[2020] IEHC 51

THE HIGH COURT

CIRCUIT APPEALS

2019 No. 183 CA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 28(3) OF THE EQUAL STATUS ACT 2000 (AS AMENDED)

BETWEEN

OLUMIDE SMITH

APPELLANT

AND

THE OFFICE OF THE OMBUDSMAN

ADAM KEARNEY

BERNARD TRAYNOR

PETER TYNDALL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 February 2020

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The procedural history is complex, and is set out in more detail under the next heading below. For introductory purposes, it is sufficient to note that these proceedings have their genesis in a decision of the Legal Aid Board to refuse a legal aid certificate to Mr Smith (the appellant herein). That decision has given rise to a series of complaints on the part of Mr Smith. An initial complaint was made to the Office of the Ombudsman. That complaint was dismissed. The Office of the Ombudsman found that the Legal Aid Board had not acted unfairly in refusing the legal aid certificate.

2. Mr Smith next made a complaint against the Office of the Ombudsman to the Workplace Relations Commission. (It should be explained that in addition to what might be described as its "employment law" jurisdiction, the Workplace Relations Commission also determines claims of discrimination under the Equality Act 2000 (as amended). Mr Smith alleged that the Office of the Ombudsman had discriminated against him on the grounds of his race. This complaint was dismissed, at first instance, by the Workplace Relations Commission, and subsequently dismissed on appeal by the Circuit Court.

3. Mr Smith now seeks to appeal the decision of the Circuit Court to the High Court. Under the relevant legislation, the appeal to the High Court is confined to an appeal on a point of law only. It is necessary to emphasise this from the outset of this judgment in circumstances where the appeal, as formulated, seeks to set aside the *findings of fact* of the Circuit Court. The High Court only has a very limited jurisdiction to review findings of fact on an appeal on a point of law.

PROCEDURAL HISTORY

4. The procedural history leading up to this appeal to the High Court is complex. It may assist the reader in understanding the (limited) issues which arise on the appeal were I to rehearse the key events in the chronology. In particular, it is necessary to explain that Mr Smith has, in fact, made two complaints to the Office of the Ombudsman, one in each of the years 2015 and 2018, respectively.

5. Mr Smith had been involved in various family law proceedings during the period 2013 to 2019. During this time, Mr Smith had made a number of applications to the Legal Aid Board for assistance in respect of those proceedings. It seems that a legal aid certificate had been granted in 2015, but that this was subsequently terminated. The precise circumstances in which the certificate came to be terminated are disputed: the Legal Aid Board contends that it revoked the certificate, whereas Mr Smith contends that he voluntarily terminated the certificate.

6. In or about the same time, Mr Smith had also sought assistance from the Legal Aid Board in respect of intended judicial review proceedings before the High Court, which would challenge certain maintenance orders that had been made by the District Court in the context of the family law proceedings. It seems that the District Court orders had been appealed, unsuccessfully, to the Circuit Court, and that consideration was being given by Mr Smith to the institution of judicial review proceedings before the High Court. In the event, however, the Legal Aid Board refused to grant a certificate in respect of the judicial review proceedings. Mr Smith contends that he made a complaint to the Office of the Ombudsman in 2015 arising out of the refusal of the Legal Aid Board to grant him a certificate of legal aid in respect of the potential judicial review proceedings ("*the first complaint*"). As explained presently, the Office of the Ombudsman relies on the fact of this first complaint having been investigated and dismissed as a reason not to carry out a review in relation to the second, more recent complaint made by Mr Smith in 2018.

7. The precise nature of the first complaint made to the Office of the Ombudsman in 2015 is unclear. The only document before the court in relation to this first complaint is a letter of 3 December 2015 which rejects an internal appeal which Mr Smith had made against the initial decision to reject the first complaint. Neither the Office of the Ombudsman nor Mr Smith has put forward any additional material. It seems that the original file may have been mislaid within the Office of the Ombudsman. I return to discuss the significance of the first complaint at paragraph 93 below.

8. Mr Smith made a further application for a legal aid certificate in 2016. The Legal Aid Board ultimately made a decision on 10 November 2017 to refuse Mr Smith's application for legal aid. The stated reason for the decision is as follows.

> "Having regard to section 28(4)(b) of the Civil Legal Aid Act 1995 the Board is refusing Legal Aid.
>
> The reason for this decision is:
>
> Section 28(4)(b) the Board may refuse to grant a legal aid certificate if it is of the opinion that … the applicant has on a previous occasion obtained legal aid or advice within the meaning of the Scheme or under this Act in respect of another matter and has, without reasonable explanation, failed to comply with the terms on which such legal aid or advice was granted.

> You had previously obtained a Legal Aid Certificate for Divorce Proceedings with another Law Centre of the Board. A letter dated 2nd June 2015 issued to you to inform you that the Board had intended to terminate your Legal Aid Certificate (Record No. 1753488). The decision was reviewed and the decision to terminate was taken on 24th August 2015.
>
> The matter at hand for which you have applied for at the Law Centre (Jervis Street) is the same and Section 28 (4) (b) must apply to this application because the Legal Aid Certificate was terminated."

9. The letter then goes on to inform Mr Smith of his right of appeal. It seems that an appeal was submitted against the decision, and that the Appeal Committee of the Legal Aid Board, at a meeting in December 2017, upheld the refusal of legal aid on the same grounds and for the same reasons as the initial decision. The Appeal Committee's decision was communicated to Mr Smith by letter dated 22 January 2018.

10. (As an aside, it should be noted that Mr Smith has explained in the course of his oral submissions to the High Court that the Legal Aid Board made a subsequent offer of a legal aid certificate on 27 November 2018. A copy of same has been exhibited. The precise circumstances in which this change in position on the part of the Legal Aid Board came about have not been explained. At all events, it cannot form part of the case against the Office of the Ombudsman to say that the Legal Aid Board issued a legal aid certificate several months *after* the Office of the Ombudsman had concluded its role).

11. Mr Smith made a complaint to the Office of the Ombudsman in January 2018 in respect of the Legal Aid Board's decision to refuse him a legal aid certificate. The complaint was assigned to a case officer, and an initial decision was communicated to Mr Smith by letter dated 6 March 2018. This initial decision was to the effect that the complaint could not be upheld.

12. The relevant parts of the letter of 6 March 2018 read as follows.

> "I am writing to you about your complaint concerning the Legal Aid Board. Having carried out an examination of your complaint, I am sorry to say that I cannot uphold your complaint. I have set out the reasons for my decision below.
>
> Your complaint:
>
> > You say that you initially applied for a Legal Aid Certificate from the Smithfield Law Centre. You say that you are unsatisfied with the service that the Smithfield Law Centre provided to you and that you felt threatened and harassed by its actions. This led to you requesting a change of Law Centre. You say that you re-applied for a Legal Aid Certificate through the Jervis Law Centre. You were denied this Legal Aid Certificate but you contend that you should qualify for this due to your present circumstances.
>
> The Legal Aid Board's Position:

On receipt of your complaint I requested a report on the matter from the Legal Aid Board. I will outline its position below.

You applied for legal representation to Smithfield Law Centre in a divorce matter in 2015. You requested an external private solicitor which was not granted. By general practice, divorce cases are handled in house in all Law Centres. Your legal aid certificate was terminated due to unreasonable behaviour. The Legal Aid Board retains the right to manage its cases in house under the Civil Legal Aid Act regulations.

