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(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 CLANMIL HOUSING FOR JUDICIAL REVIEW

KERR J

[1] Clanmil Housing is a housing association which provides sheltered dwelling accommodation throughout Northern Ireland. By this application it seeks judicial review of the refusal by an industrial tribunal to state a case for the opinion of the Court of Appeal.

[2] Clanmil was the respondent to an application before the industrial tribunal by Mark Madden. Mr Madden complained that he had been the subject of unlawful discrimination and victimisation by Clanmil Housing and a number of its employees in relation to his application for employment as a resident scheme co-ordinator at Clanmil's premises at Henderson Court, Holy wood, County Down. The tribunal found that he had been discriminated against and in a decision of 15 March 2002 awarded £4500 in compensation for the injury to Mr Madden's feelings. Clanmil served a requisition on the chairman of the tribunal on 22 April 2002 asking that the tribunal state a case for the opinion of the Court of Appeal. By a decision of 25 September 2002 the tribunal refused to state a case.

[3] The requisition to state a case contained eight separate questions. I shall deal with each in turn. The questions are as follows:-

1. In light of the fact that the respondents/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 applicant/respondent was "the only candidate with relevant experience"?

2. In light of the fact that there was unchallenged evidence providing explanations for a number of changes to the markings, [this is a reference to the marks given by each of the panel members to each of the candidates] and in the absence of any finding of fact showing how the changes disadvantaged the applicant/respondent on the ground of sex, was the industrial tribunal's decision finding of fact that he was disadvantaged on the ground of sex wrong in law and was it a conclusion which no reasonable industrial tribunal could have reached?

3. Did the industrial tribunal err in law by deciding that the applicant/respondent had been discriminated against on the ground of sex when it failed to determine that he was the best candidate for the job?

4. Did the industrial tribunal err in law and reach a conclusion that no reasonable industrial tribunal could have reached by failing to have regard to the applicant's 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 [another candidate for the job that Mr Madden had applied for] to Blessington Court [a different job within the same organisation] and Ms Stevenson [another candidate] to Greenville Court [another post within the Clanmil organisation]?

5. 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 applicant/respondent on the ground of sex?

6. In the absence of any findings of fact showing how the applicant/respondent was less favourably treated by the appointments procedure, did the industrial tribunal err in law or reach a decision which no reasonable tribunal could have reached in concluding that the applicant/respondent had been unlawfully discriminated against on the ground of sex contrary to the Sex Discrimination (Northern Ireland) Order 1976?

7. Did the industrial tribunal err in law or reach a decision which no reasonable industrial tribunal could have reached in inferring that

there was discrimination on the ground of sex because one member of the interview panel accepted that she had made remarks about which the applicant/respondent later complained and that the issues raised by him would be addressed at further training for panel members?

8. In light of all the evidence, oral and written, did the industrial tribunal err in law in deciding that the applicant/respondent had been discriminated against on the ground of sex by not being appointed to a position at Henderson Court?

(1) The previous experience of the candidates

[4] The advertisement for the post of resident scheme co-ordinator was placed in the Belfast Telegraph and stated that applicants should have "previous experience in a caring environment". This was reflected in the interview assessment forms that the panel members completed on each candidate. The first question to be asked of the candidate was "Please tell us about your experience and in what way it will enable you to carry out the duties of scheme co-ordinator". The 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.

[5] The successful candidate was awarded five marks for her experience of working with elderly people but no marks in the sheltered housing section. By contrast Mr Madden was awarded three marks by one panel member for his work with older people and four for his experience in sheltered housing. The other panel member also awarded a total of seven marks broken down as between the two components five and two respectively.

[6] The tribunal dealt with the marks awarded for previous experience in the following section of its decision: -

> "… the tribunal noted that question number 1 related to past experience and how it would enable them to carry out their duties as scheme co-ordinator. The successful candidate who had n previous experience in sheltered housing scored 5 from both interviewers, as did the first reserve candidate who also had no experience. Both of these candidates had some nursing experience but it was admitted by the respondents that nursing skills were not required in the posts advertised. Two of the other female candidates who also did not have experience of working in sheltered accommodation scored 8 and 6 and 8 and 7

> respectively whereas the applicant who had 3 years' experience in sheltered accommodation was only given 7 by each interviewer. If an objective test was to be applied to this question the applicant would appear to have merited a higher mark than any other candidate as he was the only one with relevant experience."

