Neutral Citation No. [2014] NICA 30 | *Ref:* **MOR9240**

Judgment: approved by the Court for handing down | *Delivered:* **08/04/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

SURESH DEMAN

Applicant;

-and-

INDUSTRIAL TRIBUNAL AND FAIR EMPLOYMENT TRIBUNAL and others

AND

NORTHERN IRELAND EQUALITY COMMISSION and others

Respondents.

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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MORGAN LCJ (delivering Judgment of the Court)

[1] This is an application for leave to appeal against a decision of Higgins LJ whereby he dismissed the applicant's appeal against a decision of Master McCorry dated 14 March 2011 in which the Master struck out the claims made by the applicant in each of the above entitled actions for want of jurisdiction.

Background

[2] The background is helpfully set out in the judgment of Master McCorry. On 25 October 2007 the plaintiff issued a Writ of Summons in the High Court claiming damages for religious and/or political and racial discrimination and victimisation against the Industrial Tribunal and Fair Employment Tribunal and two named individuals from those tribunals. The plaintiff alleged that the Industrial and Fair Employment Tribunal's administrative system operated in such a way as to victimise and discriminate against him in the conduct of his proceedings against the

Association of University Teachers and officers at Queens University Belfast. That claim related to a period during the 1990s when the applicant, who is of Indian origin and Hindu by faith, was employed as a lecturer at Queens University Belfast. This claim was initiated in April 1996 but was not heard until November 2007 and was completed in January 2008. The tribunal dismissed the claim on 21 March 2008. An appeal by case stated to the Court of Appeal was also dismissed on 6 May 2009. The essence of applicant's claim is that he lost his case because of victimisation on grounds of race by these defendants.

[3] On 9 June 2008 the applicant issued a writ against the Equality Commission claiming damages for unlawful discrimination and victimisation contrary to the Race Relations (Northern Ireland) Order 1997 and for religious and/or political discrimination contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998. The thrust of the applicant's complaint was that he was victimised in that there was a lack of support for his claim against the Association of University Teachers which was motivated by racism within the commission.

The Relevant Statutory Provisions

[4] The applicant's claim under the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order") is based on Article 21 contained within Part III of the Order.

> "21. - (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services-
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> (a) by refusing or deliberately omitting to provide him with any of them; or
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> (b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section."

Article 54 of the 1997 Order prescribes the nature of such proceedings and how they may be commenced.

> "54. - (1) A claim by any person ("the claimant") that another person ("the respondent")-

(a) has committed an act against the claimant which is unlawful by virtue of Part III …

may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.

(2) Proceedings under paragraph (1) shall be brought only in a county court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 51(1), would be obtainable in the High Court."

[5] Article 28 in Part IV of the Fair Employment and Treatment (Northern Ireland) Order 1978 provides the basis for the claim under that statute.

"28. - (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services-

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section. "

Article 40 of the 1998 Order provides for the commencement of proceedings.

"40. - (1) A claim by any person ("the claimant") that another person ("the respondent")-

(a) has committed an act against the claimant which is unlawful by virtue of any provision of Part IV ….

may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.

> (2) Proceedings under paragraph (1) shall be brought only in a county court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 37, would be obtainable in the High Court."

[6] The jurisdiction of the High Court is found in section 16 of the Judicature (Northern Ireland) Act 1978.

> "16 General jurisdiction of the High Court.
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> …(2) There shall, subject to the provisions of this Act, be exercisable by the High Court—
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> (a) all such jurisdiction as was heretofore capable of being exercised by the High Court of Justice in Northern Ireland;
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> (b) such other jurisdiction as is conferred by this Act or as may from time to time be conferred on the High Court by any subsequent statutory provision.
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> (3) The jurisdiction vested in the High Court shall, save as provided by this Act, include the jurisdiction heretofore capable of being exercised by the High Court of Justice in Northern Ireland or by any division or judge or officer thereof in pursuance of any statutory provision, prerogative, law or custom and also all ministerial and other powers, duties and authorities incident to any and every part of the jurisdiction so vested."