You subsequently applied to Jervis St. Law Centre on 27 September 2016 and 26 July 2017. At neither of these meetings did you mention that Smithfield Law Centre had previously been involved in this case.

Ms Anne Marie Blaney, Solicitor made an application on 23 October 2017 to represent you in your divorce proceedings. Ms Blaney was then informed that you had a previous application for legal aid with Smithfield Law Centre and had been granted a Legal Aid Certificate for the divorce proceedings which was terminated by the Legal Aid Board.

Ms Anke Hartas wrote to you to ask whether you had legal representation previously from another Law Centre and whether a Legal Aid Certificate was granted. In an email dated 27 October 2017 you replied *'I had neither a Legal Aid Certificate nor legal representation prior to this moment'.*

Ms Hartas issued a letter to you dated 10 November 2017 informing you that you had been refused legal aid on the grounds that you had previously been granted a Legal Aid Certificate for the same matter and this had been terminated.

Role of the Ombudsman:

The role of the Ombudsman is to ensure that public service providers deal with individuals properly, fairly and impartially. He seeks to ensure that public service providers act in a reasonable manner, taking all relevant factors into consideration.

Analysis:

In your submission to this Office you wrote *'I qualify for a Legal Aid Certificate as per my present circumstances as a Jobseeker on a weekly stipend of €193.00'*. However, financial eligibility is not the only criteria required to qualify for a Legal Aid Certificate. The Legal Aid Board, on their website www.legalaidboard.ie advise *'If you need to go to Court, we will look at the merits of the case before we can allow a solicitor or barrister to represent you in Court'.*

Under Section 28(4)(b) of the Civil Legal Aid Act, 1995 'the Board may refuse to grant a legal aid certificate if it is of the opinion that the applicant has on a previous occasion obtained legal aid or advice within the meaning of the Scheme or under this Act in respect of another matter and has, without

reasonable explanation, failed to comply with the terms on which such legal aid or advice was granted'.

The Legal Aid Board has previously informed you that it is of the opinion that you failed to comply with the terms on which your legal aid was granted by Smithfield Law Centre, which resulted in the termination of your Legal Aid Certificate.

Even if this were not the case, Section 11(1) of the Civil Legal Aid Regulations 1996 states 'An applicant shall provide such information as is required to enable any person, certifying committee, appeal committee or the Board, to discharge his or her or its functions under the Act of 1995 and these Regulations and the refusal or failure to provide such information without a reason which, in the opinion of such person, certifying committee, appeal committee or the Board, is satisfactory shall result in the refusal of the certificate, or, where a certificate has already been issued, the termination or revocation of that certificate'.

When Ms Hartas wrote to you to ask whether you had legal representation previously from another Law Centre and whether a Legal Aid Certificate was granted, you replied '*I had neither a Legal Aid Certificate nor legal representation prior to this moment'*. This was untrue as you had previously been granted a Legal Aid Certificate from Smithfield Law Centre in 2015. As such, you failed to provide required information to the Board and under the regulations it is within its rights to refuse you a Legal Aid Certificate on these grounds.

I cannot find the Legal Aid Board to be acting unfairly in refusing you a Legal Aid Certificate as it has two separate and valid reasons under legislation, as outlined above, to do so.

Conclusion:

Having examined your submission to this Office, the Legal Aid Board's report and copies of the correspondence between the Board and yourself in relation to the matter, I cannot uphold your complaint. While I appreciate that you may be disappointed with the outcome of my examination, based on all the information available to me, I would not be in a position to pursue the matter further with the Legal Aid Board.

Accordingly, I am now closing our file on your complaint."

13. Mr Smith, by letter dated 7 March 2018, applied for an internal review of the decision of 6 March 2018 (above). The application for review is a comprehensive document and sets out a detailed rebuttal of many of the points made in the Legal Aid Board's response (as recorded in the decision-letter of 6 March 2018).

14. The Office of the Ombudsman notified Mr Smith of the decision on the internal review as follows by letter dated 20 March 2018.

"I am writing to you about your wish to apply for a review of Mr Adam Kearney's decision not to uphold your complaint against the Legal Aid Board. I am the Review Manager for the Office of the Ombudsman and I am senior to Mr Kearney and I had no previous involvement in the examination of this complaint.

I note however that the subject matter of your complaint has been dealt with previously by this Office and by me on appeal (Case Reference O56/15/1531). In that regard and having regard to Section 4(6) of the Ombudsman Act 1980 (as amended), I regret to inform you that I will not be reviewing the decision of Mr Kearney.

I regret that other than provide you with this information there is no further role for the Office of the Ombudsman in relation to this matter."

15. The section relied upon, i.e. section 4(6) of the Ombudsman Act 1980, reads as follows.

(6) It shall not be necessary for the Ombudsman to investigate an action under this Act if he is of opinion that the subject matter concerned has been, is being or will be sufficiently investigated in another investigation by the Ombudsman under this Act.

16. Mr Smith responded by way of letter dated 22 March 2018. One of the principal points made by Mr Smith involved an allegation that the Review Manager had mixed up two case reference numbers.

"(1.) the Review Manager has mixed up Case Reference numbers;

(2.) There are two separate matters before the Ombudsman namely 'my application for a Legal Aid Certificate in or around September 2016 regarding the Divorce proceedings at the Circuit Family Court referenced by O56/18/0292' and 'my application for Legal Aid Certificate in the Year 2014 for a Judicial Review at the High Court referenced by O56/15/1531';

(3.) I am entitled to fair procedure and your said email correspondence postmarked '20 March 2018 at 15:20' violates my right to fair procedure.

(4.) Article 17 of the European Convention on Human Rights, hereinafter referred to as 'ECHR', prohibits your act(s) in your said email correspondence postmarked '20 March 2018 at 15:20'."

17. On the same date (22 March 2018), Mr Smith made a data access request pursuant to section 4 of the Data Protection Act 1988 (as amended). This application was not acceded to for the reasons set out in a letter of 18 April 2018. In particular, the Office of the Ombudsman relied on the Data Protection Act, 1988 (Restriction of Section 4) Regulations, 1989 (S.I. No. 81 of 1989).

18. It seems that Mr Smith attempted to contact the relevant officials at the Office of the Ombudsman by telephone and email on various dates in March and April 2018.

Ultimately, the Review Unit sent a letter dated 18 April 2018 to Mr Smith in the following terms.

> "I am writing to you about your emails, telephone calls and visits in response to the Review Manager's decision letter to you dated 20 March 2018.
>
> I wish to confirm that a complainant may avail of one review and one review only in relation to this Office's handling of a particular complaint. This means that the Review Manager's decision on your request for review as set out in his decision letter dated 20 March 2018 is final.
>
> *For that reason he would have nothing further to add and does not intend to revisit the issues previously raised in the above case."*

19. As noted earlier, neither side put before the Workplace Relations Commission or the Circuit Court any detailed information in relation to the first complaint to the Office of the Ombudsman, i.e. the complaint made in 2015. The only document in the papers before me which relates to this first complaint appears to be a letter dated 3 December 2015 from the Office of the Ombudsman to Mr Smith. The key part of the letter reads as follows.

