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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPEAL FROM A DECISION OF THE FAIR EMPLOYMENT TRIBUNAL

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JOHN KEVIN BOHILL

Applicant;

and

POLICE SERVICE OF NORTHERN IRELAND

Respondent.

_____

Before: Morgan LCJ, Coghlin LJ and the Rt Hon Sir Anthony Campbell

COGHLIN LJ (delivering the judgment of the court)

[1] The appellant, John Kevin Bohill, brings this appeal from a decision of the Fair Employment Tribunal ("the Tribunal") issued to the parties on 28 January 2010 after a hearing on 11 and 12 January 2010 at Belfast. For the purposes of this appeal the appellant represented himself while Miss Nessa Murnaghan appeared on behalf of the respondent.

The background facts

[2] The appellant is a former police officer who was employed both by the respondent and by its predecessor, the Royal Ulster Constabulary, over a period of some 30 years. During that period of service the appellant was commended upon six occasions and was referred to by Kevin Sheehey in his book "More Questions than Answers: Reflections on a Life in the RUC" as an "experienced and dependable officer". The appellant retired from service

with the respondent on 14 February 2001 and subsequently applied to Grafton Recruitment Services ("Grafton") to work as an investigator with the PSNI.

[3] Grafton is a recruitment agency that has a contract with the respondent for the provision of temporary workers. Potentially suitable workers are identified by Grafton using a process based upon role information supplied by the respondent. The appellant successfully passed through this process and was placed on Grafton's records as available for temporary employment in investigator or file preparation roles. From time to time the respondent would identify a need for the employment of such temporary workers and would make a request for recruitment to Grafton. Grafton would then supply the respondent with a list of suitable names. The respondent would then select temporary workers from such a list.

[4] The appellant was provided with a document by Grafton entitled -

"Contract for Services for Temporary Workers – Northern Ireland"
(Terms of Engagement)

Clause 1 of that document contained a number of definitions including the following:

> ""assignment" means the period during which the Temporary Worker is supplied to render services for the Client:
>
> "client" means the person, firm or corporate body requiring the services of the Temporary Worker together with any subsidiary or associated company:
>
> "employment business" means Grafton Recruitment Limited of [branch address]:
>
> "temporary worker" means name of Temporary Worker:
>
> "relevant period" means the longer period of either 14 weeks from the first day on which the Temporary Worker worked for the client, or 8 weeks from the day after the Temporary Worker was last supplied by the Employment Business to the Client."

Clause 2 was headed "the contract" and read as follows:

> "2.1 These Terms constitute a contract for services between the Employment Business and the Temporary Worker and they govern all Assignments undertaken by the Temporary Worker. However, no contract for services shall exist between the Employment Business and the Temporary Worker between Assignments.
>
> 2.2 For the avoidance of doubt, these terms shall not give rise to a contract of employment between the Employment Business and the Temporary Worker. The Temporary Worker is engaged as a self-employed worker, although the Employment Business is required to make statutory deductions from the Temporary Workers remuneration in accordance with clause 4.1."

The document also provided that the Employment Business, the Client or the Temporary Worker could terminate an assignment at any time without prior notice or liability.

[5] It appears that in response to requests from the respondent, the appellant's name was included in lists of potential temporary workers compiled by Grafton and forwarded to the respondent on some 13 occasions but upon none of those occasions was the appellant recruited as a temporary worker. For various reasons the appellant has formed the view that his failure to secure such employment was the result of unlawful discrimination upon the ground of age and/or religion and/or political opinion and submitted applications to the Tribunal.

[6] The Vice President of the Tribunal conducted a series of case management discussions. During the course of those discussions the appellant decided not to proceed further with a claim based on age discrimination. He also abandoned his claims against Grafton. The issues between the appellant and the respondent were then agreed as:

> "(1) Whether the respondent discriminated against the appellant on grounds of religion/perceived political opinion in failing to appoint him to a position on the occasions that his name was put forward by Grafton Recruitment.
>
> (2) Whether the appellant was applying for a position with the respondent as an agency or contract worker in a self-employed capacity.

If so –

(3) Whether he was entitled to the protection of the Fair Employment and Treatment (Northern Ireland) Order 1998 in view of the decision of the EAT in *Muschett v. HM Prison Service*."