The history of the proceedings

[7] In each case the defendants issued a summons seeking an order striking out the applicant's claims on the grounds that the High Court had no jurisdiction to deal with the matters. The defendant submitted that the statutory torts on which the applicant's causes of action were founded did not come into existence until 1997 and 1998. The High Court did not, therefore, have any pre-existing jurisdiction. No jurisdiction has subsequently been conferred. The statutes are clear that such proceedings may only be commenced in a county court.

[8] The applicant argued that he had issued proceedings in the High Court because he was advised by officers in the Equality Commission that as his claim was

for more than £15,000 it exceeded the monetary jurisdiction of the County Court. If correct that might be relevant to the issue of extension of time for issue of the proceedings in the County Court but there is no dispute about the fact that the County Court can deal with such claims without monetary limitation.

[9] The second point made by the applicant was that in the second action an unconditional appearance had been entered thereby submitting to the procedural jurisdiction of the High Court. The Master concluded that an unconditional appearance does not waive a substantive defence that the court has no jurisdiction to hear the matter (see Wilkinson v Banking Corp [1948] 1 KB 721).

[10] The third argument raised by the applicant concerned provisions for costs made in County Court (Amendment) Rules (Northern Ireland) 2006 providing for increased costs where the value of the claim exceeded £15,000. The Master rejected this argument as entirely misconceived because it had nothing to do with the issue of jurisdiction.

[11] Finally the Master considered whether the issue of the proceedings in the High Court might be considered an irregularity or whether the issue of the proceedings could be saved under the inherent jurisdiction of the High Court. He concluded that the inherent jurisdiction could only be available where the proceedings in the first place were within the jurisdiction of the High Court. In this case he concluded that exclusive jurisdiction had been conferred by statute on the County Court. He accordingly struck out the claims delivering a written judgment on 14 March 2011.

[12] The applicant lodged an appeal which was stamped on 12 April 2011. Although the appeal is out of time no issue appears to have been taken with that and the parties and Gillen J proceeded on the basis that the time for appeal had been extended. On 23 June 2011 the appeal was fixed for hearing on 28 October 2011. On 14 October 2011 an e-mail was received on behalf of the applicant indicating that he was suffering from stress and anxiety arising from the illness of his grandmother who lived in India and who subsequently died later that month. The case was relisted for 18 November 2011 but as a result of a further e-mail on behalf of the applicant dated 25 October 2011 it was then fixed for 16 December 2011. The applicant then sought a date after 16 March 2012 as a result of which the case was fixed for 20 March 2012. That date did not suit the defendants as a result of which the court finally fixed the hearing for 9 May 2012.

[13] Shortly after midday on 4 May 2012 solicitors acting on behalf of the IT and FET sent an e-mail to the court office copied to the applicant seeking confirmation that he would attend the hearing of the appeal on Wednesday 9 May 2012. At 10:15 PM on Monday 7 May 2012 the applicant sent an e-mail enclosing two medical certificates and sought an adjournment to 30 May 2012. The first medical certificate was dated 26 February 2012 and was obtained while the applicant was in India. The

medical indicated that he was suffering from muscular weakness and joint and limb pains. He was suffering from pyrexia and was administered an antimalarial drug. He had been under treatment since 31 January 2012 apparently for a period of two months. At the time of the report he was considered unfit to travel but was expected to recover in 4 to 6 weeks. That should have left him fit to travel sometime during the first half of April. He returned to the United Kingdom from India on 27 April 2012. The second medical report is handwritten and dated 4 May 2012. It merely records that the applicant had generalised weakness and systemic illness and was under investigation. The report asserted that he was not fit for travel for the next six weeks although the applicant himself was contending for an adjournment to 30 May 2012. There had been an earlier email dated 30 December 2011 from Dr D' Silva stating that the applicant was unwell as a result of an overdose of chloroquine treatment for malaria. As a result of that email Gillen J directed on 11 January 2012 that any application to adjourn the appeal on health grounds must be accompanied by appropriate medical evidence.

[14] The defendants objected to the adjournment on the basis that the medical evidence was entirely unsatisfactory. It had come at a very late stage. The first medical report provided no basis for the failure of the applicant to proceed on 9 May 2012. There was considerable doubt about the accuracy of the second report given that the applicant himself was proposing an adjournment to 30 May 2012. The case had already been adjourned for lengthy periods because the applicant had been out of the jurisdiction. That was no satisfactory reason for his failure to pursue his appeal on the appointed day.

