Neutral Citation [2008] NICA 39 | *Ref:* **KER7239**

Judgment: approved by the Court for handing down | *Delivered:* **5/8/08**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

BETWEEN:

ANDREW ALEXANDER FAULKNER, PETER ROGAN and ROBERT DAVID JOHNSTON

Claimants/Respondents

-and-

BT (NORTHERN IRELAND), BT CELLNET, BT WHOLESALE, BT plc and O_2 plc

Respondents/Appellants

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] Andrew Faulkner, Peter Rogan and Robert Johnston were employed as engineers in Northern Ireland. For convenience we shall refer to them as 'the employees'. It has been accepted that at the material time each of them was an employee of BT plc and that BT plc operated as a company in Northern

Ireland as well as in Great Britain. We shall refer to the appellants collectively as 'the employers'.

[2] The employees were described as technical officers in their official job titles but were generally known as "base site engineers". Their work for BT plc involved providing support for the BT Cellnet Ltd mobile telephone network. BT plc employed base site engineers to do identical work in Great Britain. The employees in Northern Ireland have materially different pay packages from base site engineers in Great Britain. In particular, the employers' policy on grading and bonus payments applied only to the base site engineers working in England, Wales and Scotland. The employees therefore allege that there is in effect a rule applied by BT plc conferring the benefit of bonus and re-grading on base site engineers who worked in Great Britain but not on those who work in Northern Ireland. This was the basis of their complaint to the industrial tribunal that they have been the victims of indirect race discrimination. The complaint is made on the basis that their race is "Irish" and they allege that their treatment is contrary to article 3 (1) (b) of the Race Relations (Northern Ireland) Order 1997.

[3] The employers raised a challenge to the employees' claim, contending that the 1997 Order does not permit a comparison to be made with individuals outside the territorial jurisdiction of Northern Ireland. It was decided that this should be dealt with as a preliminary issue and the following question was formulated: -

> "For the purposes of an indirect discrimination claim under article 3 (1) (b) of the Race Relations Order (Northern Ireland) 1997, can the claimants, as engineers employed within Northern Ireland by the respondents, compare their treatment in relation to grading and bonus payments with that afforded by the respondents to engineers employed by them within England, Scotland and Wales"

[4] In a reserved decision of 11 April 2006 the tribunal chairman, Mr Noel Kelly, held that the employees could rely on comparators in England, Scotland and Wales. The appellants, by a requisition lodged on 10 May 2006, asked the tribunal to state a case on this question for the opinion of this court. The tribunal stated a case which was issued on 6 June 2006 and the point of law was expressed as follows: -

> "Did the industrial tribunal err in law in determining that for the purposes of an indirect discrimination claim under article 3 (1) (b) of the Race Relations (Northern Ireland) Order 1997 the claimants as engineers employed within Northern Ireland by the

> respondents can compare their treatment in relation to grading and bonus payments with that afforded by the respondents to engineers employed by them within England Scotland and Wales?"

The legal framework

[5] Because the complaints were lodged prior to the amendments introduced by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003, they fall to be determined in accordance with the provisions of the 1997 Order before those amendments took effect.

[6] Article 2 (2) of the Order provides that Northern Ireland includes such of the territorial waters of the United Kingdom as are adjacent to Northern Ireland. Article 3 (1) defines the circumstances in which discrimination takes place. It provides: -

> "(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if—
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or
>
> (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—
>
> (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
>
> (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
>
> (iii) which is to the detriment of that other because he cannot comply with it."

[7] Article 3 (3) makes provisions as to the similarity that must exist between the circumstances of the person alleged to have been discriminated against

and the member of the other racial group with whom the comparison is sought to be made: -

> "(3) A comparison of the case of a person of a particular racial group with that of a person not of that group under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

[8] The employers claim that this provision is central to the case in that the 'relevant circumstances' between the mooted groups are not the same and are, in fact, materially different. The economic history of Northern Ireland illustrates the need, they suggest, to have differential employment conditions available for prospective employers in this jurisdiction. To require every employer to adhere to equivalent terms and conditions for employees in Northern Ireland to those applying throughout the rest of the United Kingdom, irrespective of, for instance, the different cost of living conditions, would erect a massive disincentive to companies contemplating the engagement of employees within Northern Ireland to work here.

