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Judgment: approved by the Court for handing down | *Delivered:* **30/6/04**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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CLANMIL HOUSING ASSOCIATION
MS D SHANKS
And
MS S FEARON

Appellants;

-and-

MARK MADDEN

Respondent.

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Before: Nicholson, McCollum and Campbell LJJ

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NICHOLSON LJ

Introduction

[1] This is an appeal by way of Case Stated by an Industrial Tribunal in accordance with Order 61 of the Rules of the Supreme Court (Northern Ireland) 1980 and Article 22 of the Industrial Tribunals (Northern Ireland) Order 1996 for the opinion of the Court of Appeal.

[2] Four questions for the opinion of the Court have been stated by the Tribunal.

The first question is:

In light of the fact that the appellants had deliberately not specified previous housing experience as either essential or desirable but had specified previous experience in a caring environment as desirable, did the Industrial Tribunal err in law and reach a decision that no reasonable Industrial

Tribunal could have reached in deciding that the respondent was "the only candidate with relevant experience"?

It was contended on behalf of the appellants that the respondent might have been the only one of the top three candidates with relevant experience if experience had been limited to experience in sheltered housing but it was not. But in its decision the Tribunal decided at paragraph 6 and 14 that the respondent was the only candidate with relevant experience.

The respondent contended that while person's experience in a caring environment was mentioned in the job advertisement and person specification, it was not specified at the final selection stage, when sheltered housing experience was clearly being looked for by the appellants.

When the Tribunal refused to state a case for the opinion of the Court of Appeal, an application was brought by the appellants for judicial review of its decision which included a refusal to state a case on this first question.

[3] Kerr J recorded at paragraph [4] of his decision that the advertisement for the post stated that the applicants should have "previous experience in a caring environment". Panel members were instructed to award points (to a maximum of five) based on their assessment of the candidate's experience in each of the following categories: (a) working with older people and (b) sheltered housing.

[4] The Tribunal accepted at paragraph 6 of its decision that the successful candidate and the runner-up had some nursing experience. This experience related to caring for older people and involved working with older people. Therefore we are satisfied that no reasonable Industrial Tribunal could have decided that the respondent was the only candidate with relevant experience.

[5] When the Tribunal was ordered by Kerr J to state a case in respect of the first question it did so but added to its decision that the Tribunal was of the opinion that the respondent merited a higher mark than any other candidate. It is apparent that the Tribunal realised that it had been in error in dealing with Question 1 and amended its decision by stating that the respondent merited a higher mark than any other candidate.

Accordingly we answer the first question in the affirmative.

[6] The second question is:-

Did the Tribunal err in law and reach a conclusion that no reasonable Tribunal could have reached by failing to have regard to the appellants' policy, established with recognised equal opportunities practice, that a person who is a runner-up to an advertised post can be appointed to another

equivalent post which is vacant within a limited time scale and to the application of the said policy to the appointments of Ms McBeth to Blessington Court and Ms Stevenson to Greenville Court?

It was contended on behalf of the appellants that critical to this issue was the fact that the respondent had not applied for any post other than at Henderson Court, Belfast. The respondent contended that the Tribunal had stated its concerns "regarding the number of changes to the marks" in respect of the application for the post at Henderson Court and suggested that the changes were made in order to enable the appellant to ensure that Ms Stevenson was made runner-up for Henderson Court and Ms McBeth for Greenville Court.

[7] When the Tribunal refused to state a case on this question Kerr J had this to say:-

> "It appears that the tribunal failed to understand the significance of the policy implications in the awarding of various positions to the candidates for the Henderson Court post …. The reason that Ms McBeth and Ms Stevenson were considered for and ultimately appointed to different posts was that they had been runners-up in competitions for other positions. This was in accordance with Clanmil's pre-existing policy. It did not transpire as a result of some action taken after the interviews for the post at Henderson Court."