[15] The case was listed before Higgins LJ on 9 May 2012. He considered the medical evidence and the judgment of the Master. He concluded that the medical evidence was entirely unsatisfactory and failed to demonstrate why the appellant was not present to pursue this appeal. He noted the reasoning of the Master in finding that the High Court did not have jurisdiction to hear the statutory tort. He dismissed the appeal but ordered that the dismissal should not take effect for a further seven days to allow the applicant to adduce oral medical evidence as to why he was unfit. No such evidence was adduced as a result of which the dismissals took effect.

[16] On 10 October 2012 the applicant applied for leave to appeal to the Court of Appeal. Higgins LJ indicated that the test to be applied on an application for leave was whether or not there was an arguable claim with some prospect of success. He concluded that there was no merit in the original appeal from the Master and because the application was without substance he refused the application for leave.

[17] By a notice of appeal dated 18 November 2012 and stamped on 13 February 2013 the applicant sought permission to appeal from this court. In his notice he complained first that Higgins LJ should have recused himself because of unresolved complaints of bias against him made by the applicant as a result of earlier

proceedings. He claimed that Higgins LJ had not looked at him during the hearing and had asked the defendant's counsel to proceed rather than asking the applicant to advance his application for permission to appeal. He complained that the reference to the need for oral evidence was ambiguous and submitted that the judge should have considered his additional GP note dated 17 May 2012. In a case of doubt the court should in any event consider a further short adjournment for enquiries. Finally he contended that it was open to the High Court to transfer the case to the County Court.

[18] In his written submission the applicant developed the bias argument. Higgins LJ sat in the appeal by the applicant against the tribunal decision dismissing his claim against the Association of University Teachers. The applicant indicated that he made an application for his recusal but this was unsuccessful. He also made a similar complaint against Kerr LCJ. He then appealed the Court of Appeal decision to the Supreme Court. He stated that he also reported this complaint to the Office for Judicial Complaints. That Office has no jurisdiction to deal with complaints concerning Northern Ireland and could not, therefore, have considered any such complaint. The applicant's application to the Supreme Court was unsuccessful.

[19] The applicant also contended that on 20 February 2009 the Council for Ethnic Minority made a formal complaint of unprofessional conduct and racial and religious bias against the Court of Appeal panel of which Higgins LJ was a member. This appears to have been dealt with within the context of the proceedings when the recusal application was rejected. The applicant continues to contend that the judge was predisposed against him.

[20] He also reviewed the medical evidence. He contended that there were no deficiencies in the medical evidence. The order made on 9 May 2012 indicated that the dismissal would be stayed for a period of one week to allow oral evidence to be given to the satisfaction of the court that the applicant suffered from an illness which prevented him from travelling to the court to prosecute the appeals. The applicant contended that this direction was ambiguous. He pointed out that he had provided a letter from Dr D'Silva dated 17 May 2012. In that report the doctor provided a history of visiting the applicant in India in early 2012. He noted that he had been referred to his GP in London for further investigations. He stated that he had seen the applicant a couple of weeks before the date of the note and found him still severely weak and in a distressed condition.

[21] Finally the applicant indicated that Higgins LJ had not paid sufficient attention to the merits of this application. Although his written submission did not provide any detail as to the basis for the contention that the Master had erred in his oral submissions the applicant contended that the High Court ought to have remitted the matter to the County Court.

[22] The defendants maintained that the statute was clear in providing jurisdiction only to the County Court. The High Court had no jurisdiction to deal with the matter and consequently had no jurisdiction to remit the case. The Master's approach to the issue of jurisdiction was impeccable.

Consideration

[23] The test for leave to appeal is whether there is an arguable case with a reasonable prospect of success or some other compelling reason why leave should be given (see Ewing v Times Newspapers [2013] NICA 74 at paragraph 17). The parties accept that exclusive jurisdiction for the commencement and hearing of these proceedings has been given to the County Court. Where by statute exclusive jurisdiction has been given to the County Court the High Court cannot subsequently assert jurisdiction.