[9] Article 6 (2) makes various species of discrimination unlawful: -

> "It is unlawful for a person, in the case of a person employed by him at an establishment in Northern Ireland, to discriminate against that employee—
>
> (a) in the terms of employment which he affords him; or
>
> (b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
>
> (c) by dismissing him, or subjecting him to any other detriment."

[10] The employers draw particular attention to the fact that the provision specifies that the discrimination must relate to the employee's employment at an establishment in Northern Ireland. This, they claim, betokens an intention on the part of the legislature to confine discrimination to employment within this jurisdiction and, although the provision falls short of stating explicitly that the discrimination must relate to differential treatment of other employees within this jurisdiction, this is clearly to be implied.

[11] Article 6 (5) provides that it is not unlawful for an employer to confer a benefit on a person not ordinarily resident in Northern Ireland in (or in connection with) employing him at an establishment in Northern Ireland, where the purpose of that employment is to provide him with training in skills which he appears to the employer to intend to exercise wholly outside Northern Ireland. The tribunal dealt with the employers' arguments founded on this provision at paragraph (j) of the case stated as follows: -

> "Article 6 (5) would prevent a claim for racial discrimination where an employee in those circumstances was paid at different rates from Northern Ireland workers. The effect of article 6 (5) is not restricted to workers from England, Scotland and Wales. I did not accept Mr O'Hara's submission that it is implicit in this provision that when an Englishman comes to Northern Ireland, trains local workers and then leaves, a local worker would not be able to claim entitlement to equivalent terms and conditions. It appeared to me that the exemption related only to the period when the outside workers were actually engaged in work within Northern Ireland and that it refers only to a situation where the training is for the benefit of the worker from outside Northern Ireland. The purpose of this provision may have been to assist Northern Ireland employers to train workers from developing countries without being exposed to the risk of claims from those workers. In any event, I did not regard article 6 (5) as relevant to the determination of the preliminary issue in the present case."

[12] For the employers, Mr O'Hara QC suggested that if the tribunal's approach to the preliminary issue was correct, the operation of article 6 (5) would have the anomalous result that a Northern Irish worker could not claim discrimination in relation to any superior terms and conditions enjoyed by the outside worker while that person was employed within Northern Ireland but could present such a claim when that worker returned to his normal place of employment outside this jurisdiction.

[13] Article 10 (1) defines the phrase "at an establishment in Northern Ireland". The relevant part is: -

> "10. - (1) For the purposes of this Part, employment is to be regarded as being at an establishment in Northern Ireland unless the employee does his work wholly or mainly outside Northern Ireland."

[14] This provision contemplates protection for employees from discrimination in relation to other employees in Northern Ireland, the employers argue. To construe it otherwise would mean that the Northern Irish employee could draw his comparator from anywhere in the world and this could not have been the intention of the legislature. The employees submit that the discrimination does not have to take place in Northern Ireland. All that is required is that the employee must have the necessary connection with Northern Ireland.

The tribunal's decision

[15] The tribunal stated that ordinary principles of statutory interpretation should be applied to the interpretation of the relevant provisions, in the absence of any definitive case law. It was concluded that the 1997 Order is subject to a limitation which, subject to any discernible contrary intention, confines its effects to the territorial jurisdiction of Northern Ireland. This presumption could be displaced, however, by the application of the mischief rule.

[16] Mr Kelly considered that if the 1997 Order was to be interpreted so as restrict the potential pool of comparators to individuals working at an establishment in Northern Ireland, United Kingdom employers would be permitted to offer less favourable terms and conditions of service to workers in Northern Ireland than those provided to workers in Great Britain. This could occur even where the relevant circumstances in one case were the same or not materially different from the other and even where no justification could be shown for the purposes of article 3(1) (b) (ii) and where clear disproportionate impact on grounds of race could be identified. Given the purpose of the Order, the tribunal considered that this could not have been the intention of Parliament. It concluded therefore that the territorial presumption had been rebutted.