> "In her letter, [the case officer] set out the background to your complaint and summarised the response she received from the Legal Aid Board on her queries to it on your complaint. Based on her consideration of these and the applicable legislation, she decided not to uphold your complaint and pursue the matter further. As you have already been provided with this information, and my role is to make a decision on your appeal, I do not intend to repeat that information here. Rather I would like to explain my reason for agreeing with [the case officer's] decision on your case.
>
> The Legal Aid Board is only authorised to act in accordance with the legislation governing it. It is the case that your application was reviewed against the Civil Legal Aid Act, 1995 and was refused on the merits of the case put to it. In reaching this decision advice is sought as to the reasonable likelihood of a successful outcome and if the advice indicates that there is little or no likelihood of a successful outcome, this together with the other criteria are used in making a decision in relation to the granting of a certificate. The Ombudsman's role is limited to the examination of the administrative actions of the public service providers under his remit. In this regard I note that you were refused a certificate and you appealed this decision and your appeal was not successful. It has been shown by [the case officer] that the Legal Aid Board acted in accordance with its governing legislation, so therefore there was no administrative failing.
>
> Furthermore there is no evidence of new relevant evidence/information or that there was a failure on the part of [the case officer] to examine a relevant and substantial issue of your complaint, and there is no evidence of a failure on the part

of [the case officer] to obtain relevant and necessary information from the Legal Aid Board or that its stated position is incorrect. Equally there is no evidence to suggest that the complaint has been misunderstood or misinterpreted by this Office or indeed that the decision of the Office was incorrect or unreasonable in the context of the complaint made."

20. Returning to the events of 2018, Mr Smith made a complaint to the Workplace Relations Commission on 24 May 2018. It should be explained that the Workplace Relations Commission has succeeded to the adjudicative role previously fulfilled by the Director of Equality Investigations under the Equality Act 2000. Thus, in addition to what might be described as its "employment law" jurisdiction, the Workplace Relations Commission also determines claims of discrimination in the provision of goods and services (even where these occur outside the context of any workplace relationship).

21. For convenience, the decision-maker will be referred to in this judgment as the "Workplace Relations Commission". It should be noted, however, that complaints are actually determined by individual Adjudication Officers who have been appointed under the Workplace Relations Act 2015, and not by the board of the Workplace Relations Commission.

22. Mr Smith named five respondents in his complaint. More specifically, the complaint form identifies the statutory office of the Ombudsman as two different respondents, namely *"Office of the Ombudsman"* and "*The Office of the Ombudsman*", respectively. The third and fourth named respondents are individual employees within the Office of the Ombudsman. The fifth named respondent is the Ombudsman himself, Mr Peter Tyndall.

23. The procedure under section 21 of the Equal Status Act 2000 (as amended) requires an intending complainant to serve notice of a potential claim on the intended respondent. Mr Smith did this on 25 April 2018. The Office of the Ombudsman replied by an undated letter. The relevant parts of the response read as follows.

> "You state that you are someone of the Yoruba racial or ethnic origin. Our staff were not aware of this until you provided us with this information in your 'Notification'. Therefore our staff did not racially discriminate against you in any dealings they had with you. I also find no evidence of you being harassed by any member of staff from this office.
>
> The actions of the Legal Aid Board (LAB) is at the heart of your complaints to this Office. The LAB determined that your actions caused you to have a certificate terminated and being refused another one.
>
> This Office had found that such actions were reasonable having regard to the applicable legislation. After such a finding and having regard to the provisions of Section 4(6) of the Ombudsman Acts as amended, it was determined that no further action was warranted and you were advised accordingly. Section 4(6) states:

'It shall not be necessary for the Ombudsman to investigate an action under this Act if he is of the opinion that the subject matter concerned has been, is being or will be sufficiently investigated in another investigation by the Ombudsman under this Act.'

Based on the above, I am now closing our file on your complaint."

24. Mr Smith's complaint to the Workplace Relations Commission was duly assigned to an Adjudication Officer by the Director General. An oral hearing was held on 27 September 2018. A written decision on the substantive issue was published on 6 November 2018.

25. Before turning to the detail of that decision, and the subsequent decision of the Circuit Court on appeal, it may be helpful to pause, and to summarise the legislative framework pursuant to which those decisions were made. This summary should assist the reader in understanding the issues which fell to be determined in those two decisions.

LEGISLATIVE FRAMEWORK: CLAIM FOR DISCRIMINATION

26. The claim in these proceedings has been made pursuant to the Equal Status Act 2000 (as amended) *("the Equal Status Act")*. As flagged in the introduction to this judgment, one feature of the legislation is that any appeal to the High Court is confined to an appeal on a point of law. The implications of this are discussed in detail at paragraph 56 et seq. below. The discussion under the present heading is directed to the substance of, rather than to the procedural requirements of, the Equal Status Act.

27. The principal claim advanced by Mr Smith is that the Office of the Ombudsman discriminated against him on the ground of race in the manner in which it dealt with his complaint against the Legal Aid Board. Section 5 of the Equal Status Act prohibits discrimination in the provision of a "service".

5.(1) A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.

28. The term "service" is defined as follows under section 2.

"service" means a service or facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing, includes—

(a) access to and the use of any place,
(b) facilities for—

(i) banking, insurance, grants, loans, credit or financing,
(ii) entertainment, recreation or refreshment,
(iii) cultural activities, or
(iv) transport or travel,

(c) a service or facility provided by a club (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment, and

(d) a professional or trade service.

29. It seems to have been assumed both before the Workplace Relations Commission and the Circuit Court that the carrying out of an investigation pursuant to the Ombudsman Act 1980 represents the provision of a "service" within the meaning of the Equal Status Act. The Office of the Ombudsman appeared to concede, at least for the purposes of the complaint, that the carrying out of its functions are, in principle, subject to Part II of the Equal Status Act. In circumstances where no argument to the contrary has been advanced to the High Court on this appeal, it is unnecessary to address the correctness or otherwise of this assumption or concession. Nothing in this judgment should, however, be understood as necessarily endorsing the correctness of this approach. It is, however, an issue which may require to be determined in another case.

30. Mr Smith describes himself as a person of the Yoruba racial or ethnic origin. Mr Smith's claim alleges "discrimination" within the meaning of section 3(1) and 3(3) of the Equal Status Act as follows.

3.— (1) For the purposes of this Act discrimination shall be taken to occur—

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) or, if appropriate, subsection (3B), (in this Act referred to as the 'discriminatory grounds') which—

(i) exists,
(ii) existed but no longer exists,
(iii) may exist in the future, or
(iv) is imputed to the person concerned,

[...]
or

(c) where an apparently neutral provision would put a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

31. The relevant comparator for a claim of discrimination on the grounds of race is defined as follows at section 3(2)(h).

(2) As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are:

(h) that they are of different race, colour, nationality or ethnic or national origins (the "ground of race")

32. Mr Smith has also made a claim of "harassment". Section 11 of the Equal Status Act insofar as relevant provides as follows.

11.—(1) A person shall not sexually harass or harass (within the meaning of subsection (4) or (5)) another person ("the victim") where the victim—

(a) avails or seeks to avail himself or herself of any service provided by the person or purchases or seeks to purchase any goods being disposed of by the person,
[…]

(4) A person's rejection of, or submission to, sexual or other harassment may not be used by any other person as a basis for a decision affecting that person.

(5) (a) In this section —

(i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and
(ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

being conduct which in either case has the purpose or effect of violating a person ' s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

(b) Without prejudice to the generality of paragraph (a) , such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.]