[24] The applicant seeks to avoid the consequences of his error in commencing the proceedings in the wrong jurisdiction by arguing that the High Court can remit the proceeding to the County Court. The power to remit is contained in section 31 of the Judicature (Northern Ireland) Act 1978.

> "31 Remittal and removal of proceedings.
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> (1) The High Court may in accordance with rules of court at any stage remit to a county court the whole or any part of any civil proceedings to which this subsection applies if—
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> (a) the parties consent to the remittal thereof;
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> (b) the court is satisfied upon the application of any party to proceedings involving an unliquidated claim that the full amount of that claim is likely to be within the monetary limit of the jurisdiction of the county court;
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> (c) the court is satisfied, whether upon the application of any party or otherwise, that the subject matter of the proceedings (not being an unliquidated claim) is or is likely to be within the limits of the jurisdiction of the county court; or
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> (d) the claimant abandons the right to recover any amount in excess of the monetary limit of the jurisdiction of the county court,

> and in any such case the court is of the opinion that in all the circumstances the proceedings may properly be heard and determined in the county court.
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> (2) Subsection (1) applies to civil proceedings commenced in the High Court of a kind which the county court would, apart from any limitation by reason of amount or value or annual value, have jurisdiction to hear and determine if commenced in that court."

[25] The difficulty with this argument is that the civil proceedings to which reference is made in section 31(1) are civil proceedings in respect of which the High Court has jurisdiction. If the High Court does not have jurisdiction it has no power to make any Order other than an Order striking the proceedings out. In our view the Master's judgment on that issue is correct. We do not consider the submission advanced by the applicant arguable.

[26] Even if there was power to remit we consider that this is a case in which it should not be exercised. Both the 1997 Order and the 1998 Order make specific provision for a six month time limit for the issue of proceedings in the County Court together with a just and equitable jurisdiction to extend that time (see Article 65(2) and 65(7) of the 1997 Order and Article 46(2) and 46(5) of the 1998 Order). If the applicant wishes to pursue these proceedings he can only do so by persuading the County Court that it should extend time on just and equitable principles.

[27] We are, therefore, entirely satisfied that there is no arguable case with a reasonable prospect of success. We consider, however, that we should deal with the submissions on bias in case it should be argued that in some way that provided a compelling reason for giving leave. There is no real dispute about the relevant legal principles. We are content to accept the formulation by Lord Hope in Porter v Magill [2002] 2 AC 357 relied upon by the appellant that the test is whether a fair-minded and impartial observer would conclude that there was a real possibility or a real danger that the tribunal was biased. It is implicit in that test that the fair-minded observer is informed.

[28] We also accept that there is authority to support the view that where a judge is the subject of an unresolved complaint it is inappropriate for the judge to deal with any outstanding case in respect of the complainant (see Breeze Brenton Solicitors v Weddell EAT 18 May 2004). Previous criticism of a party's conduct in an earlier case does not of itself, however, give rise to the perception of bias (see Lodick v Southwark LBC [2004] EWCA 306). Dissatisfaction with judicial conduct of a case may arise in two ways; it may be concerned with the judicial decision making in the case or it may be because of some other conduct on the part of the judge. If the

former it is dealt with through the hearing and appeal process. Otherwise it is dealt with through the judicial complaints process.

[29] The substance of the complaint in this case relates to the hearing of the applicant's appeal in 2009. That led to an application to recuse which was rejected in the course of the hearing. That was, therefore, a judicial decision which was duly appealed unsuccessfully to the Supreme Court. The applicant also asserts that he made a complaint to the Office of Judicial Complaints. We have no reason to doubt his assertion although we have received no correspondence in respect of that complaint. The difficulty is, however, that the Office of Judicial Complaints has no role in respect of judicial complaints in this jurisdiction. There is, therefore, no outstanding, unresolved complaint against Higgins LJ.

[30] The final issue is the suggestion that Higgins LJ erred in some way in refusing to adjourn the proceedings on 9 May 2012. We consider that there is no basis for that assertion. The medical evidence was plainly entirely unsatisfactory for the reasons we have set out. The court gave the applicant an opportunity to make representations. He did so by adducing a further medical on 17 May but it did not advance his position. The applicant had been given every appropriate accommodation.

Conclusion

[31] For the reasons given we dismiss this application for leave to appeal.