/06/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

_____

AVRIL McCABE

Appellant:

-and-

NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN

Respondent:

_____

Before: McCloskey LJ, Maguire LJ and Huddleston J

_____

Representation

Appellant: Self-representing
Respondent: Rachel Best, of counsel, instructed by EDG Legal Solicitors

_____

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] The progress of this appeal has become increasingly frustrating, as the court's attempts to provide both parties with an expeditious hearing and decision have been repeatedly thwarted. It is appropriate to record at the outset the court's recognition of the fact that the appellant suffers from a particular form of dyslexia recognised as a disability under the Disability Discrimination Act 1995 ("*the 1995 Act*"), an issue of some importance in the underlying proceedings.

The Appeal

[2] In August 2018, Avril McCabe ("*the appellant*") brought proceedings in the Industrial Tribunal ("*the Tribunal*") against the Northern Ireland Public Services Ombudsman ("*the Ombudsman*") complaining that she had been the victim of discrimination on the ground of disability, specifically "*failure to make reasonable adjustments*", arising out of the conduct of an interview pursuant to her application

for the post of Senior Investigating Officer ("*SIO*"). The appellant was then employed by the Ombudsman as an investigating officer ("*IO*"). In November 2019 the appellant initiated a second tribunal claim against the Ombudsman, arising out of her resignation from her employment on 15 July 2019, asserting unfair (constructive) dismissal and disability discrimination/victimisation.

[3] By its decision transmitted to the parties on 15 December 2020, the Tribunal determined unanimously that the appellant's claims would be dismissed. The appellant appeals to this court in consequence.

The Substantive Listing

[4] The notice of appeal is dated 25 January 2021. Following execution of the usual formalities, including completion of Form COAC1, the parties were notified on 23 March 2021 of the allocation of a substantive hearing date of 17 May 2021.

Sundry Pre-Hearing Issues

[5] Following receipt of the notice of appeal and the listing of this appeal for hearing active case management steps were instigated by the court. During this phase the appellant raised a series of issues namely:

(i) She was seeking transcripts of the hearings before the Tribunal (which occupied four consecutive days: 16 – 19 November 2020).

(ii) Linked to (i), she requested this court to issue a *subpoena duces tecum* addressed to the Tribunal chairman requiring him to attend on the scheduled date of hearing of this appeal producing full transcripts of the first day of the hearing, Mr McFadden's evidence and Mr Martin's evidence.

(iii) She applied for an adjournment of the hearing of the appeal.

(iv) She requested the court to provide what she termed a "*reasonable adjustment*" in the form of an order granting her anonymity.

The Transcripts Issue

[6] Of the four issues noted immediately above the first three are interconnected. Together they generated a series of written allegations and representations by the Aappellant directed to the Tribunal, including an electronic communication from the appellant to the Tribunal's secretariat dated 22 January 2021.

[7] In her next material electronic communication to the Tribunal, the appellant was no longer pursuing the "*full transcript*" of the hearings. Rather she had refined her request to "*the audio transcript from the whole first day of the hearing and a full transcript of the evidence of Paul McFadden and Sean Martin*."

[8] Next, in a letter dated 28 April 2021 transmitted to the Court of Appeal Office, the appellant reverted to requesting a transcript of the entire Tribunal hearings. Her letter states (in full):

> *"28 April 2021*
>
> *Dear Sirs*
>
> ***ICOS ref 21/ 8653 AMcCabe v NIPSO***
>
> *This matter was the subject of a case management review this morning at 10 am. I would like the judge to include in his case management order a direction to the Vice President of the Industrial*
>
> *Tribunal to produce the audio records/transcript of hearing within 7 days from today.*
>
> *The transcript of the Industrial Tribunal hearing (16-20 November 2021) is necessary for fairly disposing of the matter because it evidences the following:*
>
> • *Paul McFadden stated in his oral evidence that "he did not know there was a statutory definition of what was reasonable" under the 1995 Act*
>
> • *Sean Martin's oral evidence is material to the issues appeal and the question of whether the provisions of section 17 A DDA 1995 apply in respect of the Tribunal's procedure*
>
> • *The Vice President repeatedly heckled and interrupted me during the hearing. His interventions are material to the question of whether the hearing was unfair.*
>
> • *Following the conclusion of my cross examination of Paul McFadden, Noel Kelly stated, "we will adjourn until tomorrow when you are "going to call Marie Anderson a liar."*
>
> • *The Vice President attempted to put words in my mouth throughout the hearing, for example, stating that I was calling the respondents' witnesses "liars." The audio recording clearly evidences me refuting this.*
>
> • *He demonstrated his lack of impartiality by distorting my evidence in this way and in doing so he stepped outside of his role as an impartial judicial officer.*
>
> *The Court of Appeal has the power to order production of the audio transcript pursuant to the provisions of Order 24 rule 14.*

"*Order 24*

Order for production to Court

14. At any stage of the proceedings in any cause or matter the Court may, subject to rule 15(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit."