The relevant legal framework

[7] The relevant provisions of the 1998 Order are as follows:

"**General interpretation**

2(2) In this Order –

'employer' (except in Part VII) means –

(a) in relation to a person who is seeking employment, anybody who has employment available;

(b) in relation to a person employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, the person entitled to the benefit of the contract;

(c) in relation to a person who has ceased to be in employment, his former employer;

and 'employee', correspondingly, means (except in that Part) such a person as is first mentioned in sub-paragraph *(a), (b) or (c)* of this definition;

'employment' (except in Part VII) means employment under –

(a) a contract of service or apprenticeship; or

(b) a contract personally to execute any work or labour;

Discrimination against applicants and employees

19-(1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland –

(a) where that person is seeking employment –

(i) in the arrangements the employer makes for the purpose of determining who should be offered employment; or

(ii) in the terms on which he offers him employment; or

(iii) by refusing or deliberately omitting to offer that person employment for which he applies . . .

Discrimination against contract workers

20-(1) This Article applies to any work for a person ('the principal') which is available to be done by individuals ('contract workers') –

(a) who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal; and

(b) who, if they were instead employed by the principal to do that work, would be in his employment in Northern Ireland?

(2) It is unlawful for the principal, in relation to work to which this Article applies, to discriminate against a contract worker –

(a) in the terms on which he allows him to do that work; or

(b) by not allowing him to do it or continue to do it; or

(c) in the way he affords him access to benefits or by refusing or deliberately omitting to afford him access to them; or

(d) by subjecting him to any other detriment . . .

Discrimination by employment agencies

22-(1) It is unlawful for an employment agency to discriminate against a person, in relation to employment in Northern Ireland, -

(a) in the terms on which the agency offers to provide any of its services; or

(b) by refusing or deliberately omitting to provide any of its services; or

(c) in the way it provides any of its services."

The Tribunal decision

[8] After submissions by both parties, taking into account the overriding objective and the position of the appellant, the Tribunal decided to hear the appellant's evidence-in-chief on all issues subject to him being cross-examined by the respondent only in relation to issues 2 and 3 on the basis that the Tribunal would, at that stage, decide whether it had jurisdiction to deal with the appellant's substantive claim. The Tribunal then took into account all the submissions and documentary evidence relating to issues 2 and 3. In particular, the Tribunal considered the draft contract for services for temporary workers that the appellant would have signed with Grafton had he been successfully assigned to the respondent. After careful consideration of the evidence and the submissions the Tribunal applied the principles of law set out in the *Muschett* decision, in particular, paragraphs 29 and 30 of the judgment of His Honour Judge Ansell and, having done so, reached the following conclusion:

> "The Tribunal is satisfied that in the event of a successful assignment, the claimant would have had to enter into a contract for services for a temporary worker as a self employed worker. However, he has not even reached this stage. The Tribunal is therefore satisfied that the claimant cannot rely on Article 19, 20 or 22 of the Order so as to enable the Tribunal to have jurisdiction to hear his substantive claim, which is therefore dismissed."

[9] By notice dated 25 May 2010 the appellant appealed to this court on the following grounds:

"(1) The Tribunal did not give any weight to my submissions regarding the Police Act and the 50/50 Rule.

(2) My claim was about discrimination regarding NOT getting a job, not wrongful dismissal when having one. If I had not been discriminated against by PSNI and Grafton, the *Muschett* Case would have had no bearing at all on proceedings. Section 19 of the Fair Employment and Treatment (Northern Ireland) Order 1998 would cover this.

(3) There was no mention regarding the political discrimination in this case by the Tribunal despite submissions by me regarding this.

(4) The contracts of Grafton workers with PSNI were crucial to the *Muschett* Case. Grafton and PSNI suppressed all evidence regarding Historical Enquiry Team workers which were different to other workers within PSNI. PSNI and Grafton did not carry out in practice which was stated in their submissions. They did not call any evidence and I was prevented from calling any witnesses to corroborate the document evidence which I produced.

(5) The Tribunal appeared to rule out a directive given to PSNI and Grafton regarding recruitment procedures without any reasons given. This directive would appear to come within the law under the Police Act."