33. As appears, the concept of "harassment" refers to any form of unwanted conduct related to any of the discriminatory grounds, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

34. The dispute between the parties to this appeal centres largely on whether Mr Smith had, at the hearing before the Circuit Court, discharged the onus of proof which lies with him as complainant. To understand this dispute properly, it is necessary to consider section 38A of the Equal Status Act.

Burden of proof.

38A.—(1) Where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.

(2) This section is without prejudice to any other enactment or rule of law in relation to the burden of proof in any proceedings which may be more favourable to the person.

(3) Where, in any proceedings arising from a reference of a matter by the Authority to the Director of the Workplace Relations Commission under section 23(1), facts are established by or on behalf of the Authority from which it may be presumed that prohibited conduct or a contravention mentioned in that provision has occurred, it is for the respondent to prove the contrary.

35. Section 38A is intended to give effect to, *inter alia*, the requirements of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("*the Racial Equality Directive*").

36. Recital 21 of the Racial Equality Directive reads as follows.

(21) The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

37. Article 8 of the Racial Equality Directive reads as follows.

Article 8 / Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

38. Similar provisions in relation to the burden of proof are to be found under two related EU Directives which govern employment equality, namely Directive 2000/78/EC and Directive 2006/54/EC. The interpretation of these latter provisions has been considered in a

number of judgments of the Court of Justice of the European Union ("*CJEU*"). The essence of these judgments has been summarised as follows by Advocate General Mengozzi in Case C-415/10, *Meister* ECLI:EU:C:2012:8, [22].

> "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. In other words, as the Court has already held in its judgment in *Kelly*, (13) the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant. Central to the provisions referred to in the first question referred for a preliminary ruling is therefore the burden of proof that, although somewhat reduced, nevertheless falls on the victim. A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions."

39. The reference to *Kelly* is to the judgment of the CJEU in a reference for a preliminary ruling made by the High Court, Case 104/10, *Kelly v. National University of Ireland* ECLI:EU:C:2011:506.

ADJUDICATION OFFICER'S DECISION

40. It will be recalled that Mr Smith had named five respondents to his complaint. The Adjudication Officer issued separate decisions in respect of the three individuals named as respondents. The complaints against those individuals were dismissed on the basis that the complaints were misconceived because the vicarious liability provisions of the Equal Status Act do not allow individual employees of a respondent to be impleaded where they act in the course of their employment.

41. The appeal to the High Court is addressed to the substantive decision on the complaint against the Office of the Ombudsman. The principal findings of the Adjudication Officer are set out in the decision as follows.

> "Turning to the complaint itself, then, and having reviewed the written communications and email chains between the complainant and the respondent which the complainant opened at the hearing, I cannot see the slightest evidence of racial discrimination, even taking the complaint at its height and granting the complainant the use of a hypothetical comparator. The reasons given by the officials of the respondent who examined the complainant's complaints for his lack of success are cogent and underpinned by the provisions of the relevant legislation. It is the complainant's contention that the respondent failed to follow up his complaints against the other state agency properly, but there is simply no evidence

beyond the complainant's allegations to support this. Furthermore, there is absolutely nothing to indicate that a hypothetical white Irish person would have fared any differently in the same situation. Neither can I detect any racial animus, never mind discrimination within the meaning of the Equal Status Acts, in the fact that the complainant got cut off on the respondent's phone system, or that the named official who was dealing with his file was on annual leave during the school holiday period.

The complainant also did not adduce any evidence of harassment on the ground of race. Section 11 of the Equal Status Acts defines harassment as

'(5) (a) In this section —

(i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and

(ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

(b) Without prejudice to the generality of paragraph (a) , such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material". [Emphasis added].

The complainant did not adduce any evidence of acts by the respondent or its officials which fit this definition, i.e. being related to his race. From the totality of his evidence, it is clear that the complainant felt poorly treated by the respondent and considered that fact to be harassing. A complaint received by email post-hearing about one named official of the respondent may serve as an example here:

> 'I insisted on presenting the Statement / Submission [...] and several times, [a named official of the respondent], who is someone of the Caucasian racial or ethnic origin, coughed at me in a threatening, intimidating, degrading, and offensive manner during my read out, while he failed to cough at other Times that the Respondent's Lawyer or the Adjudication Officer spoke." [Emphasis in the original.]

I am satisfied that such behaviours simply do not break the needed threshold of connection to someone's race to constitute racial harassment under the Acts.

Last, to address the complainant's complaint of indirect discrimination: Indirect discrimination is defined in Section 3(1)(c) of the Equal Status Acts as occurring

> 'where an apparently neutral provision would put a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other

persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

This provision exists to address barriers in service provision, for example a requirement for written documentation which persons with literacy problems may find difficult to fulfil. It is then up to a particular service provider to show the necessity for such an approach, and how it meets the test set out above. I am satisfied that the complainant adduced no evidence of any provisions in the respondent's service offering which would have put him personally at a particular disadvantage. The complainant is highly intelligent, articulate, and assertive and all the evidence adduced shows that he did indeed avail himself of the respondent's services. I therefore cannot accept that any structural barriers related to the complainant's race existed which prevented him from doing so.

For all of these reasons, the complainant's complaints of direct and indirect discrimination, and of harassment, must fail."

*Emphasis (bold) in original.

OBJECTION TO TRANSCRIPT OF CIRCUIT COURT HEARING

Overview

42. Mr Smith brought an appeal to the Circuit Court against the decision of the Workplace Relations Commission's Adjudication Officer. This appeal was heard on 18 April 2019. The Circuit Court judge delivered an *ex tempore* ruling on the same date and dismissed the appeal. As explained below, a transcript has since been prepared of this ruling from the digital audio recording of the Circuit Court hearing. Mr Smith has objected to any reliance being placed upon this transcript in the context of the appeal to the High Court. For the reasons explained below, this objection is not well founded.

Discussion

43. By way of background, it should be explained that a digital audio recording is made of all court proceedings including, relevantly, proceedings before the Circuit Court. This digital audio recording is sometimes referred to by the acronym "DAR". If a party to proceedings wishes to obtain a transcript of the hearing, or a part thereof, they are required to make a formal application to a judge of the relevant court. In the case of the Circuit Court, the form of application is prescribed under Order 67A of the Circuit Court Rules. If the application is allowed, then arrangements are made for a transcript to be prepared from the digital audio recording. This exercise is normally carried out by a firm of stenographers approved by the Courts Service. This firm of stenographers is independent of any of the parties to the proceedings. The transcript is certified by the firm of stenographers to be a "complete and correct transcript of the record of the proceedings". This is subject to the caveat that "The absence of a dedicated logger in court to provide a detailed log may result in speaker names being omitted or unconfirmed".

44. The Office of the Ombudsman made an application, on 18 December 2019, to the Circuit Court to obtain a transcript of the digital audio recording of the hearing of the appeal on 18 April 2019. Mr Smith was on notice of this application, and has confirmed to me that he had duly attended court on 18 December 2019. The order was granted, seemingly on consent, on the same date. A copy of the transcript was subsequently exhibited as part of the appeal proceedings before the High Court.

45. At the commencement of the hearing before me on 14 January 2020, Mr Smith indicated that he objected to the introduction of the transcript. The principal ground of objection seems to be that the transcript, in Mr Smith's view, contains numerous errors. Mr Smith describes the transcript variously as "flawed", "biased", "partial" and the "most jaundiced" document which he had ever seen. It is alleged that the transcript has been "significantly distorted", and that it has been "specifically tailored" towards Mr Smith's detriment. Mr Smith sought to impute these (alleged) errors in the transcript to the Office of the Ombudsman. Mr Smith went so far as to say that there was nothing to indicate that the transcript was authentic, and that it could actually be a document that the other side typed for its own benefit and purposefully to Mr Smith's detriment.