[9] In the same letter the appellant added:

"Noel Kelly has failed to voluntarily arrange for the audio recording of the hearing to be transcribed in accordance with the presidential guidance issued by the industrial tribunal. I requested the transcript of the audio recording of the hearing:

i. 19 November 2020

ii. 5 January 2021

iii. 12 January 2021

iv. 18 March 2021

v. 26 March 2021

vi. 7 April 2021

vii. 14 April 2021

After 7 requests (Copies attached) Noel Kelly finally responded to the request for a transcript of the audio recording/production of the audio tape of the hearing on by replying via the Tribunal clerk on 8 April 2021:

> *"Also, I am to inform you that the Tribunal would comply with any order that might be made by the Court of Appeal in relation to audio recordings."*

The presidential guidance indicates that a partial or complete transcript will be provided in the event of an appeal. I do not need a Court order to require production of the audio recording of the Industrial Tribunal Hearing, however the Vice President has confirmed today that he is refusing to produce it voluntarily."

[10] Next, in a further communication to the court dated 10 May 2021 (seven days in advance of the allocated hearing date) the appellant applied for an adjournment of the hearing in the following terms:

> *"I would like to apply for the matter listed for the above date please to be adjourned until the issues surrounding production of transcript in including my request for a specific discovery order and/or a writ of subpoena duces tecum are fully resolved. I refer to previous correspondence to the court as the reasons why I want a transcript of the audio recording. These are not limited to the reasons set out in my e-mail of January 22 to the OITFET. The written judgment does not address the conflicts in the evidence of Sean Martin, nor does it address the issues raised in my skeleton argument regarding the evidence of Paul McFadden and the employment judge's interventions during the course of my cross examination. …*
>
> *The need for the transcript to be produced should be immediately obvious to any fully impartial judge making case management directions in this matter (See DB [2017] UKSC 7). It is a matter of considerable concern to me that the obvious need for the extracts from the hearing transcript (i.e. that it contains an incontrovertible record of the oral evidence of the witnesses and direct evidence of the employment judge's interventions) appears not to have been fully and properly addressed in the prior case management directions. Fairness requires that the relevant extracts from the transcript are produced to the Court of Appeal.*
>
> *I would not be seeking an adjournment of the hearing date, had Judge McCloskey dealt with my requests for the transcript fairly and expeditiously on 28 April 2021."*

By this stage three specially devised case management orders – dated 28 April, 06 May and 10 May 2021 respectively – had been issued by the court. Furthermore, the court had scheduled an *inter-partes* pre-hearing case management listing to be held on 14 May 2021, which duly proceeded.

[11] On 17 May 2021 a three-judge panel of the Court of Appeal convened for the purpose of conducting the substantive hearing. A further twist in the tale unfolded. At the commencement of the hearing the appellant informed the court that, some minutes beforehand, she had received yet another communication from the Tribunal. All previous communications from that source, of which there were many, had consistently maintained a refusal of her request for transcripts. This further electronic communication performed a *volte-face*. It stated that the chairman had, after all, decided to accede to the appellant's requests and that arrangements would be made to have the relevant transcripts prepared. No reason was provided for this abrupt change of stance.

[12] In the foregoing way a wholly unsatisfactory state of affairs abruptly materialised. On the eve of the appeal hearing the appellant had, quite unexpectedly, secured vindication for her persistence in pursuing her request for transcripts from the Tribunal. In substance, the Tribunal had conceded that the transcripts requested were necessary for the fair disposal of the appellant's appeal to this court (see further *infra*). This was not, of course, determinative of the appellant's adjournment application. However, given that this assessment had been made and having regard to the acutely differing situations of a first instance tribunal and an appeal court, the judicial panel, with considerable reluctance, concluded that the hearing date would have to be vacated. As a result the first and arguably the most pernicious member of the so-called "*unholy trinity*" (delay, excessive cost and undue complexity) in litigation triumphed. The court had invested what proved to be quite disproportionate resources in case managing the appeal with a view to preserving the hearing date. The waste of public resources was acute and is a matter of substantial concern.

