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Judgment: approved by the Court for handing down | *Delivered:* **18/02/09**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEAL BY WAY OF CASE STATED FROM A DECISION OF THE FAIR EMPLOYMENT TRIBUNAL IN ACCORDANCE WITH ARTICLE 90 OF THE FAIR EMPLOYMENT AND TREATMENT (NORTHERN IRELAND) ORDER 1998

AND

ORDER 61 OF THE RULES OF THE SUPREME COURT (NORTHERN IRELAND) 1980

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BETWEEN:

KEVIN CURLEY

Claimant/Respondent;

-and-

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND
and
SUPERINTENDENT MIDDLEMISS

Respondents/Appellants.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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COGHLIN LJ

[1] This is an appeal by way of case stated from the Fair Employment Tribunal ("the Tribunal") delivered on 14 April 2008. The respondents/appellants were represented by Ms Noel McGrenera QC and Mr Jonathan Dunlop while the applicant/respondent is a litigant in person.

Background facts

[2] In 1999 the respondent was a serving officer in the Royal Ulster Constabulary, now the Police Service of Northern Ireland and on 6 August 1999 and Internal Force Message was circulated amongst serving officers inviting applications for officers to be seconded to Kosovo for a 12 month period of deployment commencing in mid-September 1999. The request for the deployment, which emanated from the United Nations and was co-ordinated by the Home Office, was for a total of 60 officers comprising a superintendent as contingent commander, two inspectors, eight sergeants and forty nine constables with two sergeants and four constables to act as reserves.

[3] One hundred and six officers applied in response to the invitation and a "paper sift" was carried out in August 1999 by the first named appellant. A total of 71 officers, including the respondent, were selected following the paper sift.

[4] The next stage of the selection process was a training course that was to be held at various police venues in Northern Ireland between 27 September and 15 October 1999 to be followed by a week's attendance at the training centre of the Garda Siochana at Templemore, County Tipperary.

[5] The second named appellant, who was then serving as the Deputy Regional Head of CID for the Belfast Region, was selected by the Chief Constable to be the Superintendent in charge of the contingent and on 14 October 1999 the second named appellant decided that the respondent was to be included in the reserve list rather than amongst the 60 officers to be initially deployed. On 14 October 1999 the second named defendant communicated his decision to the officers concerned informing them that only 60 were required by the United Nations although the Chief Constable had confirmed that he was quite prepared to permit all 68 officers to be deployed, including the eight placed on the reserve list. The second named defendant explained that no stigma should be attached to an officer placed on the reserve list and that all officers should complete the course since he had no doubt that the reserves would be deployed before the year ended and, if not, they would be included in the next deployment. The respondent was clearly dissatisfied with being placed on the reserve list and emphasised to the second named appellant his desire to be included among those initially deployed. When the second named appellant reminded him that he had a number of outstanding cases including a number of assaults on the police which were invariably contentious he insisted that they could all be "sorted out" leaving him free to be included. On 15 October 1999 the respondent again spoke to the second named appellant at the canteen at Garnerville training facility. And there was a further discussion about his selection for the reserve list.

[6] On 4 November 1999 the respondent submitted an application to the Tribunal making complaints of victimisation, sexual and religious discrimination. The hearing was conducted before the Tribunal between 8-12, 15-19 and 30-31 October 2007, the 15 and 16 November 2007 and 13 December 2007. On 14 April 2008 the Tribunal delivered its decision unanimously dismissing the respondent's claims of victimisation and sexual discrimination but upholding the claim of direct religious discrimination.

[7] On 21 May 2008 the appellants submitted a requisition to the Tribunal to state a case raising eight questions for the opinion of this court. On 1 October 2008 the Tribunal stated a case helpfully reducing the questions for the opinion of this court to a total of two. These are:

> "(*i*) Whether the Tribunal, on the facts proved or admitted was correct in law in deciding the appellants had not discharged the burden of proof, pursuant to Article 38A of the Fair Employment and Treatment (Northern Ireland) Order 1998?
>
> (*ii*) Whether the Tribunal's decision, on the facts proved or admitted, was a decision which no reasonable Tribunal could have reached and was perverse in law?"