Discussion

[10] It is of fundamental importance when seeking to understand the difficulty faced by the appellant both before the Tribunal and this court to bear in mind that the jurisdiction of the Tribunal is derived entirely from statute (Biggs v Somerset County Council [1996] 2 All ER 734: Secretary for State for Scotland v Mann [2001] ICR 1005) In this case jurisdiction flows from the 1998 Order and the relevant statutory rules and regulations relating to procedure. In other words, the appellant must show that he comes within one of the relevant concepts defined within the provisions of the 1998 Order so as to

confer jurisdiction upon the Tribunal to hear and adjudicate upon the substantive merits of his claim.

[11] The appellant seeks to rely upon the provisions of Article 19 of the 1998 Order which provides that it is unlawful for an employer to discriminate against a person seeking employment, in the arrangements the employer makes for the purposes of determining who should be offered employment or in the terms upon which he offers him employment or by refusing or deliberately omitting to offer that person employment for which he applies. While the respondent might arguably fall within the definition of "employer" contained in Article 2 of the Order, the difficulty faced by the appellant is bringing himself within the definition of "employee". In the event that the appellant had been selected as a temporary worker by the respondent he would have signed a document constituting a contract for services between himself and Grafton limited to the period during which those services were supplied to the respondent. At no time would he have been employed under a contract of service either by the respondent or by Grafton. Unless and until his name had been put forward by Grafton and accepted by the respondent the appellant would not have been in any contractual relationship with either Grafton or the respondent. In such circumstances, the appellant was not a person who was seeking employment with the respondent within the meaning of the order.

[12] In the course of its decision the Tribunal referred to and relied upon the decision in *Muschett v. HM Prison Service* [2008] UK EAT/0132/08. That decision was appealed but the judgment of the Court of Appeal in *Muschett v HM Prison Service* [2010] EWCA Civ 25 was not available until after the Tribunal had delivered its ruling in this case. Mr Muschett had signed a contract with the Brook Street Employment Agency who had placed him as an agency worker with the Prison Service. In due course he claimed compensation from the Prison Service for unfair dismissal, wrongful dismissal, sex, racial and religious discrimination. The EAT rejected Mr Muschett's argument that a contract should be implied between himself and HM Prison Service and agreed with the employment judge's finding that his claims of discrimination also failed because of the absence of any contract with the Brooke Street Agency. Mr Muschett was given leave by Smith LJ to appeal to the Court of Appeal on two grounds, namely, whether a contract of employment could be implied and whether the judge had given effect to the wider definition of "employee" in section 78 of the Race Relations Act 1976. Smith LJ regarded the latter ground as important since, if the decision of the EAT was correct, a worker in Mr Muschett's position who personally provided services to an end user, but who was not employed by the agency supplying the services, would have no remedy if he was subjected to discrimination by the end user. The Court of Appeal upheld the EAT upon both grounds.

[13] In our view the inability of the appellant to establish that he is seeking an employment relationship with PSNI or that he is in such a relationship with Grafton and to bring himself within the definition of "employee" contained in article 2 of the 1998 Order is fatal to this appeal. In the absence of such proofs the Tribunal simply did not have jurisdiction.

[14] We have arrived at this conclusion with some degree of anxiety since, in doing so, the apprehension expressed by Smith LJ that a gap might exist in the remedies available to workers in the appellant's position would appear to be confirmed. That was a view that seems to have been shared by the author of the article at p 367 of [2010] IRLR. In *Muschett* the employment judge held, inter alia, that although he was not employed by the agency, the basis upon which the applicant worked for HMPS was in accordance 'with a contract for services for temporary workers entered into between ' him and Brook Street. In this case, while a similar type of contract might have arisen if the appellant's name had been approved by the respondent, the Terms of Engagement document provided to the appellant by Grafton specifically excluded the existence of a contract for services with Grafton between assignments.