Further Procedural issues

[13] In granting the adjournment the court informed the parties that the case would be relisted for substantive hearing before the end of the Trinity term, ie 30 June 2021. A timetable designed to achieve this was prescribed. In its *ex tempore* ruling the court also determined the appellant's application for anonymity, refusing same.

[14] On 26 May 2021 the court, having received and considered the parties' further written representations about relisting, notified the parties that the relisting of the substantive appeal would be on 21 June 2021. During the course of the following week three further procedural issues arose, each of them raised by the appellant:

(i) Appeal to the United Kingdom Supreme Court against the anonymity refusal ruling.

(ii) Recusal of a member of the judicial panel.

(iii) Vacating of the new substantive listing.

The Anonymity Issue

[15] The court's *ex tempore* ruling refusing the appellant's application for anonymity had the following strands. First, the court considered that whereas the appellant had submitted an application for what she termed "*reasonable adjustments*", it was in substance an application granting her anonymity. We set forth our reasons in full in what follows.

[16] The court notes that the same application was made by the appellant at first instance and refused by the Tribunal. The court takes into account the reasoning of

the Vice President which it considers clear and cogent, while recognising that the application must be determined by it *de novo*. Notwithstanding, the legal principles to be applied are the same in both contexts and the factual framework of the renewed anonymity application is essentially unchanged. The court takes into account in particular that the whole of the proceedings before the tribunal, which included five days of evidence from both parties, were conducted in public. Furthermore, the judgment of the tribunal is in the public domain. Given these factors the court considers that an anonymity order at this stage would be of little or no practical utility to the appellant. Figuratively the horse has already bolted.

[17] The court has also considered what is in substance the only piece of evidence invoked by the appellant in support of her application namely the following passage statement in the report of a cognitive behavioural psychotherapist dated 30 October 2020:

> *"Due to work related stress Ms McCabe has been diagnosed with depression and generalised anxiety disorder. The depression and anxiety have had a huge impact on Ms McCabe's day to day living …*
>
> *I would also recommend details of her identity and her disability are anonymized as a reasonable adjustments to the normal tribunal reporting procedures. This is because Ms McCabe has fallen to the protracted experience of this litigation extremely upsetting and distressing and this has adversely affected her mental health because she finds it difficult to concentrate for long periods. Her sleep is also affected. The prospect of public reporting of her identity and details of her disabilities has activated additional worries and anxieties which are causing her distress and may impact on her ability to give evidence adequately in the upcoming hearing."*

[18] This report invites the following analysis. First, neither the context in which it was compiled nor its purpose is disclosed. Second, there is no indication of any personal engagement between the author and the appellant. Third, the date of the report postdates, by some 16 months, the last date of the counselling provided to the appellant. Fourth, there is no indication of any updated interview or personal assessment of the appellant. Fifth, there are indications of uncritical and unreasoned acceptance of self–reporting and self–serving assertion from the appellant. Sixth, it provides no sustainable basis for a sustainable nexus between anonymity and fair hearing. Seventh, it contains no engagement with the relevant powers, discretions and measures at the Tribunal's disposal. Eighth, there is no evidence that a lack of anonymity compromised in any way the appellant's right to a fair hearing at first instance. Ninth, the "*... also recommends …*" is unintelligible, given that the report enshrines a single recommendation.

[19] In addition to all of the foregoing, the report does not speak to the altered litigation context now prevailing before this court. It was prepared with a view to a quite different litigation forum. To summarise, this report is considered to provide no tenable basis for the order sought.

[20] The court, further, has weighed the fact that the whole of the appeal proceedings have, thus far, been conducted in the public domain. The court also takes into account that the appellant's case involves allegations of some gravity against an important public authority. It is considered that there is a discernible public interest that the nature of such allegations and the court's determination thereof, irrespective of the outcome, should not, absent good reason, be suppressed.

[21] The court, finally, is alert to its duty as a public authority under section 6 of the Human Rights Act, considering that the appellant's right to respect for her private life under Article 8 ECHR is engaged by the application made. An assumption of *prima facie* interference is made. The court's assessment is that the public interest served by open justice ranks as a legitimate aim which outweighs, by some measure, the appellant's personal interest in belated and limited secrecy.

[22] Balancing all of the foregoing, the court concludes that no sufficient basis for departing from the potent principle of open justice has been established and refuses the application accordingly.

[23] By an electronic communication dated 18 May 2021 the appellant intimated an intention to appeal to the Supreme Court against this court's anonymity refusal decision. The court is disposed to treat this as an application for leave to pursue such appeal. We refuse this application on the ground that our anonymity ruling entails the application of well-established principles to a fact specific matrix in a litigation sensitive context. The application formulates no question of law, much less any question of law of general public importance.

