Neutral Citation No [2019] NICA 51 | *Ref:* **MOR11079**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **9/10/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JAMES ROBERT PEIFER

Appellant;

-and-

SULLIVAN UPPER SCHOOL

Respondents.

Before: Morgan LCJ and McAlinden J

MORGAN LCJ (delivering the judgment of the court)

[1] This appeal concerns the failure of the appellant to be appointed as a classroom assistant to Sullivan Upper School for which he applied in 2005. He alleges that he was the victim of direct and indirect discrimination by reason of his gender. The tribunal dismissed his claim on 10 December 2018. This is the sixth occasion on which the appellant has brought proceedings before this court arising out of claims for sex discrimination as a result of his applications for employment as a classroom assistant. For ease of reference we set out in the following paragraphs the history of these claims by way of background.

Background

[2] On 18 August 2005 the appellant presented a complaint to the Office of the Industrial and Fair Employment Tribunal that he had been discriminated against in recruitment for the post of special needs classroom assistant by three Education and Library Boards and 10 schools to whom he had made application for some 35 posts. Article 8 contained in Part III of the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order) makes such discrimination unlawful and provides the basis for these claims. All of the applications were made during 2005 and the letters advising him that he had been unsuccessful were received between 20 May 2005 and 17 August 2005. His claim to the industrial tribunal alleges that the letters of rejection

constituted the start of his claim. He contended that he probably should have been appointed on every occasion but considered that he had been discriminated against because he had the impression that only females were allowed to take jobs as classroom assistants. His claim form indicated that the respondents were guilty of direct discrimination but he suspected that there was probably also indirect discrimination.

[3] The appellant complained in particular that the schools, Education and Library Boards and the tribunals before which he has presented his claims were engaged in a conspiracy to prevent him making his claim on indirect discrimination. It appears to be common case that approximately 98% of those employed within the state education system as classroom assistants are female. Criteria for the appointment of classroom assistants had been considered by the Joint Negotiating Council (JNC) which consists of representatives of the Education and Library Boards in Northern Ireland and trade unions. JNC Circular 34 advises that the first criterion is that classroom assistants should be required to hold a recognised qualification. Such a qualification can be obtained through a period of service as a classroom assistant and among the qualifications recognised are a number in relation to early years schooling. Virtually all of those appointed as classroom assistants are appointed on the basis of holding such a qualification and are female although the appellant qualifies for appointment because he holds a teaching qualification. In relation to the posts with which this appeal is concerned the second criterion that was applied was the requirement for 12 months' experience of work as a classroom assistant. The applicant has developed his argument to contend that these criteria together with other aspects of the appointment process demonstrate a mind-set which is designed to secure the appointment of females to these posts.

[4] The industrial tribunal decided to deal with these cases by managing each claim separately in relation to each school. The tribunal dealt with the claims affecting the Western Education and Library Board first. The first claims, therefore, related to the failure of the applicant to obtain appointments as a classroom assistant at Castlederg High School. That claim was dismissed by the tribunal on 28 March 2008. The appellant applied to the Court of Appeal to require the tribunal to state a case. One of the issues in that case concerned the fact that the appellant had not signed his application to the school for the post. The school decided that it should not further consider his application and he was not, therefore, assessed for the post. The respondent suggested that this approach was consistent with the approach that they had taken in a previous competition in 2002. The appellant sought to persuade the tribunal that in that case the respondent had assessed the candidate. The tribunal rejected that argument and the Court of Appeal took the view that it was a conclusion that the tribunal was entitled to reach on the evidence. The appellant was grossly dissatisfied with that outcome.

[5] The principal argument advanced by the appellant in his application for a case stated in respect of the first tribunal decision related to his claim for indirect discrimination. He contended that the two criteria requiring at least a recognised qualification and 12 months' experience as a classroom assistant were clearly to the

detriment of a considerably larger proportion of men than women. He further submitted that the requirement within Article 3(2)(b) of the 1976 Order that he had to show that the criteria had operated to his detriment was contrary to European law and in particular to the terms of Directive 2002/73/EC which did not require a detriment or disadvantage to be established. The Court of Appeal rejected that submission and concluded that there was no question of law in respect of which the tribunal would have had jurisdiction that ought to be considered by that court. The applicant subsequently sought leave to appeal to the House of Lords in respect of that decision and leave was refused by the House of Lords on 9 March 2009.