The case for the employers

[17] Mr O'Hara referred to a number of legislative provisions which, he said, provided an illuminating comparison with the articles of the Race Relations (Northern Ireland) Order that were critical to the preliminary issue. The first of these was the Disability Discrimination Act 1995 which, Mr O'Hara pointed out, was the only anti-discrimination legislation that applied throughout the United Kingdom. By section 70 (6) the Act was stated to extend to Northern Ireland, subject to the modifications in Schedule 8. Paragraph 3 of this schedule provides that in section 4(6) of the Act "Northern Ireland" should be substituted for "Great Britain". Thus altered, section 4 (6) provides that the section (which forbids discrimination against a disabled person) applies only in relation to employment at an establishment in Northern Ireland. This

supplied an example, Mr O'Hara said, of the legislature confining the application of legislation in the field of discrimination to a particular part of the United Kingdom.

[18] Article 7 (a) of the Sex Discrimination (Northern Ireland) Order 1976 (which provides that a comparison of the cases of persons of different sex must be such that the relevant circumstances in the one case are the same, or not materially different, in the other) was echoed in article 3 (3) of the 1997 Order. Article 8 of the 1976 Order used the same language as article 6 of the Race Relations Order ("in relation to employment … at an establishment in Northern Ireland"). Similar provisions are to be found in article 3 (3) and 6 (1) of the Fair Employment and Treatment (Northern Ireland) Order 1998. Mr O'Hara claimed that these provisions were plainly designed to restrict the field of discrimination in the areas of gender, political opinion or religious belief to employment in Northern Ireland and to comparisons between workers based in Northern Ireland. It would be anomalous, he suggested, if the 1997 Order were to have extra territorial effect when the 1976 and 1998 Orders did not.

[19] Mr O'Hara next referred to the Equal Pay Act (Northern Ireland) 1970. This provides in section 1 (1) that if the terms of a contract under which a woman is employed at an establishment in Northern Ireland do not include an equality clause they shall be deemed to include one. In its material parts section 1 (7) provides: -

> "(7) … for the purposes of this section—
>
> (a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;
>
> …
>
> and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Northern Ireland which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes."

[20] The effect of this provision, Mr O'Hara argued, was to confine the application of the Equal Pay Act to cases where men and women were employed at the same establishment or at establishments in Northern Ireland

which included that at which the woman was employed and where common terms and conditions were observed. Counsel suggested that the central reasoning of the tribunal in the present case, (*viz* that the presumption of territoriality is displaced by reference to the mischief that the 1997 Order is aimed at), was at odds with the fact that the Equal Pay Act was aimed at a similar mischief but had been deliberately confined in its application to employment within Northern Ireland. The intention of the legislature in 1970 was to eliminate unequal pay between men and women and in 1997 to get rid of discrimination against persons on grounds of their ethnic origin. The effect of the tribunal's decision, Mr O'Hara said, was that the mischief of race discrimination required a broad application of the legislation throughout the United Kingdom and beyond whereas the elimination of inequality of pay between men and women required only that this be forbidden in Northern Ireland. The implication of the decision was that the legislature had a different intention as to what was needed to deal with race discrimination from that which it deemed sufficient for gender discrimination. That, counsel asserted, defied logic and common sense.

[21] In relation to the tribunal's suggestion that the purpose of article 6 (5) of the 1997 Order might have been to assist Northern Ireland employers to train workers from developing countries without being exposed to the risk of claims from those workers, Mr O'Hara suggested that this was but one of the possible explanations for the provision. But, in any event, the consequence of the tribunal's decision was that, if there was an English worker training in Northern Ireland who was being paid more than his Northern Irish counterpart, no claim of discrimination by the latter could be entertained while the English worker was in Northern Ireland but when he returned to Great Britain, such a claim could proceed. Again, counsel suggested, this did not make sense.

[22] Mr O'Hara submitted that the chairman of the tribunal was wrong to have identified the mischief that the legislature intended to suppress as the elimination of differential treatment between employees in different parts of the United Kingdom. In paragraph (q) of the case stated, Mr Kelly had said that if the legislation was interpreted so as to "restrict comparators to individuals working at an establishment in Northern Ireland, that interpretation would permit UK employers to offer less favourable terms and conditions of service to workers in Northern Ireland than the terms and conditions of service offered to workers in England, Scotland and Wales even where the relevant circumstances in one case were the same or not materially different than the other and even where no justification could be shown for the purposes of article 3 (1) (b) (ii) and a clear disproportionate impact on grounds of race could be identified … Given the purpose of the Order, I did not believe that could have been the intention of Parliament and I therefore concluded that the territorial presumption had been rebutted." The employers contended that there was no reason that the chairman should have

concluded that such could not have been the intention of Parliament. When he was asked why Parliament would have had such an intention, Mr O'Hara claimed that it was an unavoidable fact from our history that employers were encouraged to locate in Northern Ireland because rates of pay in this jurisdiction have been lower. If the tribunal's decision were to be upheld there is no reason that employees of a multi-national company should not be permitted to compare themselves with other employees of the same company throughout the world and that would act as a massive disincentive to firms from America or mainland Europe investing in Northern Ireland.