The Recusal Issue

[24] On 24 May 2021 the appellant submitted an application for the recusal of the author of this judgment in the following terms:

> *"Dear Judge McCloskey*
>
> ***A McCabe v. NIPSO - Application for recusal***
> *I am notifying you of my intention to make a formal application for you to recuse yourself from hearing this appeal. First, however I would like to give you the opportunity to informally recuse yourself in these proceedings to avoid the need for a formal recusal application.*
>
> *This is because:*
>
> *Evidence of predetermination*

During the case management hearing on 14 May 2021, you stated words to the effect that "the Court[1] won't forget the costs thrown away in respect of the hearing date of 17 May 2021."

- *"Costs thrown away" means costs in legal proceedings which one side has unnecessarily incurred.*
- *Costs are unnecessarily incurred if they made no difference to the outcome of the proceedings.*
- *There are disputed factual matters in these proceedings relating to the oral evidence of the respondents' witnesses which can only be resolved by the information in the transcripts*
- *It is not possible therefore to describe "costs thrown away" at this point in the proceedings unless you have already have predetermined the outcome of the appeal in advance of the oral hearing.*

No other construction can be placed on your observations regarding "costs thrown away" other than you have pre-determined the outcome of this appeal and failed to consider the evidence fairly.

Evidence of apparent bias
In your case management directions order of 28 April 2021 you put the words reasonable adjustments in inverted commas. This is known as scare or sneer quotes[2]. It is a linguistic device used to convey irony. I believe that this is inappropriate and conveys evidence of possible, or actual bias / predetermination of the issues in my appeal.

[25] It is the considered decision of the panel that this application must be refused. First, as explained above, the phrase "*special measures*" emanates from the appellant, had to be construed by the court and, where it has been employed – whether in the orders of the court or this judgment – the application of inverted commas goes no further than making these two points clear. Second, in its *ex tempore* ruling vacating the substantive listing on 17 May 2021, the author considered it appropriate to remind both parties that the act of ordering that all costs thrown away be reserved would not result in the burial of this issue.

[26] The court considers unreservedly that the hypothetical reasonable observer having knowledge of all material facts and considerations would not entertain the slightest reservation about the fairness and impartiality of the author arising out of

[1] *Meaning you won't forget*

[2] *Scare quotes are identical to standard quotation marks, but do the opposite of what quotation marks are supposed to do.*
https://www.merriam-webster.com/dictionary/scare%20quotes

the foregoing two matters. The application for recusal does not begin to establish apparent bias on the part of the author. It is refused accordingly.

The Adjournment Issue

[27] The troubled history of this appeal is outlined above. The court, prior to determining that the fresh hearing date would be 21 June 2021 gave both parties an opportunity to make representations and, further, took into account that a period of five weeks should be more than sufficient for the production of the limited transcripts pursued by the appellant. In particular the court's expectation was that having regard to the saga which had culminated in the loss of the initial substantial hearing date the Tribunal and its agents would make strenuous efforts to accommodate this timetable.

[28] On 27 April 2021 the appellant forwarded an email from a Departmental official in the following terms:

> "*The recording was burned onto a disc in five parts due to the size and the supplier has indicated that the estimated timescale for each part is between 2 – 6 working days. I can confirm that the transcripts will contain whatever was recorded at the hearing on the dates you have requested.*"

Neither the appellant nor the Tribunal or, for that matter, the Tribunal's agent has seen fit to clarify for the benefit of this court the specific terms of the dates requested by the appellant. This is a matter of fundamental importance since, on the date when the court was driven to vacate the original substantive listing, the appellant's request for transcripts had been very considerably refined.

[29] The appellant, enclosing the foregoing email in her separate communication to the court, has not merely failed to engage with this critical issue. She has also overlooked that a period of ten days *could be* sufficient, given the terms of the official's communication. Thirdly, in her email she has formulated a request to vacate the rescheduled substantive listing of 21 June and has done so in the most casual terms imaginable. Finally, there is no indication that she has communicated with the respondent's representatives about this matter.

[30] To describe all of the foregoing as entirely unsatisfactory is to indulge in understatement. The court concludes without hesitation that the appellant's request to vacate the forthcoming rescheduled hearing date of 21 June 2021 is entirely devoid of merit and refuses it accordingly. We would add that this date may have to be rescheduled to 30 June 2021 for logistical reasons.

Postscript

The afore-noted adjustment of the rescheduled hearing date was confirmed after both parties had consented.