Neutral Citation No. (2002) NICA 35

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

Ref:	CARC3744
Delivered:	01/08/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

FRANCES CLYDESDALE

(Applicant) Appellant

and

1. **DRIVER AND VEHICLE TESTING AGENCY**
2. **DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND**
3. **DSA TRAINING AND DEVELOPMENT SERVICES**

(Respondents) Respondents

Before: Carswell LCJ and Campbell LJ

CARSWELL LCJ

[1] This appeal is brought by way of case stated from a decision of an industrial tribunal given on a preliminary issue in a claim brought by the appellant for sex discrimination and victimisation.

[2] The appellant commenced proceedings by presenting an originating application on 16 October 2000. The matter was listed on 16 August and 19 September 2001 for the purpose of determining the preliminary issue. That issue was eventually defined as whether the appellant was entitled to bring proceedings in an industrial tribunal in Northern Ireland under Articles 16 and 43 of the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order) against the third named respondent DSA Training and Development Services (DSA) in respect of alleged acts or omissions all of which took place in England.

[3] The tribunal held that the appellant was not entitled to bring such proceedings against DSA under Article 16, but was entitled to bring them under Article 43. Both parties lodged requisitions requesting the tribunal to state a case and the tribunal stated and signed a case dated 1 March 2002. The questions on which the opinion of the court is sought were set out in the case as follows:

"(1) Whether the tribunal misdirected itself in law in deciding that the applicant was not entitled to proceed with her complaint against the DSA under Article 16 of the Sex Discrimination (Northern Ireland) Order 1976.

(2) Whether the tribunal was correct in law in deciding that the applicant is not precluded from pursuing her complaint that the DSA has contravened Article 43 of the Sex Discrimination (Northern Ireland) Order 1976, although the acts which constitute the alleged breach of Article 43 took place in England.

(3) Whether the tribunal misdirected itself in law in having regard to the commentary set out at paragraphs 1318 to 1320 of Volume 44(1) of Halsbury's Laws of England, Fourth Edition Reissue, although that commentary was not mentioned or referred to during the course of argument in this case.

(4) Whether the tribunal misdirected itself in law in taking account of the statement of the law set out at paragraph 87 of the judgement of the European Court of Human Rights in the case of *Z –v- The United Kingdom* 29392/95 [2001] 2 FCR 246, although that case was not mentioned or referred to in the course of argument in the present case.

(5) Whether the tribunal misdirected itself in law in taking account of the differences in wording between, on the one hand, the Fair Employment (Northern Ireland) Act 1976 and the Fair Employment and Treatment (Northern Ireland) Order 1998 and, on the other hand, the Sex Discrimination (Northern Ireland) Order 1976, the Sex Discrimination Act 1975 and the race relations legislation."

[4] For the purposes of determining the preliminary issue the following facts were agreed between the parties:

> "(1) The first named respondent, the Driver and Vehicle Testing Agency ("the Agency") is an agency of the second named respondent, the Department of the Environment for Northern Ireland ("the DOE"), which is a Northern Ireland Government Department. The DSA is an integral part of a United Kingdom Government Department; at all times material to the present proceedings, the relevant UK Department was the Department of the Environment, Transport and the Regions.
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> (2) As a Northern Ireland civil servant, the applicant was based in the Agency, which carried out all its operations in Northern Ireland. The DSA carries out no operations in Northern Ireland and none of its staff are based here. The DETR carries out no operations in Northern Ireland and none of its staff are based here. The acts and/or omissions, by the DSA and/or by persons whose acts/omissions are deemed to be those of the DSA, were all done in England, in connection with courses which the applicant attended in her capacity as a Northern Ireland civil servant.
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> (3) In these proceedings, the applicant complains of `unlawful discrimination on grounds of sex including discrimination by way of victimisation … breach of contract … wrongful dismissal.' However, in the present context, we are concerned only with the allegation that there has been unlawful sex discrimination and unlawful victimisation discrimination, in contravention of the Order. In response to question 12 of the Originating Application, the applicant provided detailed factual information in relation to the relevant

complaints. So far as material, that information can be summarised as follows:

(a) In or about August 1999, the applicant made application for the position of Driving Traffic Examiner with the Agency.

