Neutral Citation no. [2003] NIQB 29 | *Ref:* **KERC3914**

Judgment: approved by the Court for handing down | *Delivered:* **30-4-03**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ANN MARY McKEVITT

FOR JUDICIAL REVIEW

KERR J

Introduction

[1] By this application Miss Ann Mary McKevitt challenges a decision of the Fair Employment Tribunal to order that she provide particulars in reply to a notice issued by respondents to complaints made by the applicant that are currently pending before the tribunal.

Background

[2] The applicant has seventeen complaints against a total of eleven respondents including DHSS. All respondents apart from one are represented by Mr Noel Kelly of the Departmental Solicitor's Office. Mr McMullan, solicitor, represented the remaining respondent.

[3] At a hearing before the Tribunal on 24 April 2001 the applicant's then solicitor, a Mr Vernon, agreed to provide replies to notices for particulars that had been served by the respondents. A directions hearing was then set for 26 June 2001.

[4] On 1 June 2001 Miss McKevitt wrote to the office of the Tribunals to say that Mr Vernon no longer acted for her. Some short time before this she had written to request a postponement of the directions hearing and for an extension of time in which to provide the reply to the notice for further and better particulars. She was informed that the directions hearing would have to proceed on 26 June 2001. On 6 June 2001 she replied stating that she would provide replies to the respondents' notice by 12 June 2001.

[5] On 7 June 2001 the applicant wrote again to the office of the Tribunal asking that the respondents be ordered to furnish discovery and further particulars. She was informed that these requests would be dealt with at the hearing on 26 June 2001. Copies of the applicant's replies to the respondents' notice for particulars were sent to the office by letter of 8 June 2001.

[6] At the hearing on 26 June 2001 the applicant was not represented. For the respondents Mr Kelly submitted that the replies that the applicant had provided to the notice for particulars were deficient in a number of areas. The chairman, Miss McBride, described what happened after Mr Kelly had made his submissions in the following paragraphs of her first affidavit: -

> "6. At the conclusion of Mr Kelly's submissions and those of Mr McMullan I addressed the applicant.
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> 7. As I had the applicant's replies beforehand as these had been provided by letter of 8 June 2001 … I had had an opportunity to consider these prior to the hearing. From these it was evident to me that the applicant was willing and indeed was eager to respond but that she may not have grasped the purpose of particulars and the methodology required for effective response to the requests made.
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> 8. Accordingly, and in view of the applicant being unrepresented and of the informal nature of the proceedings, at this juncture I explained to the applicant in detail what the purpose of particulars were (*sic*), namely to define the case which the respondents had to meet, and the need for the applicant to provide a clear response. I offered the applicant advice as to how she should go about responding to the request made as elucidated by the respondents' submissions. My object in dealing with the matter I this way was not in any way to inhibit the applicant's ability to respond but was to assist her in relation to the issue of particulars. I then went through all of the complaints with her and indicated to her where sufficient particulars had been provided and where not and why in the latter case further clarification was needed. At the end of this

> process my recollection is that I asked the applicant whether she understood the process and whether she was prepared to provide the particulars sought and to this she replied that she was but that to do so she would require time. I indicated to her that I would provide time for her to reply especially given the number of complaints involved. I said in particular that I would give her 12 weeks, that is, up to 24 September 2001 and I told her that if she could not comply with that timetable she could apply to me for more time. … The applicant indicated to me that this was acceptable to her. In the course of the hearing the applicant appeared to listen and understand what I was saying and at no stage did I speak across her or inhibit or prevent her from contributing. When the applicant did contribute she appeared content with what I was doing and raised no objection or otherwise indicated that she considered that anything unfair to her was occurring.
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> …
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> 11. I accept that in the course of the hearing of 26 June 2001 I did not in a formal way invite submissions from the applicant as would often happen in other contexts. …"

The arguments

[7] For the applicant Mr Treacy QC submitted that the chairman had clearly decided that she was going to make an order in favour of the respondents before she addressed the applicant. She did not give the applicant the opportunity to make submissions before informing her as to how she should go about replying to the notice for particulars. This was, Mr Treacy said, procedurally unfair. The applicant was entitled to be heard before any decision on the application by the respondents was made – particularly because she was a personal litigant.

[8] Mr Maguire for the Tribunal argued that, when viewed in context, the chairman's approach was unimpeachable. He pointed out that the applicant's solicitor had agreed at an earlier hearing to supply answers to the notice for further and better particulars. The hearing before the Tribunal on 26 June 2001 had a considerable case management function. The rules of procedure for Tribunals emphasised the need for informality and highlighted the fact that the Tribunal was master of its own procedure and could conduct the hearing in any manner it considered appropriate. The applicant had had an

opportunity to oppose the grant of the order sought but had focussed on the time that she would require to answer rather than on any resistance to the making of the order. Her subsequent contact with the Tribunal did not betray any concern that she had been denied the chance to oppose the making of the order. On the contrary Miss McKevitt was preoccupied with securing sufficient time in which to make the replies.

The requirements of fairness

[9] It is well established that the requirements of fairness will depend on the context in which a particular decision is made or a course is followed – see for instance *R v Secretary of State ex parte Doody* [1994] AC 531, 560 *per* Lord Mustill. It is therefore relevant to have regard to the informality of the tribunal hearing; the circumstance that Miss McKevitt's solicitors had previously indicated that replies to the notice would be provided; that she did not appear unwilling to provide the replies; and that the applicant did not raise any objection to the procedure adopted by the chairman until the judicial review challenge was made.

[10] It is also highly relevant, in my opinion, that the applicant was unrepresented at the Tribunal hearing. In those circumstances it was particularly important that she was given the opportunity to oppose the making of the order. One can sympathise with the chairman who was faced with a substantial array of complaints covering a wide variety of incidents; moreover she had not received any intimation that there was an objection to providing the replies to the notice but I am satisfied that the only proper course was to invite the applicant to make such submissions as she wished in response to the application for an order compelling replies.

[11] The suggestion that the applicant had the opportunity to voice her opposition to the making of the order and chose not to avail of it must be viewed in light of her position as an unrepresented party. Miss McBride had listened to a long submission from the representatives of the respondents and, according to her own account, had moved directly to an explanation of what was required in order to provide satisfactory replies. To an unrepresented applicant it must have appeared that the issue of *whether* replies would be ordered was closed. I am satisfied that she should have been told that she was entitled to make submissions opposing the application made by the respondents.

Discretion

[12] It was suggested that the applicant had failed to demonstrate that she would have been able to put forward any convincing argument that the order should not be made. This may be so but I am far from persuaded that it is clear that no modification of the Tribunal's order would have been achieved if

she had been allowed to make submissions. The applicant cannot be denied relief on that account. The court's discretion to refuse judicial review could only be exercised if it was clear that any submission made by the applicant would inevitably have to be rejected. That is not the position here.

Conclusions

[13] I have concluded that the applicant ought to have been informed that she was entitled to and should have been allowed to make submissions opposing the grant of the order sought by the respondents. This did not happen and the decision of the Tribunal must therefore be quashed.

[14] It is right that I should acknowledge and commend the entirely proper way in which the chairman of the Tribunal dealt with this matter in affidavit. She openly accepted that she had not invited submissions from the applicant and this admission was critical to the applicant's success in her judicial review challenge.