

Neutral Citation No: [2021] NICA 66

Ref: MOR11713

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

ICOS No: 20/014724

Delivered: 16/12/2021

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERT JAMES PEIFER (damages)

Appellant;

-and-

SOUTHERN EDUCATION AND LIBRARY BOARD

and

DRUMGLASS HIGH SCHOOL

Respondents

Mr Peifer made written submissions on his own behalf

Before: Humphreys J and Sir Declan Morgan

Sir Declan Morgan (delivering the judgment of the court)

[1] This was an appeal against the decision of an Industrial Tribunal given on 20 November 2019 to award the appellant compensation in the sum of £1063 comprising £500 damages for injury to feelings together with interest thereon in respect of his victimisation claim. The appellant argued that the decision did not address the range and magnitude of the unequal treatment to which he was subjected.

[2] The appellant presented a complaint to the Office of the Industrial and Fair Employment Tribunals on 25 August 2005 claiming that he had been discriminated against in a recruitment competition for the post of special needs classroom assistant at the respondent school. The recruitment competition was re-advertised as a result advice from the respondent Board and the appellant was once again unsuccessful. On 23 November 2005 he lodged a claim alleging both sex discrimination and victimisation.

[3] Those claims were determined by the Tribunal in a decision issued on 18 August 2014 in which it awarded a sum of £2000 together with interest thereon for injury to feelings in respect of the sex discrimination claim and dismissed the victimisation claim. The appellant appealed and in a judgment issued on 26 September 2017 his appeal against the victimisation claim was allowed on the basis that the Tribunal had not considered the factual basis for the claim in light of the admission in respect of sex discrimination. The victimisation claim was remitted to a fresh Tribunal.

[4] For the reasons set out in its decision the fresh Employment Tribunal limited his claim to unfairnesses within the context of the recruitment process from its commencement until it was abandoned after the second competition in October 2005. The Tribunal accepted that at all material times the fact that the claimant had already issued his first proceedings in August 2005 was known to at least some of those who made the decisions. It made the award set out at para [1] above.

[5] We handed down judgment in the appeal in that case on 11 June 2021. We concluded that the appellant should have been entitled to pursue his claim for damages in respect of the conduct of the principal of the school after October 2005 in appointing females on an ad hoc basis to take up the relevant posts rather than re-advertising as advised by the respondent Board. We accepted, for the reasons there set out, that the appellant ought to have been advised of the need to amend his claim form to pursue the victimisation claim in the way that he wished and that the failure to do so deprived him of a fair hearing and was unlawful.

[6] Although in the normal course of events we would have remitted this case to the Tribunal for reconsideration of the wider claim we were conscious that the events in question occurred in 2005 and there had been extreme delay in having the matter determined. There had already been a previous hearing before the Court of Appeal.

[7] We indicated in our conclusion that we would be prepared to use our powers under section 38(1)(a) of the Judicature (Northern Ireland) Act 1978 to assess the additional sum of damages for injury to feelings that should be awarded. We offered the parties an opportunity to make submissions on this. The respondents were content that we should make the assessment in respect of injury to feelings. The appellant objected on the basis that he still wished to pursue his loss of earnings claim but we had indicated in our judgment that we could not interfere with the assessment of the Tribunal that even if he had been appointed he would not have taken the position up. Accordingly, we do not consider that his objection should prevent us dealing with the matter as we suggested.

Consideration

[8] There are competing factors in examining the appellant's claim for damages for injury to feelings as a result of the victimisation. First, the conduct of the

Principal in making the appointments of the female applicants without a competition in circumstances where the Board had twice indicated that there were failings in the original competition procedures and had advised that the position should have been re-advertised was in our view egregious.

[9] On the other hand the finding by the Tribunal that the appellant would not have taken up the post indicates that the objective of the appellant at all times was to achieve a compensatory sum. The principal case that he has always advanced in his wider litigation is that because classroom assistants are predominantly female the failure to appoint him in every one of the 35 applications that he made for classroom assistant posts constituted sex discrimination. The Court of Appeal has rejected that principle. The vigour with which he has contested this indicates that his disappointment is caused to some extent by the failure of his principal case.

[10] Despite the egregious conduct of the Principal we consider that this is a case which falls within the upper end of the first band described in *Vento v Chief Constable of West Yorkshire Police* (2003) IRLR 102. At the time of the initial Tribunal decision the lower band went up to £6000. It has recently been increased to a maximum of £9100. In assessing compensation in this case one has to be careful to recognise that the appellant is entitled to substantial interest on the sum awarded. In our view there would be double counting if that interest was calculated on today's figure.

[11] Accordingly, we consider that the appropriate figure for compensation for injury to feelings for the sex discrimination and victimisation which the tribunal should have awarded in August 2014 was £5000. The appellant was awarded £2000 plus interest in respect of sex discrimination in 2014. He was awarded £500 plus interest in respect of victimisation on 24 June 2019. He is entitled, therefore, to a further award of £2500 plus interest. The interest is obviously substantial and to bring this matter to a conclusion we consider that the appellant is entitled to a further award of £5500 to include interest.