[7] The two other candidates referred to in this passage from the tribunal's decision were Mrs Beth Snodgrass and Ms Dana McBeth. Mrs Snodgrass had 15 years experience of working with the elderly and had worked in a FOLD housing scheme (which is sheltered housing) as a home help. Ms McBeth also had 15 years experience of working with the elderly and had provided care in sheltered housing also. Mr Madden had 3 years experience working with the elderly and had carried out residential work with adolescents. One panel member gave him 2 marks for his work with the elderly and he received 3 for this from the other panel member. But they gave him 5 marks and 4 marks respectively for his experience in sheltered housing.

[8] The first question in the requisition sought to challenge the tribunal's findings on the basis that they were factually incorrect in suggesting that Mr Madden was the only candidate with relevant experience and on the basis that the tribunal had failed to appreciate the significance of the marking system. In its reply to the first requisition the tribunal stated: -

> "This is a question of fact and does not raise a valid question of law. The post advertised was for a resident scheme co-ordinator in Henderson Court, Belfast. The tribunal accepted that candidates should have (inter alia) previous experience in a caring environment. The successful candidate had at the date of her application been working in the rate collection agency and prior to that had been involved in general administration in RUC headquarters for the previous 7 years whereas the respondent's experience over the past 3 years was in a post similar to that being advertised and he also had previous experience in connection with the social services. The tribunal concluded the respondent had more relevant experience."

[9] This passage fails to acknowledge the tribunal's error in suggesting that Mr Madden was the only candidate with relevant experience. It also fails to recognise the true significance of the marking system. The successful applicant *had* nursing experience. The panel members were required to give

marks for those who had been employed in a caring environment. They could not have failed to give the successful candidate marks for that experience. The fact that nursing experience was not required for the post could not alter the requirement that marks had to be awarded for experience of working in a caring environment and both the successful candidate and the runner-up had such experience. It was required of the panel members and inevitable if they were performing their task correctly that they would award marks for that experience.

(2) The changes to the markings

[10] In its decision the tribunal dealt with the changes that the panel members had made to the scores allocated to Mr Madden as follows: -

> "The applicant referred the tribunal to specific markings by the interviewers in respect of each of the candidates and in particular the successful and first reserve candidates and claimed that scores were altered in order to benefit Ms Hawthorn and Ms Stevenson. He contended that if the scoring had not been changed the successful candidate would have scored 93 and he would have had the same mark as the first reserve at 92.
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> …
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> The tribunal expresses concern regarding a number of changes made to the scoring and in particular to the applicant's score which was always changed downwards.
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> …
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> The tribunal was also concerned regarding a number of changes in the markings which culminated in the applicant being disadvantaged."

[11] The requisition on this issue sought to challenge the tribunal's failure to deal with the explanation offered by the panel members for the changes that they had made to the marks. They had explained that they had taken notes of answers made by each candidate and marked the candidates immediately on hearing the answers. At the end of each interview the marks were reviewed in order to ensure that they were being awarded in a satisfactory and consistent fashion. The tribunal did not refer to this evidence in its decision. The requisition also challenged the way in which the tribunal appeared to equate the reduction in marks with an unjustified disadvantage being cast on

Mr Madden. The mere fact that marks were deducted does not, of and in itself, establish that he was disadvantaged in that sense.

[12] The tribunal dealt with this requisition as follows: -

> "This question is likewise one of fact and does not raise a valid question of law. The respondent did challenge the markings in his own evidence and in his cross-examination of Ms Shanks. The respondent contended that if proper consideration had been given to his experience and markings had not been changed, he should have been successful. He contended he had not been properly assessed in Questions 1 and 11. It is not for the tribunal to do its own assessment but the tribunal accepted if the marks had not been changed he could have been first reserve, the changing of the marks clearly disadvantaged him and benefited the two female candidates placed ahead of him."