(b) On or about 14 January 2000, having passed a written exercise, an interview and a special practical driving test, she was offered a one year conditional contract of employment. A condition of that contract was that she had to attend and successfully complete a course for driving instructors which was run by the DSA and held in England.

(c) She attended the course in March 2000. She was assigned with another participant called Roy. According to the applicant, Roy behaved in a bullying and aggressive way towards her and made derogatory and sexist comments to her; as a result of his behaviour, attitude and comments, her self-esteem was adversely affected and she was unable to perform as she should have; accordingly, she did not pass the course.

(d) Following her return, a meeting was held at the Agency's headquarters on 20 March 2000 to investigate her complaint of bullying against Roy. At that meeting, she gave full details of her complaints in relation to his behaviour.

(e) Subsequently, she was offered another opportunity to undergo the course. When she attended at the DSA premises for the second time, she was assigned a different instructor. However she considers that she was subjected to undue and unjustified criticism, that excessive demands were made of her and that in general terms things were made as difficult as possible for her. She asserts that she believes that she was not given a genuine opportunity to complete the course successfully and asserts that she considers that she was treated in this way because she had earlier raised a complaint under the Agency's Equal Opportunity Policy on Sex Discrimination. She asserts that, as a result, her confidence was adversely affected and she did not pass the course.

(f) By letter dated 25 July 2000, she was informed that her employment as an Examiner in the Agency had been terminated on account of her failure to pass the course.

(g) She asserts that the `less favourable treatment' afforded to her on her first attendance at the DSA premises constitutes unlawful discrimination and that her treatment during her second attendance constituted

> unlawful discrimination by way of victimisation, as a result of her having raised concerns about the earlier `less favourable treatment'. The applicant also asserts that the termination of her employment resulted directly from those alleged acts of unlawful discrimination."

[5] The complaints made by the appellant against DSA were that it had contravened Articles 16 and 43 of the 1976 Order. Article 16(1) provides:

> "**16.**-(1) It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman –
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> (a) in the terms on which it is prepared to confer on her that authorisation or qualification; or
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> (b) by refusing or deliberately omitting to grant her application for it, or
>
> (c) by withdrawing it from her or varying the terms on which she holds it."

Article 43 deals with aiding unlawful acts. Paragraphs (1) and (2) are the material provisions for present purposes, but in order to follow paragraph (2) it is necessary also to examine the terms of Article 42. These provisions read:

> "**42.**-(1)Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.
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> (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be

treated for the purposes of this Order as done by that other person as well as by him.

(3) In proceedings brought under this Order against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

43.-(1) A person who knowingly aids another person to do an act made unlawful by this Order shall be treated for the purposes of this Order as himself doing an unlawful act of the like description.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under Article 42 (or would be so liable but for Article 42(3)) shall be deemed to aid the doing of the act by the employer or principal."

[6] The tribunal held that there was a presumption that legislation is concerned with conduct only within the territory of the legislature, which had not been displaced by anything in domestic law. It was necessary, however, to comply with the provisions of Article 6 of the Equal Treatment Directive, and for that purpose to construe legislation in such a way as to accord if possible with the interpretation given to the Directive by the European Court of Justice. If an act were done in England by a Northern Ireland employer in contravention of Article 16, the complainant could pursue a complaint before an industrial tribunal in England. There accordingly would be no breach of the Directive and it was unnecessary to construe Article 16 of the 1976 Order as having extraterritorial application.

[7] The tribunal reached a different conclusion, however, in respect of a breach of Article 43. It considered that a person who carried out acts in England which assisted an employer in Northern Ireland to discriminate against a woman or victimise her would not be liable if she brought a complaint in England. It was therefore necessary to construe Article 43 in such a way as to give it extraterritorial application in order to avoid a breach of the Directive.