Findings of the court

46. Any suggestion that the transcript may have been interfered with is entirely without merit and should not have been made. First, as explained above, the preparation of transcripts of digital audio recordings is undertaken by a firm of stenographers who are independent of the parties to any particular proceedings. Given that they are not involved in its preparation, there is no basis for suggesting that a party to proceedings could "tailor" the terms of the transcript.

47. Secondly, minor inaccuracies in a transcript of the digital audio recording are not uncommon. This is because, in contrast to the situation where the parties have arranged for a stenographer to attend in court and to take a note, transcripts of the type at issue here are prepared on the basis of an audio recording only. The person preparing the transcript will not have had the benefit of being in court. This may have the practical consequence that transcripts of this type will not always be as accurate as those prepared by a stenographer in court. For example, certain speech may be attributed to the wrong person, i.e. something said by a witness might mistakenly be written down as having been spoken by one of the barristers. Other types of mistakes can also occur, especially in relation to punctuation, the names of judgments or the numbering of sections of legislation. Mistakes can also be made in respect of words which sound similar but have very different meanings, i.e. homophones.

48. All of this is to say that there is nothing unusual, still less sinister, in there being minor inaccuracies in a transcript.

49. I am satisfied that the transcript of the hearing before the Circuit Court on 8 April 2019 properly reflects the audio recording, and insofar as there are any minor errors same are typical of the type of errors which are to be found in almost all such transcripts.

50. The principal relevance of the transcript in the present case is that it contains a written form of the *ex tempore* judgment of the Circuit Court. Given the vehemence with which Mr Smith pursued his objection to the introduction of the transcript, I have taken the exceptional step of listening to the digital audio recording of that part of the Circuit Court hearing myself. On the basis of this exercise, I am satisfied that, as one would expect, the transcript properly records the *ex tempore* judgment. Insofar as there are any inaccuracies, same are insignificant and of precisely the type one would expect given the fact that the person preparing the transcript did not have the benefit of being in court.

51. The alleged inaccuracy with which Mr Smith is most aggrieved involves a comment which he maintains was made by him to opposing counsel and not to the judge. It is unsurprising that an aside of this type may not have been transcribed entirely accurately.

52. I emphasise that this exercise of listening to the digital audio recording was an exceptional step to take. In most cases, it will be neither necessary nor appropriate for a judge to engage in this exercise. Rather, a transcript which has been prepared and certified by a reputable firm of stenographers can safely be assumed to be accurate.

53. Before concluding this discussion, I should state that it is most regrettable that Mr Smith took advantage of the privilege which attaches to submissions in legal proceedings to make entirely unwarranted allegations against the Office of the Ombudsman.

JUDGMENT AND ORDER OF THE CIRCUIT COURT

54. The operative part of the *ex tempore* judgment of the Circuit Court reads as follows. (See pages 29 and 30 of the transcript).

> "I have no doubt, Mr Smith, that you sincerely believe that the defendants or their servants or agents behaved in a manner prohibited by section 3(8)(a)(1) and section 3(1)(a) of the Equal Status Act. It's up to you to establish a prima facie case that you were discriminated against. I don't know whether the Ombudsman was right or was wrong in their determinations. But one thing I'm satisfied is that I have received no evidence whatsoever of discrimination. It was for the plaintiff, Mr Smith that is you, to satisfy the Court that there was a prima facie case to answer. And if there was a prima facie case to answer then it would have been for the defendants to justify the behaviour of the Ombudsman or their servants or agents.
>
> As I say, I accept your sincerely held view that you were discriminated against on the grounds of race, having read the correspondence, having read the letters from the Legal Aid Board. There is nothing in any of that that supports any such allegation. You have asked the Court to presume that the principle of equal treatment has not been applied to you. I have received no evidence that you were not treated the same as anybody else. The Ombudsman throws out cases from time to time. The Legal Aid Board refuses legal aid from time to time. Indeed, the Legal Aid Board occasionally refuses legal aid in circumstances where people think that they are on identical all fours with somebody else. As I said, I have no express evidence of discrimination, racial or otherwise. And there's nothing that

I've heard or read from the documents produced by the plaintiff which enables me to infer any discrimination, racial or otherwise. I am satisfied, therefore, that this case must be dismissed. The burden of proof rests with you, Mr Smith, and, as I say, you failed to establish a prima facie case of discrimination in the eyes of this Court. The plaintiff's claims, therefore, must be dismissed in their entirety.

And just by way of comment, that you didn't or that you chose not to read the defendants' replying affidavit, well it's remarkable. For somebody who alleges conspiracies and all the rest, I would have thought that at least you should have informed yourself as to the position being maintained by the defendants, which they have sworn on oath. That affidavit and your affidavit greatly assisted and informed the Court. They were both properly before the Court. I don't think there's anything further for me to say, other than to dismiss the claims in their entirety. Do you have any other application?"

55. The transcript indicates that the Circuit Court judge's attention was drawn to the provisions of section 38A of the Equal Status Act. It is also expressly referred to in the written legal submissions of 4 April 2019 which had been filed on behalf of the Office of the Ombudsman before the Circuit Court.

"18. Section 38A(1) of the Act provides that the burden of proof is: '*Where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the Defendant to prove the contrary.*' It requires the Plaintiff to establish, in the first instance, facts upon which he can rely in asserting that prohibited conduct has occurred. Therefore the Plaintiff must first establish a prima facie case of discriminatory treatment and it is only when a *prima facie* case has been established that the burden of proof shifts to the Defendants to rebut the presumption of discrimination."

APPEAL ON A POINT OF LAW

56. Section 28 of the Equal Status Act (as amended) reads as follows.

28 (1) Not later than 42 days from the date of a decision of the [Director of the Workplace Relations Commission] under section 25, the complainant or respondent involved in the claim may appeal against the decision to the Circuit Court by notice in writing specifying the grounds of the appeal.

(2) In its determination of the appeal, the Circuit Court may provide for any redress for which provision could have been made by the decision appealed against (substituting the discretion of the Circuit Court for the discretion of the [Director of the Workplace Relations Commission]).

(3) No further appeal lies, other than an appeal to the High Court on a point of law.

57. The interpretation of section 28, and, in particular, the limitations of an appeal on a point of law, have been considered in detail by the Supreme Court in *Stokes v. Christian*

Brothers High School Clonmel [2015] IESC 13; [2015] 2 I.R. 509, [83] and [84] as follows.

"[83] On the other hand, there are important features of s. 28(3) of the Act of 2000 which need to be considered. The first is that it is clear that the subsection is intended to permit only a limited form of appeal. The appeal is one 'on a point of law'. That is terminology which has been used to limit many forms of statutory appeal to, and within, the courts. For instance, s. 42(1) of the Freedom of Information Act 1997 provides for an appeal on a point of law to the High Court by a person affected by a decision of the Information Commissioner following a review under s. 34 of the Act of 1997; and s. 123(3) of the Residential Tenancies Act 2004 provides for an appeal on a point of law to the High Court by any of the parties in respect of a determination of a tribunal of the Private Residential Tenancies Board. The principles applicable to the scope of such appeals have been summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, where he said at p. 452:-

> 'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> - it cannot set aside findings of primary fact unless there is no evidence to support such findings;
> - it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
> - it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
> - if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision ...'