[6] In respect of the second case against Limavady High School and the Western Education and Library Board five requisitions to state a case were lodged between 28 January 2009 and 29 April 2009 arising from Case Management Discussions. These applications were refused by the Court of Appeal on 2 June 2009 and leave to appeal in respect of them was refused by the Supreme Court on 9 June 2010. In large measure these applications retraced ground in relation to the question of indirect discrimination which had been the subject of the considered judgment of the Court of Appeal in the first case.

[7] The third appeal was concerned with five further requisitions to state a case which were lodged on 7 August 2009, 25 August 2009, 17 September 2009, 7 October 2009 and 29 October 2010 all arising out of Case Management Discussions in preparation for the hearing of the Limavady case. In his application lodged on 7 August 2009 the questions raised by the appellant arose from his contention that he has been the victim of indirect sex discrimination. He raised an issue as to whether domestic law complied with Directive 2002/73/EC and whether the case should be referred to the European Court of Justice (ECJ). In his requisition lodged on 25 August 2009 he again returned to the question of indirect discrimination but in particular raised questions as to the adequacy of discovery by the respondent. This related in particular to classroom assistants who had been appointed on a temporary basis without apparently any open competition. The next requisition was dated 1 October 2009. The appellant again returned to the question of his entitlement to pursue an indirect discrimination case and in particular highlighted what he claimed to be the practice of allowing females to be selected without verifying their qualifications. A further requisition was lodged dated 7 October 2009 in which the appellant claimed that the chairman dealing with his cases was biased because he had been a member of the General Teaching Council for Northern Ireland between 2002 and 2007. The Council is the independent professional body for teachers in Northern Ireland. It is dedicated to enhancing the status of teaching and promoting the highest standards of professional conduct and practice. Those wishing to teach in a grant aided school in Northern Ireland must be registered with the Council. There are 33 members of the Council and the chairman was appointed as one of four appointments by the Department of Education. He resigned from the Council in 2007 when he was appointed a chairman of Industrial Tribunals. The last requisition in connection with the Limavady appeal was dated 29 October 2010. It repeated much of what had been included in previous requisitions and made the point that by restricting discovery in relation to indirect sex discrimination the tribunal chairman

offended the requirements of Rule 17 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 which prohibit the determination of a person's civil rights or obligations by way of Case Management Discussion. In all the circumstances the applicant sought to prevent the full hearing of his second case proceeding on 10 January 2011.

[8] Since all of the applications to state a case arose from Case Management Discussions we declined to state a case on the basis that all of these issues could be revisited during the full hearing of the Limavady case. We rejected the allegation of bias for the reasons set out in our judgment dated 12 October 2011. The appellant sought leave to appeal to the Supreme Court in respect of our decision and this was refused on 23 February 2012.

[9] The hearing of the Limavady case took place on 10 January 2011. The appellant indicated at the outset that he did not intend to participate in the proceedings. He sought an adjournment. He explained that he was processing an appeal of our decision in December 2010 that the case should proceed and was also preparing appeals to the ECHR and the European Commission. He took the view that there had been inadequate discovery and that the Department of Education and the JNC should be joined as respondents as they had developed and promulgated the criteria which he sought to challenge. The adjournment application was opposed on the basis that the respondent's witnesses had come to the hearing and the case was more than five years old. The tribunal decided that the hearing should proceed. It noted that the burden of proving facts from which sex discrimination could be established lay on the appellant and that no such facts had been established. There was no basis for a referral to the ECJ and the application was dismissed.

[10] The appellant appealed against the dismissal of the claim in respect of the Limavady case which was heard on 10 January 2011. The Court of Appeal dismissed the appeal. The date for the hearing had been set by the tribunal on 21 September 2010. That gave the appellant more than three months to prepare. The appellant was not proposing any alternative date for hearing. The application to adjourn had come on the morning of the hearing. The case was more than five years old. The appellant had indicated his intention to persist with his indirect discrimination case despite the views expressed by the Court of Appeal at paragraph 15 of his Castlederg case that such an approach was misconceived. The decision to adjourn was a discretionary decision and the refusal of the adjournment in those circumstances was well within the area of discretionary judgment available to the tribunal even though the effect was to dispose of the appellant's case.