The evidence before the Tribunal

[8] A wide range of issues were canvassed before the Tribunal during a hearing which lasted some 15 days and produced a judgment running to some 44 pages. That judgment was highly critical of the procedure adopted by the second named appellant for the purpose of selecting those who were to be included in the initial deployment and referred to it as having been carried out "in a somewhat informal/ad hoc way" with "no documentation/record properly kept" to demonstrate the basis upon which the assessments had been made. The second named defendant maintained that his decision to place officers on the reserve list had been based upon an assessment of various specific criteria including application scores, sick records, performance on the training course as described by other supervisors, complaints against officers and outstanding court cases. The Tribunal recorded that, in such circumstances, it would have expected to be furnished with proper detailed document/records identifying specific candidates and clearly and transparently recording the assessment of each such candidate against the relevant criteria. The second named appellant was unable to give detailed evidence of the basis upon which the performance of candidates during the training course had been assessed explaining that it came down to a matter of judgment on his part based on his experience. He said that if no

adverse comment had been made about any particular candidate he assessed that candidates performance as "good" and did not further investigate the matter.

[9] The Tribunal recorded that the crucial factor relied upon by the second named appellant as the basis for his decision to include the respondent in the reserve list had been a specific adverse comment that the second named appellant alleged had been made about the respondent's performance during the training course. The comment was that the respondent had been over enthusiastic in relation to the use of handcuffs. The Tribunal described the second named appellant as being "extremely vague" about this comment, being unable to remember the circumstances under which it had been made, and by whom it had been made although he believed that it had been made by one of the trainers and relayed by one of the training inspectors. During his evidence he expressed the view that it had probably been reported by him by Inspector Douglas. The second named appellant explained that, as a result of hearing this comment, he had concerns about the respondent's suitability in the volatile environment of Kosovo and that, as a result, he made enquiries of the Personnel Department in order to discover whether any allegations/complaints had been made by members of the public against the respondent. He said that he was informed by the Personnel Department that there had been complaints/allegations against the respondent by members of the public which related to alleged assaults and incivility. He agreed that he had not obtained any records or other details when making his enquiry. No such enquiries were raised with the Personnel Department about any other participant in the training course and the second named appellant maintained that such action was unnecessary in the absence of a similar adverse comment.

[10] The Tribunal rejected the second named appellant's evidence that he had received an adverse comment about the performance of the respondent during the training course for the following reasons:

(*i*) There was no written record of receiving the comment.

(*ii*) The second named appellant had not included any specific reference to the comment in either his contemporaneous journal or witness statements.

(*iii*) Despite the significance of the comment it had not been mentioned by the second named appellant to the respondent on either 14 or 15 October at times when the respondent had obviously been very anxious to learn as much as possible about the reason for being placed on the reserve list.

(*iv*) The said comment had not been referred to during the subsequent grievance procedure brought by the respondent.

(*v*) The second named appellant had been extremely vague about this aspect of his evidence.

(*vi*) Despite expressing the view that the comment had probably been made by Inspector Douglas, the second named appellant had not called that officer as a witness. In such circumstances, the Tribunal came to the conclusion that Inspector Douglas' evidence would not have supported the second named appellant in accordance with the decision in Lynch v Ministry of Defence [1983] NI 216.

[11] Having rejected the second named appellant's evidence about the alleged adverse comment on the respondent's performance in the training course. The Tribunal concluded that the respondent had established facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the appellants had committed an act of discrimination against the respondent on the grounds of religious belief. In reaching those conclusions the Tribunal relied upon the provisions of Article 38A of the Fair Employment and Treatment (Northern Ireland) Order 1998 (the 1998 Order) and the jurisprudence relating to the interpretation thereof including Igen v Wong [2005] IRLR 258, Laing v Manchester City Council [2006] IRLR 748, Madarassy v Nomura International Plc [2007] IRLR 246, McDonagh and Others v Samuel Tom T/as The Royal Hotel Dungannon [2007] NICA 3 and Arthur v Northern Ireland Housing Executive and SHL (UK) Ltd [2007] NICA 25.