[84] Thus, at least part of the purpose of subs. (3) must be designed to define the type of appeal which can be pursued to the High Court. In that context, it might be argued that the phrase "no further appeal" is simply designed to limit the scope of appeal to the High Court rather than to preclude what would otherwise be a constitutionally conferred right of appeal to this court."

58. These principles have been more recently affirmed by the Supreme Court in *Cahill v. The Minister for Education and Science* [2017] IESC 29; [2018] 2 I.R. 417 at [58] and [109].

59. As an aside, it should be noted that the limited function of an appellate court hearing an appeal on a point of law has been emphasised in one of the judgments which Mr Smith himself relied upon. See the judgment of the Court of Appeal of England and Wales in *North West Thames Regional Health Authority v. Noone* [1988] ICR 813.

> "As I have said earlier in this judgment, these racial discrimination claims are never easy, and so much depends on the inferences which the industrial tribunal think it right to draw from the evidence and material put before it. If there is no evidence or material from which an industrial tribunal can draw the inference of racial discrimination then, of course, they should not do so. On the other hand, one must not forget that it is the industrial tribunal which sees and hears the persons actually involved. Perhaps more than in most cases the assessment by the industrial tribunal of the thinking of the person or persons against whom the allegation of racial discrimination is made is most important. *As is well known, appeals lie from an industrial tribunal to the appeal tribunal only on a point of law, and it is only when the latter is satisfied that there was no material upon which the former could reach the conclusion that it did that the appeal tribunal should entertain the appeal.* "*
>
> *Emphasis (italics) added.

60. The proper procedure for making an appeal to the High Court pursuant to a statutory appeal on a point of law only is prescribed under Order 84C of the Rules of the Superior Courts. The appeal is to be made by way of originating notice of motion. Crucially, the notice of motion must specify the points of law.

61. The appeal which Mr Smith has brought does not comply with these requirements. Instead of issuing a notice of motion pursuant to Order 84C, Mr Smith instead filed a notice of appeal in the form prescribed under Order 61 of the Rules of the Superior Courts (as amended by S.I. No. 428 of 2018). This is the form of notice of appeal which applies to what might be described as a "conventional" appeal from the Circuit Court to the High Court pursuant to section 37 or 38 of the Courts of Justice Act 1936.

62. Mr Smith's appeal is, therefore, irregular in form. Strictly speaking, the failure to comply with the requirements of Order 84C would, in and of itself, be good reason to dismiss the appeal in its entirety. However, in circumstances where Mr Smith is a litigant in person, I have taken the unusual step of addressing the substance of his appeal in any event, notwithstanding the fact that the appeal is procedurally irregular.

63. For the sake of completeness, it should be noted that Mr Smith made an argument to the effect that the Rules of the Superior Courts (Appeals from the Circuit Court) 2018 (S.I. No. 428 of 2018) have *changed* the nature of an appeal under the Equal Status Act 2000. More specifically, it was submitted that the appeal is now a full appeal, by way of a rehearing, and is no longer confined to an appeal on a point of law.

64. With respect, this submission is incorrect for the following reasons. The Rules of the Superior Courts (Appeals from the Circuit Court) 2018 merely amend the *pro forma* notices of appeal under Appendix I of the Rules of the Superior Courts. These are the forms applicable to a conventional appeal from the Circuit Court to the High Court under the Courts of Justice Act 1936. The 2018 Rules do not purport to amend the *substantive* jurisdiction of the High Court in any respect. Moreover, and in any event, the 2018 Rules,

as a piece of secondary legislation, could not have amended the *primary* legislation, i.e. section 28 of the Equal Status Act.

MULTIPLE RESPONDENTS

65. As explained at paragraph 20 above, the complaint submitted by Mr Smith to the Workplace Relations Commission in 24 May 2018 had identified five respondents. The Adjudication Officer had written to the parties prior to the hearing in September 2018 to notify then that the joinder of the individual respondents, namely the Ombudsman himself (Mr Peter Tyndall) and the two employees appeared to be irregular. The letter referred to an earlier determination of the Workplace Relations Commission which indicated that individual employees should not be joined as a respondent to a complaint in circumstances where their employer would be vicariously liable for any conduct on their part.

66. Having heard submissions on this issue, the approach ultimately adopted by the Adjudication Officer was to issue one substantive determination addressing the underlying merits of the complaint, and three procedural determinations dismissing the claims against Mr Tyndall and the individual employees on the basis that same were frivolous and vexatious within the meaning of section 22 of the Equal Status Act. A fourth decision was made dismissing the claim against a different iteration of the name of the Office of the Ombudsman as frivolous and vexatious.

67. Mr Smith is aggrieved by this approach on the part of the Adjudication Officer. In submission to the High Court, Mr Smith emphasised that he had only made one complaint, and that for the Adjudication Officer to have addressed same in five separate determinations was intended to make him look like a "troublemaker".

68. This procedural issue was raised again before the Circuit Court, and having heard submissions, the Circuit Court judge indicated that he would treat the five complaints as a single appeal. (See page 29 of the transcript).

69. Having regard to the concerns raised by Mr Smith in this regard, I set out below the approach which I have adopted to the appeal.

70. An appeal to the High Court, pursuant to section 28(3) of the Equal Status Act, is an appeal against the "determination" of the Circuit Court. As indicated above, the Circuit Court adopted the pragmatic approach of making a single order which addresses the position of all five respondents. This is the "determination" which is under appeal. The High Court will, similarly, deliver a single omnibus judgment and make a single order in respect of the appeal from the Circuit Court, i.e. as opposed to delivering separate judgments in respect of each of the five respondents. Counsel on behalf of the Office of the Ombudsman and the individual respondents indicated that his clients had no objection to this course.

GROUNDS OF APPEAL

71. As explained earlier, the appeal to the High Court is confined to an appeal on a point of law only. It is not a *de novo* hearing as would be the position in a conventional appeal

under the Courts of Justice Act 1936. Bearing these limitations in mind, I turn now to consider the grounds of appeal in this case.

72. Mr Smith submits that the officials in the Office of the Ombudsman would have been aware from his first name (Olumide) that he was of a different ethnic or racial origin than them, and that, consequently, they deliberately inserted errors in the decisions of March 2018. Mr Smith further submits that the letter of 20 March 2018 dismissing his request for a review constitutes a "denial of service" in breach of section 5(1) of the Equal Status Act. These submissions were rejected by the Circuit Court. The gravamen of the appeal is that the *findings of fact* made by the Circuit Court are so unreasonable and/or disproportionate as to amount to an error of law.

73. In support of his argument, Mr Smith cited a number of determinations and judgments in his written legal submissions. The two authorities of most relevance are the determinations of the Labour Court in *Citibank v. Ntoko* [2004] 15 E.L.R. 116 and *Campbell Catering Ltd v. Rasaq* [2004] 15 E.L.R. 310. It should be explained that both of these determinations were made in respect of claims for unfair dismissal which had been submitted pursuant to section 77 of the Employment Equality Act 1998 *prior to* its amendment by the Equality Act 2004. Prior to that amendment, there was no provision of domestic legislation applicable which expressly governed the burden of proof in respect of claims of racial discrimination. The fact that these two determinations were made against a very different legislative context weakens their precedential value.