[15] The appellant clearly feels a sense of frustration at his inability to put before the tribunal the evidence that he claims to constitute the substance of his case. However, in the absence of any contract with either Grafton or the respondent, the tribunal does not have jurisdiction. There is no doubt that this type of agency arrangement has become much more prevalent over recent years and it would appear that the U.K. economy uses agency provided workers to a much greater extent than those of most other E.U. states. There may well be advantages for workers in entering such arrangements in terms of flexibility and finance. In *Tilson v Alstrom Transport* [2010] EWCA Civ 1308 the respondent offered the appellant, an agency worker, a permanent job as an employee under an employment contract but the offer was rejected because of the higher earnings and tax advantages enjoyed by the latter as a consequence of the agency arrangement. In the course of delivering the judgment of the court Elias LJ said at paragraph [11]:

> "Nor is it legitimate for a tribunal to imply a contract because it objects to the practice of employers entering into arrangements of this kind in order to avoid incurring the obligations they owe to their employees. In many cases that is undoubtedly the reason why employers enter into agency arrangements, although certainly not all. Some employees prefer these arrangements because they are perceived overall to be more beneficial to them, as this case demonstrates. But even where employers are seeking to avoid liabilities with respect to workers who would prefer to enter into an employment

> relationship, if as a matter of law the arrangements have in fact achieved the objective for which they were designed, tribunals cannot find otherwise simply because they disapprove of the employer's motives."

However this case would appear to illustrate how such an arrangement, whether or not it may appear to offer the agency worker economic incentives, may ultimately deprive potential employees of important protections.

[16] While it was not raised in the course of argument, the court has given some consideration to the Employment Equality Directive 2000/78/EC ("the Directive") which would arguably be directly effective against the respondent, although not against Grafton, – see *Johnston v Chief Constable* Case 222/84 [1986] 3 All E R 135 and, therefore, might be used as a basis for purposively construing the 1998 Order. The Directive lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in relation to "…conditions for access to employment, to self-employment or to occupation"- see, in particular articles 1, 2, 3.1(a) and 9. The term "occupation" is used disjunctively in article3.1(a) in contrast to employment and self-employment and ECJ jurisprudence suggests that inclusion of the term provides protection from discriminatory restrictions to access to professional groups or panel systems – see, for example the maximum age for practising as a dentist in a statutory health insurance scheme *Peterson v Berufungsausschuss Westfalen-Lippe* (C-341/08) or national provisions relating to the date of admission to practical legal training as a prerequisite for employment in the judiciary or higher civil service - *Schnorbus v Land Hessen* (C- 79/99). The issue as to whether a voluntary worker may be protected, including the impact of the Directive and ECJ jurisprudence, is also currently before the court of appeal in England and Wales in *X v Mid Sussex Citizens Advice Bureau* on appeal from Burton J sitting in the EAT [2009 WL 3447850]. The court of appeal has given permission for a number of interveners to make submissions and the appellant may seek a reference to the ECJ. However in that case, which concerned a voluntary expert in welfare law, "occupation" was defined by counsel for the appellant for the purpose of the litigation as "the carrying out of a real and genuine activity, which is more than marginal in its impact upon the person or entity for whom such activity is carried out *and which is not carried out for remuneration or under any contract*" (our emphasis). Furthermore, after reviewing the provisions of the Directive, Burton J, in the course of delivering the EAT judgment, remarked:

> "There is nothing therefore to oust, and everything to support, the conclusion that occupation is included in order to emphasise qualifications and professional requirements required for access to employment."

In summary, neither of these jurisprudential developments would appear to provide a source of any real optimism for the appellant who is ultimately seeking remunerated employment but presently has no contractual status. It is to be noted that the Remedies and Enforcement section of the Directive is specifically made without prejudice to national rules relating to time limits.

[17] In England and Wales the requirements of Directive 2008/104/EC (Temporary Agency Workers Directive) have been implemented by the Agency Workers Regulations 2010. Those Regulations apply to 'agency workers' who are defined in reg. 3 in a way which does not depend directly on general definitions of 'employment' although they do require such workers to have a contract with an agency which is – "(i) a contract of employment with the agency, or (ii) any other contract to perform work and services personally for the agency." The Regulations are limited to ensuring that such workers enjoy some of the same specific working and employment conditions as if they had been recruited directly by the hirer, provided that the agency worker is employed in the same role for 12 continuous calendar weeks. Those Regulations do not come into force until 1 October 2011 and do not contain any relevant provisions extending to Northern Ireland.

[18] For the reasons set out above this appeal must be dismissed but the case does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination. Northern Ireland enjoys a well deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of OFM/DFM concerned with legislative reform. We emphasise that, as a consequence of the lack of jurisdiction, we are unable to give any consideration to the substance of the appellant's case.