The relevant law

[12] Part III of the 1998 Order prohibits discrimination in the field of employment and Article provides as follows:

> "(1) In this order 'discrimination' means –
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> (*a*) Discrimination on the ground of religious belief or political opinion;
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> (2) The person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this order if –
>
> (*a*) On either of those grounds he treats that other person less favourably than he treats or would treat other persons;"

Article 38A of the 1998 Order which relates to the burden of proof provides as follows:

> "Where on the hearing of a complaint under Article 38, the complainant proved the facts from which the Tribunal court apart from this Article, conclude in the absence of an adequate explanation that the respondent –
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> (*a*) committed an act of unlawful discrimination … against the complainant; or
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> (*b*) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination … against the complainant, the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act."

Conclusions

[13] The appellant's advisors criticised the Tribunal's rejection of the second named appellant's evidence relating to the adverse comment upon a number of grounds. For example, they submitted that it was hardly surprising that the second named appellant had not recorded the comment in the context of the Tribunal's finding that he had generally carried out the selection exercise in an "informal/ad hoc way" without properly keeping any documents or records. They also emphasised the fact that neither the respondent nor the Tribunal had ever directly suggested to the second named appellant that he had fabricated his evidence about the comment and, indeed, that the fact that he had not done so was supported to some extent by the reference at paragraph 5 of the written statement by Chief Superintendent Wilson to the fact that the second named appellant had provided course performance as one of the reasons for placing the respondent on the reserve list. The witness statement made by Chief Inspector, as he then was, Wilson was admitted before the Tribunal as hearsay evidence on behalf of the claimant – see paragraph 3.18 of the Tribunal's decision. They further submitted that the fact that the second named appellant had spoken to the inspectors and trainers about conduct on the training course would have been clear from the second named appellant witness statement and journal entry. The plaintiff's own witness statement confirmed that the second named appellant had told him that he had spoken to and taken into account the comments made by the inspectors responsible for the training course specifically recording that:

> "I asked Superintendent Middlemiss did the directing staff from COT trainers say anything about my performance during training. He replied, 'Yes, it is because of comments made and your Courts list that you are on the reserve list'."

The appellant's advisors also drew the attention of the court to the fact that, apart from the reference to the adverse comment, the Tribunal had been prepared to accept and relied upon every other key point in the second named appellant's evidence.

[14] It is clear from the relevant authorities that the function of this court is limited when reviewing conclusions of facts reached by the Tribunal and that, provided there was some foundation in fact for any inference drawn by a Tribunal the appellate court should not interfere with the decision even though they themselves might have preferred a different inference. As Carswell LCJ, as the then was, observed in Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A [2000] NI 261 at 273:

> "[4] The Court of Appeal which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.
>
> [5] A Tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless –
>
> (*a*) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the Tribunal (Fire Brigade Union v Fraser [1998] IRLR 697 at 699, per Lord Sutherland); or
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> (*b*) the primary facts do not justify the inference or conclusions drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse; Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, per Viscount Simmons at 29 and Lord Radcliffe at 36."

[15] However, this court would wish to emphasis the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim is founded upon allegation of religious discrimination. The need to retain such a focus is particularly important when applying the provisions of Article 38A of the 1998 Order. In both the decision and the case stated the Tribunal recorded that it had taken into account the fact that both Protestants and Catholics were selected for deployment, that both Protestants and Catholics were included in the reserve list and that the second named appellant, who was a Protestant, had previously been married to a Catholic and that his children and grandchildren were Catholic. However, in this context, another finding of fact by the Tribunal which was in our view fundamental was that, prior to the selection process for the reserve list, the second named appellant did not know the respondent – see paragraph 6.4 of the Tribunal's decision and paragraph 3.1(7) of the case stated. Neither the decision nor the case stated contains any reference as to whether, and if so how, the Tribunal gave specific consideration to the basis upon which this complete lack of prior knowledge of the respondent by the second named appellant could be reconciled with an inference of religious discrimination.

[16] In Laing v Manchester City Council [2006] 1519, the case of alleged racial discrimination, Elias P said at paragraph 71:

> "There still seems to be much confusion created by the decision in Igen [2005] ICR 931. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed and act of race discrimination. The shifting and the burden of proof simply recognises that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race."