[13] It is unfortunate that the tribunal did not deal expressly with the evidence given to explain why the marks were changed but it is plainly implicit in the passages set out above that the tribunal, as it was entitled to do, rejected the evidence given by the panel members as to why they changed the marks. Again, it is unfortunate that this was not made explicitly clear. That omission can create the impression that it was the tribunal's view that the mere reduction of the marks (irrespective of the reasons for the reduction) amounted to discrimination. I am satisfied that that was not in fact the case.

(3) The best candidate?

[14] The tribunal disavowed any decision on whether Mr Madden was the best candidate for the post. On this issue the tribunal said: -

> "The tribunal were of the unanimous opinion that the applicant had been discriminated on the grounds of sex.
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> The applicant did not claim that he had suffered financial loss by not being appointed as he was in a similar post in England but he did contend that he had suffered considerably by the failure of the respondents to appoint him."

[15] Mr Wolfe (who appeared for Clanmil) argued that this reasoning could only be relevant if the tribunal had concluded that the applicant was in fact the best candidate for the post. How, otherwise, would the question of the applicant's entitlement to financial loss arise? He accepted, however, that it would have been open to the tribunal (provided that the necessary evidence was present) to conclude that the applicant had been discriminated against under article 8 (1) (a) of the Sex Discrimination Order (Northern Ireland) 1976 which provides: -

> "8. - (1) It is unlawful for a person, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a [man]-
>
> (a) in the arrangements he makes for the purpose of determining who should be offered that employment …"

Thus, Mr Wolfe accepted that if the tribunal had concluded that Mr Madden had been discriminated against because of the arrangements put in place by Clanmil, provided there was evidence to support that claim, no challenge to the correctness of that decision would lie. His argument was that the tribunal must have become confused between its original disavowal of any attempt to decide that Mr Madden was the best candidate and its examination of the question whether any financial loss accrued since the latter question was predicated on it being shown that Mr Madden should have been appointed to the post.

[16] Again, the wording of the tribunal's decision is perhaps less than fortunate. It is not clear why it was felt necessary to refer to the question of financial loss. The reaction of the tribunal to the requisition on this point is perhaps illuminating. They said: -

> "This question again raises a question of fact and does not raise a valid question of law. The tribunal do not accept that it was necessary for it to determine that the respondent was the best candidate in order to conclude that he was discriminated against. The tribunal accepted the respondent's contentions that the interviewing process and marking system discriminated against him. He was the only male candidate, he had the most closely related experience for the post and satisfied all the criteria for the post. The tribunal was satisfied that if proper weight had been given to his experience and the markings had not been altered he should have obtained higher markings

> than he did. The respondent was marked higher than two female candidates, both of whom were given posts they had not applied for."

[17] It is clear from this passage that the tribunal did not decide that Mr Madden was the best candidate. It is also tolerably clear (although it might have been expressed rather more forthrightly) that the tribunal based its decision that Mr Madden had been unlawfully discriminated against in the arrangements that Clanmil had made for the interview of candidates. As Mr Wolfe properly accepted, this was a conclusion open to them on the evidence.

(4) The appointment of other candidates to different positions

[18] The tribunal dealt with this aspect of the case in the following passage of its decision: -

> "The tribunal had before it a document which showed that the interviews for the post in Henderson Court were held on 10 May and 12 May 2000. Ms da Costa and Ms McBeth were interviewed on 10 May, Ms Stevenson, Ms Hawthorne, Mr Madden and Ms Snodgrass were interviewed on 12 May. The interview assessment forms appeared to relate to appointments in other schemes, Mrs McBeth contained (*sic*) a reference to Greenville Court and Ms Snodgrass a reference to Somme Park and Ms da Costa a reference to Greenville Court. The tribunal sought an explanation and were informed that Ms da Costa and Ms McBeth were interviewed on 10 May for Greenville Court and their scoring at that interview was used to place them in order of merit for the Henderson Court job, for which they had also applied. This explanation may have been satisfactory but for the fact that the interviewing panel for Greenville Court was not constituted in the same manner as that for Henderson Court. In addition to Ms Shanks and Ms Fearon and Ms Roisin Omokere, housing officer for Greenville Court attended and scored the candidates. Her marks were discounted in respect of Ms da Costa and Ms McBeth and the scorings given at that interview by Ms Shanks and Ms Fearon were transposed to the scoring frame for Henderson Court."