[11] The tribunal next set about dealing with the claims arising from applications to St Patrick's and St Brigid's College Claudy (the Claudy case). Between 23 March 2011 and 6 December 2011 the appellant lodged five appeals in relation to Case Management Discussions concerning these applications and one appeal in relation to the decision of a Pre Hearing Review held on 2 September 2011. The Claudy case came on for hearing on 17 October 2011. The chairman recorded that the appellant gave disjointed evidence consisting of references to other claims, speculation and

legal submissions. He was directed to deal with evidence in relation to his discrimination claim. He stated that he had concentrated on his various appeals and was not in a position to put a reasoned argument in respect of his current claim. The tribunal rose to give the appellant some time to prepare himself but when it returned the appellant was still not in a position to proceed. In light of the fact that the case was now more than six years old the tribunal considered that it should not further delay the case and the appellant indicated that there was no point in continuing. The case was dismissed.

[12] His appeal in respect of that dismissal largely concentrated on the argument that he was the victim of indirect discrimination. This court dealt with that submission between paragraphs [17] and [23]:

> "[17] At the time that the appellant presented these complaints the jurisdiction to do so was contained in Article 63(1) of the Sex Discrimination (Northern Ireland) Order 1976 as amended (the 1976 Order) which provided:
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> '63-(1) A complaint by any person ('the complainant') that another person ("the respondent")
>
> (*a*) has committed an act of discrimination … against the complainant which is unlawful by virtue of Part III … may be presented to an Industrial Tribunal.'
>
> Part III of the 1976 Order dealt with discrimination in employment. It must follow, therefore, that the only complaints with which the tribunals in these cases were concerned were those alleged acts of discrimination committed on or before 18 August 2005, which was the date on which the applications were lodged.
>
> [18] The definition of discrimination in employment at the relevant time was contained in Article 3 of the 1976 Order.
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> > '3 - (2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if –
> >
> > (*a*) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or

(*b*) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –

(*i*) which is such that it would be to the detriment of a considerably larger proportion of women than men,

(*ii*) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(*iii*) which is to her detriment.

(3) Paragraph (2) applies to –

(*a*) Any provision of Part III …'

It is clear from the definition that for indirect discrimination under Article 3(2)(b) the application of the provision, criterion or practice must cause a detriment to the claimant.

[19] The appellant disputes this. He relies on Directive 2002/73/EC which defines indirect discrimination as a situation where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The appellant argues, therefore, that although he satisfied the criteria that were used for the posts for which he applied the fact that less men than women would be likely to satisfy those criteria was sufficient. Since those criteria were applied to him he submits that he is a victim of indirect discrimination without having to demonstrate any particular disadvantage suffered by him.

[20] The date for transposition of Directive 2002/73/EC was 5 October 2005. On 1 October 2005 the 1976 Order was amended to replace the definition of indirect discrimination by substituting the following for Article 3(2)(b):

'(b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but –

(*i*) which puts or would put women at a particular disadvantage when compared with men,

(*ii*) which puts her at that disadvantage, and

(*iii*) which he cannot show to be a proportionate means of achieving a legitimate aim.'

[21] That transposition became the subject of a Reasoned Opinion from the European Commission dated 23 November 2009. The Commission concluded that the requirement in the transposition for actual damage did not reflect the intent of the Directive that hypothetical damage should also be covered. The Commission relied on the decision in the Feryn Case C-54/07 for the conclusion that where candidates were dissuaded from the labour market they were potential victims covered by the Directive. The Commission noted that a requirement that an alleged victim of indirect discrimination was put or would be put at a disadvantage would normally bring UK law into line with the Directive. On foot of this determination the Sex Discrimination (Amendment) Regulations (Northern Ireland) 2011 were made on 31 March 2011 and amended Article 3(2)(b)(ii) of the 1976 Order by inserting the words 'or would put' after the word 'puts'.