[8] If we are to decide the questions posed by the tribunal in the case stated it is necessary to make two assumptions, first, that the DVTA discriminated in some fashion against the appellant or victimised her and, secondly, that DSA assisted the DVTA in such discrimination or victimisation. We do not find either assumption easy to make:

1. Under Article 42(2) of the 1976 Order anything done by a person as agent for another person with the authority of that other person is treated as being done by both principal and agent. On the assumed facts DSA could be regarded as having run the course for driving instructors on behalf of the DVTA, but it is more difficult to suppose that it had authority to discriminate against the appellant or victimise her.

2. It appears on its face a somewhat surprising proposition that DSA could be said to assist the DVTA in committing an unlawful act when DSA itself committed the wrongful act in question and any liability that the DVTA might have is purely vicarious. That does, however, appear to be the effect of Article 43(2), and the correctness of the proposition was accepted by the EAT in *AM v WC* [1999] IRLR 202.

We shall accordingly make the necessary assumptions in order to answer the questions asked, since they pose issues which may be of some consequence in this area of law. We should add that the respondents did not seek at the hearing of the appeal to argue against the tribunal's conclusion in respect of Article 43, notwithstanding their request for a case stated on the issue. Since the question was posed in the case and since the issue may arise in other cases, we thought it right nevertheless to consider the correctness of the tribunal's decision in respect of Article 43.

[9] The tribunal held that there was a presumption that the 1976 Order was intended to apply to acts done in Northern Ireland, which was not displaced by any provisions of domestic law. The Order was made under the powers conferred by the Northern Ireland Constitution Act 1973 and the Northern Ireland Act 1974. It was provided by section 4 of the 1973 Act that "Laws may be made for Northern Ireland by Measures of the Assembly." Employment was not one of the excepted or reserved matters. When the then Assembly was dissolved it was provided by section 1(1)(*b*) of the 1974 Act that Her Majesty may by Order in Council make laws for Northern Ireland. Although that power to make laws by Order in Council is not limited territorially the tribunal was in our view correct in concluding that there was a presumption that such laws when made are intended to apply only to acts done in Northern Ireland, the territory to which the laws extend: see Halsbury's Laws of England, 4th ed, vol 44(1), para 1319. That conclusion is reinforced by contrasting the 1976 Order with the Fair Employment and Treatment (Northern Ireland) Order 1998, Article 2(9) of which provides that references

to acts done include references to acts done outside Northern Ireland. No such provision is to be found in the 1976 Order and its absence indicates that it was specifically included in the 1998 Order because without it the application of the Order would have been territorially limited.

[10] The tribunal went on to consider the impact of the Equal Treatment Directive 76/207/EEC. Article 6 provides:

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of [relevant Articles of the Directive] to pursue their claims by judicial process after possible recourse to other competent authorities".

National courts must construe domestic legislation in the light of the wording and the purpose of a directive in order to achieve the result referred to in the third paragraph of Article 189 of the EEC Treaty (that a directive is binding as to the result to be achieved upon each Member State): *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891. The tribunal considered both Article 16 and Article 43 of the 1976 Order in the light of this principle. It concluded that there was no breach of the requirements of the Equal Treatment Directive if Article 16 was not construed in a way which gave it extra-territorial application, but that it was necessary so to construe Article 43.

[11] The tribunal based its conclusion in respect of Article 16 on the fact that a complainant would be free to pursue a complaint to a tribunal in England under section 13 of the Sex Discrimination Act 1975, which makes similar provision to that contained in Article 16 of the 1976 Order. While acknowledging that a complainant would be able to do so, Miss Higgins submitted on behalf of the appellant that if she had to go to England to bring proceedings that would deny her an effective remedy or disproportionately obstruct her access to justice. We do not accept this submission. In our view the tribunal was correct in its conclusion in respect of Article 16.