[8] When the Tribunal was ordered to state a case in respect of this question, it sought to explain its decision. It was stated that consideration was given to the appellant's policy that a person on the reserve list would have his or her name retained for six months and be considered for a similar post which would have been vacant within that period. It was stated that the Tribunal was of the opinion that the application of a policy which enabled a candidate, who was interviewed for the same post as the respondent and had been asked the same questions and had scored 15 marks less than he did, to be appointed to a post solely on the basis that she was placed first reserve did not demonstrate that the best person was chosen on merit. This completely overlooked the fact that the respondent applied only for the post at Henderson Court whereas Ms McBeth and Ms Stevenson applied for other posts and were appointed to other posts because of pre-existing policy of Clanmil House. If the respondent had been appointed to a post for which he had not applied, candidates who would otherwise have been appointed would have had an unanswerable claim.

[9] Accordingly we are satisfied that the second question must also be answered in the affirmative.

[10] The third question is:-

Did the Industrial Tribunal err in law and reach a conclusion which no reasonable Industrial Tribunal could have reached by deciding that the interviewing process was "contaminated by the fact that the panel of interviewers had differed" without concluding that such change discriminated against the respondent on the ground of sex?

The appellants submitted that two candidates had been interviewed for the post in Greenville Court prior to the interviews for Henderson Court. The interview panel for the post in Greenville Court consisted of two persons who sat on the interview panel for Henderson Court and a third person who did not. Rather than interview these two candidates again, the marks which they received from the two interviewers for the post at Greenville Court were accepted as their markings for the post at Henderson Court. The marks of the third person who interviewed them for the post in Greenville Court were ignored. Neither of them scored as highly as the respondent. But one of them was later offered another post because she had been reserve candidate for the Greenville Court post.

At paragraph 14 of its decision the Tribunal stated:-

> "The Tribunal is of the opinion that the interviewing process had been contaminated by the fact that the applicant was not interviewed by the same panel as some of the other candidates, one of whom was appointed to a position she did not apply for. They were referring to Ms McBeth."

The appellants pointed out that the questions which were asked at the two sets of interviews were precisely the same. The only difference between the two sets of interviews were that there were three interviewers for the Greenville Court post and only two for Henderson Court. As the marks of the third interviewer were subtracted from the marks received by the two candidates for the post at Henderson Court, there was no evidence on which any reasonable Tribunal could hold that the process was contaminated, let alone that any contamination could amount to sex discrimination.

The respondent argued that the third interviewer's opinion on the scoring of the two candidates for Greenville Court could have influenced the scores given by the other two interviewers and if he had had this third interviewer present at the time of his interviews, her influence on his scoring would have had a bearing on his scoring and placement.

[11] The Tribunal refused to state a case on this question and Kerr J had this to say:-

> "Again, regrettably, this response (to the requisition for a case stated on the point) betrays the tribunal's failure to appreciate the manner in which the interviews were conducted …. The tribunal does not explain in what way the contamination occurred nor how that affected the outcome of the interviewing process."

Having set out the evidence as to how the interviews took place he stated:-

> "In these circumstances it is not easy to discern how contamination could have entered the process."

The Tribunal sought to justify its finding by stating that the Tribunal of the opinion that all candidates should have been advised, prior to the interviewing process, what posts were available and the procedure which it intended to follow.

[12] We are satisfied that we must also answer this question in the affirmative.

[13] The final question is:-

In light of all the evidence oral and written, did the Industrial Tribunal err in law in deciding that the respondent had been discriminated against on the grounds of sex by not being appointed to a position at Henderson Court?

We have read the decision of the Tribunal, its answers to the requisition and the judgment of Kerr J on this point; we have read and heard the submissions of counsel for the appellants and read the submissions of the respondent.

We are satisfied that no reasonable tribunal could have held that the respondent had been discriminated against on the grounds of sex. It is unfortunate that he applied only for the post at Henderson House. If he had applied for the post at Greenville Court, it is likely that he would have obtained the post which Ms McBeth obtained. But he did not. He was given the marks which would have entitled him to obtain that post if he had competed with Ms McBeth for Greenville Court. But he did not compete and the Tribunal failed to realise that this was the simple reason why Ms McBeth who finished runner-up for Greenville Court but with fewer marks than he did at Henderson Court was offered another post.

[14] Accordingly we also answer this question in the affirmative.