[22] The effect of the 2011 amendment of the 1976 Order is to limit a claim for compensation under Part III of the 1976 Order to those who have been or would be disadvantaged by the application of the provision, criterion or practice. The appellant submits that in light of his submission set out at paragraph 19 above this transposition does not meet the requirements of the Directive. We do not agree. We consider that in the context of a claim for compensation the claimant must demonstrate that he has been or would have been put at a disadvantage. We consider that paragraph 24 of the Reasoned Opinion plainly supports this interpretation. For that reason we consider that the appellant's reliance on Mangold v Helm Case-144/04 [2006] IRLR 143 is of no assistance to him. Our conclusion is also

> consistent with the decision of the EAT in Villalba v Merrill Lynch & Co [2006] IRLR 437.
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> [23] It follows, therefore, that we reject the appellant's submission that he can maintain an indirect discrimination claim based on Directive 2002/73/EC in circumstances where he is not contending that the provision, criterion or practice is one which puts or would put him at a disadvantage since his case is that he satisfies each criterion. We, therefore, reject the appeal in relation to the Pre Hearing Review on 2 September 2011."

[13] An application for leave to appeal this decision was dismissed by the Supreme Court on 21 December 2012. In its Order the Supreme Court stated that the application did not raise an arguable point of law and that it was not necessary to request the Court of Justice to give any ruling on the point of European Union law raised because the answer was so obvious as to leave no scope for any reasonable doubt. The appellant has sought to revisit this issue in his submissions in these appeals but in light of our previous judgments we do not consider that we need to deal with them. Those submissions also ground his argument that additional parties needed to be joined. Accordingly, those applications must also fall.

[14] The litigation in this court has been characterised by extensive, prolix submissions by the appellant. Since late 2010 the court has encouraged the appellant to focus on securing final decisions in relation to his claims. In particular he had adopted the practice of appealing as a matter of course every case management decision made in the course of a tribunal hearing. We pointed out that such decisions did not have any binding effect and could be revisited by the tribunal in the course of the final hearing. The effect of such appeals has been to significantly delay the proceedings in his cases, to promote entirely unnecessary litigation within this court and to cause the appellant to spend countless hours preparing appeals in relation to case management decisions which were pointless.

[15] On 4 October 2012 the Vice President of the Industrial Tribunal conducted a case management hearing at which he listed five of the outstanding cases. Each case was listed for between three and five days over a period that commenced on 3 December 2012 and finished on 12 April 2013. There was a one week gap between the first and second case, a five-week gap between the second and third case, a three-week gap between the third and fourth case. The second case was rescheduled with a further two week gap and there was a further three-week gap before the fifth case was scheduled.

[16] On 10 December 2012 the Vice President held a further Case Management Discussion at which he scheduled five further cases. The first of those was scheduled for six weeks after the end of the fifth case. The second was scheduled for four months later, the third case was scheduled for nine weeks after the end of the

second case, the fourth case was scheduled for 10 days after the end of the third case and the fifth case was scheduled for 10 days after the end of the fourth case.

[17] In light of the time which had expired since the events giving rise to these claims it was clearly necessary to impose a tight schedule in relation to the determination of all of the outstanding cases. All of the cases raised essentially similar issues and at the core of each case lay the proposition that there had been indirect discrimination on the grounds of sex.

The Sullivan Upper application

[18] A need arose in June 2005 to recruit a classroom assistant with experience of working with children with special educational needs to work with a male pupil with Asperger's syndrome who had a statement of special educational needs and was making the transition from primary school into Year 8 in September 2005. The recruitment panel comprised the then Principal, the Bursar and the Special Educational Needs Co-ordinator ("the SENCO"). The last two were responsible for shortlisting. The agreed shortlisting criteria were:

(a) General Educational Qualifications which was given a weighting of 1;

(b) Relevant Vocational Qualifications which was given a weighting of 2;

(c) Appropriate Experience which was given a weighting of 3; and

(d) Other Relevant Experience which was given a weighting of 2.

Candidates were awarded marks from one to four against each criterion. (4 ="exceeds requirements", 3 = "meets requirements", 2 = "below requirements but could be developed" and 1 = "unacceptable".)