[12] The tribunal came to a different conclusion, however, in respect of Article 43. It held that if it did not construe that provision so as to give it extra-territorial effect there would be a gap in the legislative protection afforded by the 1976 Order. That conclusion was based on the inability of the complainant to invoke the equivalent of Article 43 if she had to bring proceedings in England. The tribunal appears to be right in its opinion that she could not bring such proceedings under section 42 of the Sex Discrimination Act 1975, the analogue of Article 43 of the 1976 Order, because it refers to aiding another person to do an act "made unlawful by this Act". It

is not necessary, however, for the complainant to resort to section 42. If DSA discriminated against her or victimised her, she would have a direct remedy under section 13 (the equivalent of Article 16) or section 4 (which corresponds to Article 6). Neither provision is confined to acts made unlawful by the Act and no restriction appears in section 13 concerning the location of the profession or trade for which the qualification is needed. It follows that if DSA discriminated against the appellant or victimised her in respect of conferring the qualification upon her, she could obtain a remedy in England. This equates the case in respect of Article 43 with that in respect of Article 16. We therefore consider that the tribunal was in error and that it is not necessary to construe Article 43 so as to have extraterritorial effect.

[13] Moreover, it is necessary to bear in mind that the only jurisdiction outside Northern Ireland considered by the tribunal or addressed in argument was that of England, where the alleged discrimination and victimisation took place. This part of the law of England is virtually identical with that applying in Northern Ireland. A similar situation could arise in another jurisdiction, either inside or outside the EU, where the manner or degree of protection conferred upon women against such acts may be framed in different terms, or where such acts may not be unlawful at all. It is hard to suppose that a citizen of such a state, especially one outside the EU, where his act may be quite lawful, could be made subject to the jurisdiction of an industrial tribunal sitting in Northern Ireland. This in our view constitutes a further reason why Articles 16 and 43 should not be construed so as to apply with extraterritorial effect.

[14] Miss Higgins also argued that failure to construe Articles 16 and 43 with extraterritorial effect so as to enable the appellant to bring proceedings against DSA in Northern Ireland constituted a breach of Article 6(1) of the European Convention on Human Rights. The tribunal pointed to the statement of the European Court of Human Rights at paragraph 87 of its judgment in *Z v United Kingdom:*

> "The Court recalls its constant case-law to the effect that `Article 6.1 extends only to *contestations* (disputes) over (civil) `rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) `rights and obligations' in the substantive law of the Contracting States …".

Miss Higgins submitted that the tribunal misunderstood or misapplied that decision, but we cannot agree. In *Z v United Kingdom* the court held (paragraph 100) that there was no breach of Article 6(1) because –

> "the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law."

The appellant's inability, as we have found, to sue DSA in Northern Ireland is similarly a product of the substantive rules of law, not of any procedural restriction such as would bring the case within the purview of Article 6(1) of the Convention.

[15] Another complaint, which was made the subject of questions 3, 4 and 5 in the case, was that the tribunal made reference to several authorities or matters which had not been argued at the hearing. Whether it does so in any given case is a matter of discretion. It certainly need not confine its consideration to the actual authorities cited by the parties, if in its researches it finds an apposite case which throws light on the principles advanced by them. Nor need it refer back to the parties or leave out of consideration a further line of argument supporting one conclusion or the other, so long as it is not so fundamental that the party affected ought reasonably to have an opportunity to deal with it. The discretion is fairly broad and an appellate will not readily interfere with its exercise. In any event, if the parties have had an opportunity to meet the argument and deal with the cases on appeal the tribunal's failure to afford it below cannot of itself constitute a ground of appeal.

[16] We shall therefore answer the questions posed in the case stated, substituting the words "was correct" for Misdirected itself" in line 1 of question 1:

1. Yes.
2. No.
3. No.
4. No.
5. No.

The appeal will accordingly be allowed to this extent.