[9] The requisition on this issue challenged the tribunal's understanding of the system by which those who are runners-up in interviews may be appointed to alternative posts. Ms McBeth had applied for a position at Greenville Court at the same time as she made her application for the post at Henderson Court. Mr Madden had only applied for the Henderson Court post. In a written submission to this court he stated that this was because he had not been aware of the other openings. Be that as it may, the situation that the interviewing panel had to deal with was that Mr Madden had not applied for the other posts.

[10] It was established in evidence that Ms McBeth was the reserve candidate for the post at Greenville Court. The leading candidate could not take up the position because of some difficulties with references and Ms McBeth was therefore offered the post. By the time this offer materialised, however, another more suitable post had become available and Ms McBeth accepted this. In the meantime Ms Stevenson, the runner-up in the Henderson Court competition, was entitled to be awarded the post at Greenville Court after Ms McBeth had rejected it. This entitlement arose because Ms Stevenson was the reserve candidate for Henderson Court. All these permutations were in line with the policy operated by Clanmil in accordance with recognised equal opportunities practice.

[11] 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. In its answer to the requisition on this point the tribunal stated: -

> "The tribunal asked why the respondent had not been considered for any of the other posts the reply had been that he had not made application for those posts. This determination did not apply to either Mrs McBeth or Mrs Stevenson who were appointed to posts for which they had not applied."

Unfortunately, this passage reveals a fundamental misunderstanding on the tribunal's part. 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.

(5) The "contamination" of the interviewing process

[12] The tribunal's response to the requisition on this question was as follows:

> "The tribunal formed the opinion that the interviewing process had been contaminated. It was only during the hearing and on being questioned by the tribunal did it become apparent that two of the candidates had been interviewed for a post in Greenville Court. This panel was made up of three members and the marks for the post of Ms Shanks and Ms Fearon wre then accepted as their markings for the post at Henderson Court notwithstanding the schedule of marking clearly showed the interview related only to Greenville Court. Neither of these candidates scored as highly as the respondent but one of them was offered an appointment on the basis that she was first reserve in the Greenville Court interview. The tribunal was of the opinion that the whole process placed the respondent at a disadvantage and that he had been less favourably treated."

Again, regrettably, this response betrays the tribunal's failure to appreciate the manner in which the interviews were conducted and the effect of the policy referred to above. The tribunal does not explain in what way the contamination occurred nor how that affected the outcome of the interviewing process.

[13] Evidence had been given to the tribunal that those who had applied for the Greenville post had been interviewed in precisely the same manner as for the Henderson post. They were asked the same questions. The only difference was that instead of being interviewed by two, the candidates faced a panel of three interviewers. When the applications of Ms da Costa and Ms McBeth were being considered for the Henderson post, the marks of Ms Omokere were simply subtracted from the total so that only the marks of Ms Fearon and Ms Shanks were taken into account. In these circumstances, it is not easy to discern how contamination could have entered the process.

Questions 6 & 7

[14] Mr Wolfe was disposed to accept (rightly in my opinion) that in light of the tribunal's answers to requisitions 6 & 7 it would be difficult to press the case for an order requiring the tribunal to state a case on these questions.

(8) Was Mr Madden discriminated against on the ground of his gender?

[15] The tribunal's response to the final question raised in the requisition to state a case was cryptic. It was as follows: -

> "This does not raise a question of law. It merely disputes the findings of the tribunal that the respondent had been unlawfully discriminated against."