[19] The highest ranking candidate on the shortlisting was a female who scored 24 points, the second, third and fourth each scored 23 points and included two females and one male. The appellant was fifth with 19 points. The sixth and seventh ranking female candidates each scored 16 points with the eighth lowest scoring female candidate getting 15 points. The outcome was discussed with the Principal and he decided that four people should be called to interview since there was a clear gap between the top four and the remaining candidates.

[20] There were a number of sub criteria in relation to each criterion. In respect of General Educational Qualifications a 4 was given for an A level or above, a 3 for GCSE or equivalent in four or more subjects at grade C or higher, a 2 for other GCSE passes at grade C and 1 for no such qualifications. The appellant was awarded a 4 and the candidate who topped the shortlisting was awarded a 1.

[21] In respect of Relevant Vocational Qualifications a 4 was awarded for a degree or higher diploma or a diploma in a relevant subject and a 3 for a certificate/NVQ in a relevant subject. The appellant had a teaching qualification in the United States which was recognised in this jurisdiction as a certificate. He complained that he should have been awarded a 4 but we are satisfied that the tribunal was correct to find that there was no error in awarding him a 3. The top candidate at shortlisting

was also awarded a 3 on the basis of her NVQ 3 which was confirmed by the authorized course provider after the date of the interview in August 2005 but prior to her taking up the employment. The formal certificate did not issue from City and Guilds until November 2005. The evidence in the case is that it is common practice to proceed on the basis of the confirmation from the course provider and there is nothing to indicate that it is indicative of any form of discrimination.

[22] Appropriate Experience was assessed as experience as a classroom assistant in schools. A 4 was awarded for three or more years post primary, a 3 for one to two years post primary or primary, a 2 for experience less than that and 1 for no experience. The top candidate in shortlisting was awarded a 4 on the basis of her three years during her NVQ in a post primary school whereas the appellant was awarded a 1. It is common case that 98% of those who have experience as a classroom assistant are female.

[23] For Other Relevant Experience a 4 was awarded for three or more years with SEN children, a 3 for other work with children, a 2 for other relevant experience and a 1 for no relevant experience. This criterion was introduced to widen the field to the advantage of male candidates who had specific experience of working with SEN children. That was a different relevant quality which would not necessarily be satisfied by a classroom assistant but might be satisfied by those such as sports coaches and scout leaders. The top candidate was awarded a 4 for her three years' experience with SEN children and the appellant was awarded a 3 for his work with children as a teacher.

The **Tribunal Hearings**

[24] The appellant's case first came before a tribunal for hearing in November 2013. He alleged direct and indirect sex discrimination. The direct discrimination claim was based on his assertion that he had been marked down on some of the selection criteria and other female and male candidates had been marked up. He had been awarded a score of three in respect of Relevant Vocational Qualifications. He considered that there was no comparison between his PGCE and the NVQ 3 upon which a number of the other applicants relied. He also contended that the highest ranking candidate should not have been awarded that score since her NVQ 3 had not yet been awarded. We have already dealt with that issue. The tribunal was satisfied that the award of three marks to the applicant for his Certificate was appropriate because he did not have a degree, higher diploma or diploma in a relevant subject.

[25] A second area of contention concerned the marks awarded for Appropriate Experience. The appellant contended that he should have been awarded a maximum of four points. He had three or more years working as a teacher in a post primary setting. He contended that a teacher does what a classroom assistant does and more. He argued that the shortlisting panel should have assumed this about him when his application form showed that he had teaching experience.

[26] The tribunal was satisfied that the scores allocated to each of the candidates including the claimant against each of the shortlisting criteria were correctly

assessed on the basis of the information supplied by each candidate in their application forms. The claimant did not provide examples in his application form of how his qualifications and experience as a teacher fitted him for the duties of this particular post. In respect of the score of 3 awarded to the top candidate at shortlisting the tribunal was satisfied that a male candidate who completed the NVQ 3 but had not yet been awarded the certificate would have been treated in the same way. The direct discrimination claim was dismissed.

[27] The tribunal then turned to the indirect sex discrimination claim. It was accepted that the number of females employed as classroom assistants overwhelmingly outnumbered the number of males employed as classroom assistants. The tribunal accepted the submission made on behalf of the respondent that experience as a classroom assistant was a relevant criterion to adopt in the same way as teaching experience would be a relevant consideration for a teaching post. The tribunal then went on to hold that there was no detriment to the appellant because he maintained that he satisfied all of the shortlisting criteria and should have been awarded full marks against each of them.

