

Neutral Citation no. [2007] NICA 13 (1)

Ref: **KERF5769**

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

Delivered: **01/03/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CHARLOTTE CARTWRIGHT and RAYMOND McMICHAEL

Appellants

and

**CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND**

Respondent

Before Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

[1] I have had the advantage of reading in draft the judgments of Sir Michael Nicholson and Sir John Sheil and I gratefully adopt from both the rehearsal of the factual background to this appeal that therein appears.

[2] The critical issue in this appeal, as it seems to me, is whether the originating applications of the appellants by which they initiated their complaints of victimisation were sufficiently widely drawn to accommodate an allegation that Superintendent Laird, Sergeant Wilson and Sergeant Shirlow had made the reports that brought about service of the forms 17/3 because (in the case of the first appellant) she had taken proceedings against the Chief Constable for sex discrimination and victimisation and (in the case of the second appellant) he had given evidence in those proceedings. This is essentially a factual issue.

[3] Three important matters about which there was no dispute underlie the case that the appellants claim they are entitled to make. The first is that, although the Chief Constable is named as the respondent to the complaints of victimisation, if that victimisation has been procured by Superintendent

Laird, Sergeants Wilson and Shirlow, the appellants are entitled to pursue their complaint against the person who stands in the position of employer to all the *dramatis personae*, namely, the Chief Constable of the Police Service for Northern Ireland – see *Nagarajan v. London Regional Transport* [1999] IRLR 572. The second matter on which no challenge is raised by the respondent to this appeal is that the evidence of Ms Connolly is directly relevant to the question whether service of the forms 17/3 was wrongly procured by the officers concerned. Finally, it is not disputed that if the officers brought about the service of those forms because the first appellant had taken the earlier proceedings and the second appellant had given evidence in those proceedings, this would – at least potentially – amount to victimisation of the appellants.

[4] In my opinion, both in the originating applications and in the opening of the case to the tribunal, the appellants sufficiently signalled an intention to base their complaints of victimisation on the claim that the superintendent and the two sergeants had wrongly procured the service of the forms 17/3 on them. I do not consider that any other conclusion could properly have been reached by the tribunal. As Sir Michael Nicholson pointed out in his judgment, Mr McArdle for the appellants made clear in opening the case to the tribunal that the purpose of calling Ms Connolly to give evidence was to impeach the *bona fides* of Superintendent Laird in causing the complaint to be made that prompted the issue of the form 17/3. It required no great leap of imagination to deduce that this should be so. Assistant Chief Constable Beaney had merely been the recipient of the complaint that led to the issue of the forms. The gravamen of the case against the respondent was always and obviously that those who had complained about revelations made in the course of the earlier proceedings were the progenitors of the victimisation. It is not surprising nor is it without significance that all three police witnesses were present at the hearing before the tribunal but were, in the event, not called, doubtless because the tribunal's ruling made that unnecessary. It seems to me perfectly plain that any informed observer would have realised that the burden of the appellants' case would inevitably have been that the makers of the complaint to the Assistant Chief Constable were those who had procured the victimisation.

[5] In this connection the remarks of Sir Michael Nicholson in paragraph [14] of his judgment are entirely apposite. It is not conducive to the proper ventilation of all the issues that arise in what were intended by the legislature to be informal proceedings if a close parsing of the originating application is conducted so as to confine the scope of the complaint to artificially contrived boundaries. To focus too directly on the term 'initiate' in the originating applications and conclude that this related exclusively to the actions of ACC Beaney seems to me to incur precisely this risk. I therefore agree with the conclusion of the other members of the court that the first question in the case stated should be answered 'Yes'. I would allow the appeal to that extent and

remit the matter to a differently constituted tribunal with a direction that it should admit the evidence of Ms Connolly and proceed to a determination in light of that and such other evidence as may be called on the issue of the motivation of Superintendent Laird, Sergeant Wilson and Sergeant Shirlow in making the complaints that brought about the issue of forms 17/3.

[6] In relation to the second question I also agree with the other members of the court that the tribunal did not err in law in holding that the respondent was compelled to instigate a formal procedure to start an investigation of the events leading up to the complaints without hearing evidence to test the credibility of any of the allegations or the bona fides of those who made complaints against the appellants and would answer the second question 'No'. It does not appear to me that the respondent could have failed to act on the complaints that had been made. If it were a prerequisite to the issue of form 17/3 complaints that some type of anterior examination into the merits of the complaint was required before the formal part of the investigation could be initiated, an unnecessary - and potentially fatal - inhibition to the effective inquiry of such complaints would be introduced.

[7] It was, as Sir John Sheil has recorded in his judgment, conceded by the respondent that the tribunal had confused the issue of the comparators for the appellants. In light of my conclusion on the first question, however, I do not consider that it is necessary to address the third question which deals with this issue. The tribunal does not appear to have adverted to the burden of proof in its decision but again I do not consider that it is necessary to address the fourth question, in light of my conclusion on the first question. Since the consequence of the decision of the court on the first question is to remit the matter to a differently constituted tribunal with a direction that it admit the evidence of Ms Connolly, it is not, I consider, appropriate to deal with the final question in the case stated.