[23] The mischief that the Order was designed to prevent was, Mr O'Hara claimed, racial discrimination within Northern Ireland. That was a clearly discernible mischief which was consistent with the presumption that there should be a territorial limitation to the effect of the legislation.

The employees' arguments

[24] Mr Allen QC for the employees pointed out that Council Directive 2000/43/EC which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive) did not permit states to compartmentalise the implementation of the Directive within different parts of member states. Each member state has to ensure that issues of discrimination as defined in articles 1 and 2 of the Directive apply throughout each country. If the employers' case was correct it would have been necessary for the United Kingdom to re-enact a single race relations law. It did not do this and the fact that it was not considered necessary indicated that the 1997 Order had extra territorial effect, at least to the extent of the rest of the United Kingdom.

[25] In meeting the employers' argument that the Equal Pay Act of 1970 made incongruous the employees' claim that the 1997 Order should have effect beyond Northern Ireland, Mr Allen pointed out that neither the Northern Irish legislation nor its counterpart in Great Britain (which was enacted in the same year) came into effect until 1976. By that time the United Kingdom had acceded to the European Community and articles 48 and 119 of the Treaty of Rome (which had been held in *Van Duyn v UK* and *Defrenne v Sabena* to have direct effect in the law of member states) had overtaken the provisions which restricted the application of those statutes to particular parts of the kingdom. This, he said, explained why such provisions were not replicated in later legislation. Indeed any attempt to re-enact similar provisions in the Sex Discrimination or Race Relations legislation would have been contrary to what was then established European law.

[26] Counsel for the employers stated that his principal submission was that the proper approach to construing the legislation was as part of a code. Until 1997 there was no legislation in Northern Ireland dealing with the socially

divisive concept of race discrimination. That omission was cured by the 1997 Order which widened the code to cover the whole of the United Kingdom. This was the proper way to begin the construction of the 1997 Order. It replicated the 1976 Act entirely apart from some minor interpretation provisions and those which reflected the type of access to tribunals that is peculiar to Northern Ireland.

[27] Turning to article 3, Mr Allen pointed out that the statement of agreed facts contained an acceptance by the employers that the test for whether one was entitled to the advantageous grading or bonus was whether or not one was employed as a base site engineer in Great Britain. He suggested that the relevant circumstances for both sets of employees were the same. The requirement in article 3 (3) of the Order that the comparison between persons of different racial groups must be on the basis that the relevant circumstances in both cases are the same, or not materially different, was therefore met. There was no distinction between the contracts that the employers used in Great Britain and Northern Ireland.

[28] There was no reason to read into article 3 any territorial restriction, counsel argued. In what he described as a "quibble" with the reasoning of the tribunal chairman, Mr Allen suggested that he had been wrong to find that there was a presumption that the effects of the legislation should be confined to the territorial jurisdiction of Northern Ireland. For reasons that we will discuss we do not consider it necessary to expatiate on this issue.

Conclusions

[29] We have set out the arguments of counsel in this appeal at some length in deference to the erudition with which they were presented and because they may require further consideration before the case can finally be disposed of. In the event, however, we need focus on only one aspect of the appeal. Before addressing that issue, we should say something about the question of hearing preliminary points in the Industrial Tribunal. This is a matter about which this court has previously expressed concern. In *Ryder v Northern Ireland Policing Board* we said: -

> "[16] A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points – see, for instance, *Bombardier Aerospace v McConnell and others* and *Cunningham v Ballylaw Foods*. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe,

> often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."