[28] That decision was appealed to this court. The court took no issue with the conclusions in relation to direct discrimination but considered that the imposition of a requirement for experience as a classroom assistant was such that it would be to the detriment of a considerably larger proportion of men than women. That required justification and it was not sufficient to determine that the criterion was relevant. Accordingly the appeal was allowed on the indirect discrimination claim and a further hearing directed before a new tribunal.

[29] That hearing took place in August 2018. The Statement of Educational Needs for the pupil set out the stated aims for a classroom assistant to:

(i) organise his books and equipment and go from one class to another without getting lost;

(ii) monitor his ability to react appropriately with other pupils and allow opportunities to develop social interaction skills;

(iii) reduce the effect of his behaviour on the rest of the class by, for instance, removing him from a situation where he became upset or disruptive; and

(iv) help him develop his ability to cope in unstructured situations, such as lunchtime in the playground.

[30] The specific duties included in the job description supplied to each applicant included:

(i) supervising the pupil outside class times in the morning and during mid morning and lunchtime breaks and in movement between classes;

(ii) ensuring that he would be met in the morning and return to his school to home transport in the afternoon at the end of the school day;

(iii) assisting in the classroom as directed by the teachers concerned;

(iv) ensuring that all books and other school equipment needed were available as and when required;

(v) helping the pupil with his own general personal management, for example, and changing for PE and games, for swimming etc;

(vi) contributing to assessments of the pupil's progress and development and undertaking other such duties which may be assigned by the SENCO.

[31] The tribunal noted that throughout the hearing the appellant was of the unshakeable view that his possession of a teaching qualification and related teaching experience deserved to trump the other candidates' qualifications and experience. He was of the view that classroom assistant posts were a form of "social planning" designed for women who otherwise would not have jobs, the idea being basically to "stick them in the classroom to read to kids". In the course of his submissions he described the job as essentially babysitting.

[32] The tribunal noted that this stood in stark contrast to the comprehensive detail provided by the school's witness in her evidence as to the nature of the duties and insight required in respect of the child's needs. The respondent school contended from the outset that the post was demonstrably not a teaching post and that the relevant insight and skills needed to demonstrate the ability to perform the role successfully both inside and outside the classroom were very different from those required of a candidate applying for a teaching post. The tribunal accepted the respondent's evidence that while it is possible that a teacher may be able to perform the role of a classroom assistant, a different skill set is required, as the classroom assistant must assist and enable the individual child to access teaching in the classroom and to maximise the child's ability to engage in the whole school experience.

[33] In light of that analysis the tribunal concluded that the criterion of appropriate experience was properly viewed by the panel as being directly relevant to the post of classroom assistant and marked accordingly. It was of the view that it would have been extremely surprising had such a criterion not been included. The sensitivities and challenges of this post clearly required someone with a proven ability to engage with the pupil as quickly and as seamlessly as possible. The criterion of appropriate experience had a legitimate aim or purpose, namely the appointment of a classroom assistant best suited to meet the needs of this particular child.

[34] The evidence on behalf of the school was that the selection committee recognised that the vast majority of classroom assistants were female and the respondent sought to reduce the impact of that element by introducing an additional criterion of Other Relevant Experience. The outstanding example of this was the other male candidate. He had a social work background and in that capacity had worked for three years with deaf children. He had accordingly achieved a maximum

mark on this criterion and that had enabled him to satisfy the shortlisting criteria despite the fact that he had no qualification or experience of working as a classroom assistant.

[35] The tribunal concluded that the introduction of this additional criterion persuasively demonstrated that the respondent had successfully devised another channel to recruitment. The tribunal therefore unanimously indicated that it was satisfied that the respondent had discharged the burden of proof by way of justification for the criteria and that the respondent did not indirectly discriminate against the claimant on the ground of sex. The appellant's case was dismissed.