74. One of the principal issues in dispute in each of the Labour Court determinations concerned the burden of proof in discrimination claims. More specifically, an issue arose as to whether, under the then legislation, i.e. prior to the Equality Act 2004, the burden of proof ever *shifted* from the complainant to the respondent. In each instance, the Labour Court applied, by analogy, the approach which it had previously taken in respect of sexual discrimination cases in *Mitchell v. Southern Health Board* [2001] 12 E.L.R. 201 ("*Mitchell*"). In *Mitchell*, the Labour Court gave "indirect effect" to Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex by interpreting and applying domestic law in accordance with the objectives of that Directive.

75. The Labour Court summarised the evidential burden on a complainant as follows in *Mitchell*.

> "It is necessary, however, to consider the extent of the evidential burden which a claimant must discharge before a prima facie case of discrimination on grounds of sex can be made out. The first requirement of Article 4 of the Directive is that the claimant must 'establish facts' from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.
>
> It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a

presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.

Applied to the present case, this approach means that the appellant must first prove as a fact one or more of the assertions on which her complaint of discrimination is based. A prima facie case of discrimination can only arise if the appellant succeeds in discharging that evidential burden. If she does, the respondent must prove that she was not discriminated against on grounds of her sex. If she does not, her case cannot succeed."

76. In *Citibank v. Ntoko* [2004] 15 E.L.R. 116 and *Campbell Catering Ltd v. Rasaq* [2004] 15 E.L.R. 310, the Labour Court similarly sought to interpret and apply the relevant provisions of the then domestic legislation and the rules of evidence in line with the wording and purpose of article 8 of the Racial Equality Directive.

77. This approach is summarised as follows in *Citibank v. Ntoko* [2004] 15 E.L.R. 116 (at page 127).

"The Court normally requires the complainant to establish the primary facts upon which the assertion of discrimination is grounded. If those facts are regarded by the Court as being of sufficient significance to raise an inference of discrimination, the respondent must prove the absence of unlawful discrimination (see *Mitchell v Southern Health Board* [2001] E.L.R. 201).

This approach is based on the empiricism that a person who discriminates unlawfully will rarely do so overtly and will not leave evidence of the discrimination within the complainant's power of procurement. Hence, the normal rules of evidence must be adapted in such cases so as to avoid the protection of antidiscrimination laws being rendered nugatory by obliging complainants to prove something which is beyond their reach and which may only be in the respondents capacity of proof."

78. The Labour Court concluded that the complainant in *Citibank v. Ntoko* had discharged this (initial) burden of proof.

"The Court is satisfied that the complainant has proved as a matter of probability that he was singled out for special unfavourable treatment by his manager, that another agency employee of a different racial origin would not be so treated and that his dismissal arose as a direct consequence of the special treatment to which he was subjected. Having regard to all of the surrounding circumstances this is a fact of sufficient significance to raise a presumption of discrimination. The Court has considered the respondent's explanation of what occurred and in light of the evidence as a whole, finds it unconvincing. Accordingly the respondent has failed to satisfy the Court that it's decision to dismiss the complainant was not racially motivated and the complainant is entitled to succeed."

79. A similar approach to the burden of proof was adopted by the Labour Court in *Campbell Catering Ltd v. Rasaq* [2004] 15 E.L.R. 310.

80. In each determination, the Labour Court was satisfied that the respective complainant had established that a work place policy had been applied with full rigour to them, notwithstanding that the policy was not generally enforced against other employees of a different racial origin. (The policies at issue concerned the making of personal telephone calls, and the consumption of food, respectively). Proof of this *difference* in treatment of comparable employees had been sufficient to shift the onus of proof to the respondents in those cases, i.e. the respondents had to prove that the difference in treatment had not been on the ground of race.

81. Mr Smith has also cited a decision of an Equality Officer, *A Complainant v. A Department Store*, (13 March 2002) (DEC-E2002-017). The complainant alleged that she had been victimised by a (potential) employer because she had previously sought redress under the Employment Equality Act 1998 against the employer. Victimisation on this ground is expressly prohibited. The Equality Officer applied the approach to the burden of proof identified in Mitchell.

> "The consequence of applying the approach to this case is that the complainant must demonstrate both that the behaviour complained of is capable of constituting victimisation and also that it arose as a consequence of her having done one or more of the things envisaged in section 74 (1). It is frequently the case that the Labour Court or an Equality Officer has no choice but to draw inferences of discrimination or victimisation from facts presented. *In this case, however, the respondent unquestionably sent a letter to the complainant saying that she would not be considered for future employment because she had made allegations to the Equality Authority.** To that extent, the matter is quite clear. The complainant was refused consideration for employment because she made contact with the Equality Authority regarding an allegation of discrimination under the 1998 Act."
>
> *Emphasis (italics) added.

82. As appears, it is a consistent theme of the domestic determinations and decisions relied upon by Mr Smith that the initial burden of proof lies with a complainant. A complaint is required to establish facts which give rise to an inference of discrimination. It is only then that the burden of proof shifts to the respondent. A similar approach has now been transposed into domestic law under section 38A of the Equality Act. In determining the within appeal, the High Court must, of course, apply the legislation currently in force. In particular, this court must have regard to the actual language of section 38A.

83. Finally, Mr Smith has cited two judgments of the English Court of Appeal as follows: *King v. Great Britain China Centre* [1991] EWCA Civ 16, and *North West Thames Regional Health Authority v. Noone* [1988] ICR 813. These judgments are of little assistance in circumstances where they were delivered in the context of a very different legislative background, and at a time which predates the Racial Equality Directive. The judgment in

King v. Great Britain China Centre, in particular, cannot safely be followed in circumstances where it disavows the use of a reverse burden of proof, i.e. the very thing which has since been introduced under the Racial Equality Directive (and transposed into domestic law by section 38A of the Equal Status Act).

DISCUSSION AND DECISION

84. The Circuit Court dismissed Mr Smith's complaint on the basis that he had failed to make out even a *prima facie* case of discrimination on the grounds of race. The High Court's jurisdiction to entertain an appeal against the Circuit Court's determination is confined to an appeal on a point of law. (Section 28(3) of the Equal Status Act 2000). The limited nature of such an appeal has been explained in detail at paragraphs 56 *et seq*. above, by reference to the judgment of the Supreme Court in *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13; [2015] 2 I.R. 509.

85. The only point of law which might potentially arise for consideration on this appeal is whether the Circuit Court applied the correct legal test in respect of the burden of proof. If it did do so, then its *findings of fact* could only be disturbed on an appeal on a point of law in circumstances where (i) there is no evidence to support the Circuit Court's findings of primary fact; or (ii) the inferences drawn by the Circuit Court were either unreasonable or based on an incorrect interpretation of documents.

86. I turn, therefore, to consider the correct legal test in respect of the burden of proof.

87. A complainant who wishes to advance a claim of discrimination must discharge the burden of proof prescribed under section 38A of the Equal Status Act 2000 (as inserted by the Equality Act 2004). The section reads as follows.

> 38A.—(1) Where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.