[30] The present case exemplifies the unsatisfactory situation that can arise where a preliminary point is segregated from the substantive issues that arise in a claim of unlawful discrimination. It appears to us that the defence that, on a full hearing, the employers would have advanced under article 3 (1) (b) (ii) (that the less favourable treatment can be justified in terms of the different conditions that obtain in Northern Ireland) sound on the very question that lies at the heart of the present appeal *viz* whether the comparison between the two groups of workers can be said to be a comparison where the relevant circumstances in the one case are the same, or not materially different, in the other. Apart from the statement in the agreed facts (about which we shall say something in a moment) there was no examination of this subject before the tribunal. We are satisfied that a full exploration of that matter was required before the preliminary issue could properly have been determined and that this necessary investigation ought to have taken place in the context of a substantive hearing.

[31] We are reinforced in that conclusion because it appears to us that the essential underpinning of the chairman's conclusion on the matter of statutory interpretation was that it could not have been the intention of Parliament to permit United Kingdom employers to offer less favourable terms and conditions of service to workers in Northern Ireland from those provided to workers in Great Britain "even where the relevant circumstances in one case were the same or not materially different from the other and even where no justification could be shown for the purposes of article 3(1) (b) (ii) and where clear disproportionate impact on grounds of race could be identified". It appears to us that an examination of whether the premise that underlies that statement is supportable would be necessary before reaching a firm conclusion as to what Parliament's intention was likely to be. If, for instance, it transpired that there was a general recognition at the time the legislation was enacted that the cost of living in Northern Ireland was substantially lower than in the rest of the United Kingdom, a very different light might be shone on what the intention of the legislature was in fact.

[32] Mr Allen argued that the questions that arise under article 3 (3) were effectively dealt with by the agreed statement of facts. But this did no more than confirm that the contracts for both sets of workers were in the same terms, save for those that dealt with grading and the payment of bonuses. 'Relevant circumstances' are not defined in the 1997 Order. It was accepted by counsel for the employees, however, that it would be open to the employers to seek to justify the differential treatment of the Northern Irish employees and he did not suggest that the matters adumbrated by Mr O'Hara

(such as that the historical fact of lower rates of pay in Northern Ireland was vital in attracting companies to invest here) were not germane to that debate. If such factors can influence the issue of whether less favourable treatment can be justified, we cannot see how they would not be material to the question of whether the relevant circumstances of the two groups are the same or not materially different.

[33] The position can perhaps best be explained by taking an extreme example. If one supposes that the cost of living in Northern Ireland was one half of that in Great Britain and, in order to achieve a parity of disposable incomes for base site engineers in the different jurisdictions, it was necessary to increase the salary of those who lived in England and Wales, could it be said that the relevant circumstances of both groups were the same or substantially so? We do not believe that such an argument would be viable and, in fairness to Mr Allen, he did not advance a case akin to that.

[34] We have concluded, therefore, that the tribunal should have declined to deal with this matter as a preliminary issue. The claim that the base site engineers were entitled to rely on comparators in Great Britain required a close examination of all the relevant circumstances of the respective groups. While, as a theoretical exercise, it is possible to examine the legislation in order to discuss in an academic way whether it was intended to have what we might describe as an extra-territorial dimension, this could never have provided a comprehensive answer to all the issues that arise on the question whether the two groups were comparable within the terms of the legislation and we consider that it would only have been in such circumstances that a preliminary issue should be determined.

Disposal

[35] Section 38 (1) of the Judicature (Northern Ireland) Act 1978 provides: -

> "*Powers of court for purposes of appeal*
>
> 38. - (1) For all purposes of and incidental to the hearing or determination of any appeal, other than an appeal under the Criminal Appeal Act, against any decision or determination of a court, tribunal, authority or person (in this section referred to as "the original court") and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal shall, in addition to all other powers exercisable by it, have all the jurisdiction of the original court and may -

> (a) confirm, reverse or vary the decision or determination of the original court;
>
> (b) remit the appeal or any matter arising thereon to the original court with such declarations or directions as the Court of Appeal may think proper;
>
> …
>
> (f) where the appeal is by case stated, amend the case stated or remit it, with such declarations or directions as the court may think proper, for hearing and determination by the original court or for re-statement or amendment or for a supplemental case to be stated thereon;
>
> …
>
> (i) make such other order as may be necessary for the due determination of the appeal."

[36] We are satisfied that it is open to this court to refuse to express an opinion on the question raised in the case stated where it considers that the dispute between the parties giving rise to the question should not have been tried as a preliminary issue. We therefore refuse to answer the question posed and remit the matter for hearing by the tribunal on all the substantive issues that the respondents' claims raise.