Consideration

[36] The first tribunal dealing with this case rejected the appellant's claim for direct discrimination on the grounds of sex. In allowing the appeal this court did not interfere with that finding. The material adduced before the second tribunal reinforces the view that this was not a case of direct discrimination. It is accepted, however, that the criterion relating to experience as a classroom assistant is such that it would be to the detriment of a considerably larger proportion of men than of women. The principal issue in this case is, therefore, whether the application of that criterion is justifiable.

[37] It is apparent from the appellant's submissions to this court and the approach that he took before the tribunal that he considers that there are no qualifications necessary for the purpose of carrying out duties as a classroom assistant other than the ability to read and perhaps write. That has significantly coloured his approach to the way in which the criteria were evaluated. We are satisfied that he is seriously in error in that approach. The Statement of Special Educational Needs and the job description demonstrate that a classroom assistant is required to evaluate the level of support required by the child, be able to communicate effectively with the vulnerable child, anticipate issues of difficulty for the child, provide order and facilitate the conduct of the daily business of the school and contribute to the broader assessment of the pupil's needs.

[38] The evidence advanced on behalf of the respondent broadly addressed these issues as can be seen from paragraphs 39, 46, 58 and 69 of the tribunal's decision. The appellant relied on the Teachers (Terms and Conditions of Employment) Regulations (Northern Ireland) 1987 to suggest that the professional duties of a teacher set out in Schedule 3 of those Regulations included the insight and skills necessary for the job of classroom assistant. We do not accept that comparison. The professional duties of the teacher relate to the planning and preparation of courses and lessons and the teaching and marking of work in respect of the pupils assigned to the teacher. The issues of progress, well-being, guidance and advice to pupils is delivered within the context of the class. The reason that the pupil is assigned a classroom assistant is because of the special needs of the pupil which the teacher cannot address in the context of his obligations in the class.

[39] We consider that the evidence adduced on behalf of the respondent supported the conclusion that the introduction of a criterion related to experience as

a classroom assistant had a legitimate aim being that of identifying a person with proven ability to engage with the pupil as quickly and as seamlessly as possible given the sensitivities and challenges of the post. It is not, however, sufficient for the respondent to demonstrate that the criterion had a legitimate aim. The respondent must go on to demonstrate that its application was proportionate.

[40] The introduction of the criterion of Other Relevant Experience was designed to provide an opportunity for those who did not have experience as classroom assistants but did have experience of working with vulnerable children to enhance their applications. We accept that those who had worked as a classroom assistant would also have obtained a score of at least 3 on this criterion but it did give an opportunity to those who demonstrated their experience with vulnerable children to advance their case. The other male applicant in this competition obtained the maximum mark on this criterion without having any experience as a classroom assistant and thereby was shortlisted for the post.

[41] In his submissions to this court the appellant referred to aspects of his experience teaching children from difficult backgrounds with vulnerabilities similar to those of children with Statements of Special Educational Needs. The difficulty he faced, of course, was that he did not descend into any detail in relation to those experiences in his application form but required the selection committee to make an assumption in his favour. The making of any such assumption would clearly have been quite inappropriate.

[42] We recognise that the addition of the Other Relevant Information criterion could not entirely counteract the advantage given to a person who had worked as a classroom assistant but we accept that it was capable of diminishing that advantage in some circumstances. The only alternative offered by the appellant was the exclusion of the criterion of experience as a classroom assistant but we consider that the tribunal was entitled to take the view that such an approach would have been an extremely surprising option because it would have imperilled the task of the selection committee to find the right person for the pupil in question. The tribunal accepted, therefore, that indirect effect caused by the inclusion of the classroom assistant criterion was proportionate

[43] The relevant authorities on the approach to be taken by an appeal court are helpfully set out in R v London Borough of Hackney [2019] EWCA Civ 1099 at [63]-[66]. An appeal court should only interfere with a first instance assessment of proportionality if it is satisfied that the decision is wrong. We consider that the second tribunal gave careful consideration to the extent to which the disputed criterion was required for the purposes of the post, the effect on male applicants of its application and the extent to which any disadvantage could be ameliorated by the application of the Other Relevant Information criterion. We cannot detect any error in the approach of the second tribunal and cannot say that the decision was wrong.

Conclusion

[44] For the reasons given the appeal is dismissed.