[16] The question plainly went further than merely disputing the conclusion of the tribunal that there had been discrimination. It was designed to explore and challenge the tribunal's analysis (or the lack of it) that the two elements necessary to support a finding of discrimination were present. It was the applicant's contention that there had been no satisfactory exposition of the reasons that the tribunal had concluded (if, indeed it did) that not only had Mr Madden been less favourably treated but that this was on the ground of sex. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 the House of Lords held that a cogent explanation was normally required for a finding that the less favourable treatment had been meted out on the ground of sex. At paragraph 86 of the report Lord Hutton said: -

> "In my opinion the majority of the tribunal gave no reasons in the first two sentences of the last subparagraph of para 3.13 to show why they considered that the treatment of the appellant was on the ground of her sex, and why their opinion was right and the opinion of the minority member was wrong. The law is clear that an appellate court should not substitute its own opinion for the opinion of the tribunal, and that the decision of a tribunal should not be subjected to a detailed and critical analysis. But the law is also clear that a tribunal must state the reasons which led them to reach their conclusion. A party is entitled to know why he lost. In *Meek v City of Birmingham DC* [1987] IRLR 250 at 251 Bingham LJ stated:
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> > 'It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to

> enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted.' "

[17] The tribunal's reasons for finding that there had been less favourable treatment *on the grounds of sex* are not apparent from its decision. It merely states: -

> "The tribunal were of the unanimous opinion that the applicant had been discriminated against on the grounds of sex."

This conveys nothing as to why they concluded that the less favourable treatment was on the ground of sex.

[18] In *Re Cookstown District Council's application* [1996] NIJB 194 it was held that in order to obtain an order for mandamus directing a tribunal to state a case for the opinion of the Court of Appeal an applicant should be in a position to show that he enjoys at least a reasonable prospect of success in establishing that the tribunal's decision was wrong in law. In the same case the court said at page 208f: -

> "…in order to qualify as a point of law on which the opinion of the Court of Appeal may be sought, any disputed finding on a factual matter should not only be demonstrably wrong but must have influenced the tribunal in a material way to its ultimate conclusion on the allegation of discrimination. Thus a palpably incorrect decision on a question of fact will not warrant an appeal by way of case stated if it played no part whatever in the eventual finding of the tribunal."

[19] In my judgment the tribunal was wrong in concluding that Mr Madden was the only candidate with relevant experience; it was also wrong in its understanding of the true significance of the marking system. I consider that the applicant has at least a reasonable prospect of persuading the Court of Appeal that not only was the tribunal wrong in both these areas but that the error influenced its decision that Mr Madden had been the victim of unlawful discrimination. I will therefore make an order of mandamus directing the

tribunal to state a case for the opinion of the Court of Appeal on the first question raised in the requisition.

[20] As to the second question, as I have said, I am satisfied that the tribunal rejected the explanation given by the panel members for the reduction of the marks awarded to Mr Madden. They were entitled to make that finding. I refuse the application for an order of mandamus in relation to the second question, therefore.

[21] On the third question I am satisfied that the tribunal did not decide that the applicant was the best candidate. Read as a whole, the tribunal's decision makes clear that they concluded that he had been discriminated against by reason of the arrangements that had been put in place for the interview of candidates and the implementation of those arrangements. I am therefore not prepared to accede to the application in respect of this question.

[22] On the fourth question I am satisfied that the tribunal misunderstood the system by which those who were runners-up in interviews may be appointed to other available posts. I consider that there is at least a reasonable prospect that the applicant will succeed in demonstrating that this error played a part in the tribunal's decision that Mr Madden had been discriminated against. I will therefore make an order directing the tribunal to state a case on this question.

[23] For the reasons that I have given I consider that the tribunal misunderstood the evidence relating to the composition of the tribunal and failed to explain the manner in which contamination of the interview process had occurred or how this might have discriminated against Mr Madden. I will make an order in respect of the fifth question on the requisition.

[24] I make no order on questions 6 & 7.

[25] The tribunal has failed to give reasons for finding that Mr Madden had been discriminated on the grounds of sex. In the absence of such reasons their decision is, in my opinion, susceptible of challenge. I will therefore make an order on question 8.