In the Sergeant A case Carswell LCJ, as he then was, said at page 273:

> "[3] Discrepancies in evidence, weaknesses in procedures, poor record-keeping, failure to follow established administrative processes or unsatisfactory explanations from an employer may all constitute material from which an inference of religious discrimination may legitimately be drawn. But Tribunals should be on their guard against the tendency to assume that every such matter points towards a conclusion of religious discrimination,

> especially where other evidence shows that such a conclusion is improbable on the facts."

[17] In this case the Tribunal purported to follow the guidelines set out in Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332 as approved in the Court of Appeal in England and Wales in Igen v Wong [2005] IRLR 258 and in this jurisdiction in McDonagh and Others v Samuel Tom T/as The Royal Hotel, Dungannon(2007) NICA 3. The approach that it adopted was first to consider in isolation the second named appellant's evidence relating to the adverse comment and, having rejected that evidence, to conclude that the respondent had established facts from which the Tribunal could infer that the appellants had committed an act of discrimination against the respondent, namely, treating unfavourably by comparison with his Protestant comparators by consulting the records of public complaints held by Department B and doing so on the ground of his religion. In our view this was a flawed and over mechanistic approach as a result of which the Tribunal appears to have failed to give consideration to facts of fundamental importance namely that neither the respondent nor his religious persuasion had been known to the second named appellant prior to the selection exercise. At paragraph 4.4 of the original decision in the course of a careful analysis of relevant authorities the Tribunal included the following words from the decision of the Court of Appeal in England and Wales in Madarassy v Nomuri International Plc [2007] IRLR 246:

> "The burden of proof does not shift to the employer simply on the claimant establishing a different in status (eg sex) and a difference in treatment. Those bear facts only indicate a possibility of discrimination. They are not without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. 'Could conclude' in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the

> claimant to prove less favourable treatment, evidence as to whether the comparisons made by the complainant were of like with like as required by Section 5(3), and available evidence of the reasons for the differential treatment …. Although Section 63A(2) involves a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not on the grounds of her sex or pregnancy (in this case religion). Such evidence from the respondent could, if accepted by the Tribunal, be relevant as showing that, contrary to the claimant's allegation of discrimination, there is nothing in the evidence from which the Tribunal could properly infer a prima facie case of discrimination on the prescribed ground."

The Tribunal also referred to the view of Elias J in Laing, quoted with approval by Campbell LJ in the Arthur's case, that it was obligatory for a Tribunal to go through the formal steps set out in Igen in each case. As Lord Nicholls observed in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] NI 174:

> "Sometimes a less favourable treatment issued cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

[18] In relation to the respondent's allegation of sex discrimination the Tribunal correctly applied the observations of Mummery LJ in Madarassy in holding that simply proving unfavourable treatment and a different status, in that context sex, gave rise merely to a possibility of discrimination and was not sufficient to shift the burden of proof. The Tribunal recognised that a similar situation existed in relation to the respondent's claim for religious discrimination insofar as he had established unfavourable treatment and a difference of status, in this context religion, between himself and Constables

R and B but again accepted that those facts alone would not have been sufficient to shift the burden of proof. However, the crucial difference for the Tribunal appears to have been its finding that the evidence of the second named appellant relating to the adverse comment had not been made. At paragraph 7.7 the Tribunal stated that it had no hesitation in concluding that the burden of proof had shifted as a consequence of this finding. In our view that was a flawed approached to the evidence. The evidence about the making of the adverse comment was the rationalisation put forward by the second named appellant for carrying out the enquiries with Department B. The Tribunal found not only that such enquiries had been made by the second name appellant but that such enquiries would have been reasonable and appropriate had the adverse comment been made. In the circumstances we consider that the proper approach for the Tribunal to have adopted would have been to consider that rationalisation in the context of the surrounding evidence and not in isolation in relation to the issue as to why the enquiries with B Department were made about an officer whose identity and religion had been completely unknown prior to and during the selection process. In such circumstances only one inference could reasonably have been drawn, namely, that the enquiries were stimulated by a comment of the nature described by the second named appellant rather than on the ground of the respondent's religion.