88. Section 38A gives effect to article 8 of the Racial Equality Directive (Directive 2000/43/EC). The complainant must establish a *prima facie* case of discrimination, i.e. the complainant must establish facts from which it may be presumed that there has been direct or indirect discrimination. The effect of these legislative provisions is that a complainant is required to discharge a reduced burden of proof, and once this is done, the burden of proof is reversed. As explained by Advocate General Mengozzi in Case C-415/10, *Meister* ECLI:EU:C:2012:8, [22], the effect of the burden of proof provisions under the Racial Equality Directive (and other related Directives) is that a measure of balance is maintained between the parties, enabling the complainant to claim his or her right to equal treatment but preventing proceedings from being brought against a respondent solely on the basis of the complainant's assertions. (See discussion at paragraphs 34 to 39 above).

89. Where it is alleged that discrimination has occurred on the ground of race, it is necessary to establish a *prima facie* case that the complainant has been treated less favourably than

another person is, has been or would be treated in a comparable situation, on the ground that the complainant is of a different race, colour, nationality or ethnic or national origin.

90. The Adjudication Officer and the Circuit Court both reached the conclusion that Mr Smith had failed to discharge this burden of proof. In particular, it was found that Mr Smith had not established any facts which would give rise to an inference of discrimination on the grounds of race.

DECISION ON APPEAL

91. Applying the principles governing an appeal on a point of law, as set out by the Supreme Court in *Stokes v. Christian Brothers High School Clonmel*, I am satisfied that there is no basis for saying that the findings of fact made by the Circuit Court were unsupported by evidence, unreasonable or based on an incorrect interpretation of documents. The Circuit Court properly applied the evidential test as required under section 38A of the Equal Status Act 2000 (as amended). There was nothing in the evidence—written or oral—before the Circuit Court which suggests that the manner in which Mr Smith's complaint was dealt with by the Office of the Ombudsman was other than in accordance with its regular and normal procedure. The Ombudsman Act 1980 (as amended) allows for the carrying out of a preliminary investigation, and envisages that the Office will seek information from the public authority against whom the complaint is made. The letter of 6 March 2018 indicates that this is precisely what occurred in the case of Mr Smith's complaint. The case officer sought and obtained the Legal Aid Board's response to the complaint. Mr Smith is aggrieved that the case worker did not revert to him, and allow him an opportunity to reply to the Legal Aid Board's response, before the case worker reached his conclusions. Mr Smith submits that the procedure is not "fair".

92. With respect, the question for determination upon a *claim of racial discrimination*—as opposed to, for example, an application for judicial review—is not whether the procedure adopted by the Office of the Ombudsman is subjectively fair, but rather whether the procedure applied to Mr Smith *differed* from the approach applied to other complainants generally. Mr Smith adduced no evidence which suggests that the approach taken by the case worker in March 2018 was other than the standard practice of the Office of the Ombudsman. Mr Smith did not, for example, produce any printout from the Office's website or publications to show that it would be standard practice to afford a complainant an opportunity to make a submission in reply to the public authority's response. Put otherwise, there was nothing before the Circuit Court to suggest that Mr Smith's complaint had been treated any differently from any other similar complaint.

93. The same logic applies to the subsequent letter of 20 March 2018. There is no statutory obligation on the Office of the Ombudsman to provide a "review" of a case officer's decision. Rather, as is explained in detail in the letter of 3 December 2015 and on the Office's website, the Office operates a (non-statutory) appeals or review procedure. It is expressly stated that a complainant may avail of one appeal only. This is entirely consistent with the provisions of section 4(6) of the Ombudsman Act 1980.

94. Mr Smith had adduced no evidence before the Circuit Court which suggests that the "one appeal" rule is not applied to all complainants or that he had been singled out in this regard. The most that Mr Smith can say is that he disagrees with the manner in which the "one appeal" rule was applied in the circumstances. Mr Smith contends that the subject-matter of the second complaint to the Office of the Ombudsman, i.e. the complaint made in January 2018, was separate and distinct from the first complaint. This contention relies on the fine distinction between (i) family law proceedings before the District Court and Circuit Court, and (ii) judicial review proceedings before the High Court which seek to challenge orders in those self-same family law proceedings. It was certainly open, as a matter of law, for the Office of the Ombudsman to conclude that the issues were closely connected, and that the two complaints made to the Office covered the same subject-matter for the purposes of section 4(6). However, the question for determination upon *a claim of racial discrimination* is not whether the decision was right or wrong, but rather whether the procedure applied to Mr Smith *differed* from the approach applied to other complainants generally. The decision that the two complaints involved the same subject-matter cannot be said to have been so unreasonable as to allow for the drawing of an inference, even on a *prima facie* basis, that the decision to refuse the request for a review must have been informed by other undisclosed reasons, i.e. on the ground of race.

95. In summary, Mr Smith failed to adduce any evidence before the Circuit Court which suggested, even on a *prima facie* basis, that the Office of the Ombudsman had treated him differently than it would any other complainant. This is to be contrasted with the circumstances of the two determinations of the Labour Court relied upon by Mr Smith. (See paragraphs 73 to 82 above). In each instance, the Labour Court was satisfied that the respective complainant had established that a workplace policy had been applied with full rigour to them, notwithstanding that the policy was not generally enforced against other employees of a different racial origin. (The policies at issue concerned the making of personal telephone calls, and the consumption of food, respectively). Proof of this *difference* in treatment of comparable employees had been sufficient to shift the onus of proof to the respondents in those cases, i.e. the respondents had to proof that the difference in treatment had not been on the ground of race.

96. It should also be noted that there was no evidence before the Circuit Court that the relevant officials in the Office of the Ombudsman had been aware of Mr Smith's race or ethnicity. The procedure had been a "paper based" procedure, and there is no evidence to suggest that either official had met with or even spoken with Mr Smith on the telephone prior to the issuing of the two letters in March 2018. It was expressly stated in the Office of the Ombudsman's undated letter that the staff were not aware of Mr Smith's racial or ethnic origin.

> "You state that you are someone of the Yoruba racial or ethnic origin. Our staff were not aware of this until you provided us with this information in your 'Notification'. Therefore our staff did not racially discriminated against you in any

dealings they had with you. I also find no evidence of you being harassed by any member of staff from this office."

97. Mr Smith has assumed that the employees of the Office of the Ombudsman are of what he describes as the Caucasian racial origin, and seeks to infer racial discrimination on this basis. Aside entirely from the fact that there is simply no evidence of any discrimination against him, Mr Smith's argument in this regard misunderstands the concept of a comparator under the Equal Status Act. The relevant comparator for a claim of discrimination on the grounds of race is defined as follows at section 3(2)(h).

> (2) As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are:
>
> (h) that they are of different race, colour, nationality or ethnic or national origins (the "ground of race")

98. As appears, the correct comparison is not as between the complainant and the person providing the service, but rather as between the complainant and another service recipient.

99. Mr Smith has also sought to criticise the decision of the Circuit Court on the basis that there is no express finding to the effect that the letter of 20 March 2018 represented a "denial of service" in breach of section 5 of the Equality Act. It was submitted that the Circuit Court had failed to make any decision under section 5(1).

100. With respect, this submission is based on a misunderstanding of the scheme of the legislation. Section 5(1) reads as follows.

> 5.(1) A person shall not discriminate … in providing a service, whether the … provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.

101. Section 5 is not a stand-alone provision, to be interpreted and applied in isolation. Rather, the prohibition under section 5(1) ("*shall not discriminate … in providing a service*") must be read in conjunction with section 3 (general discrimination) and/or section 4 (discrimination on disability ground). These are the sections which define the concept of "discrimination". The Circuit Court expressly found, by reference to section 3, that Mr Smith had failed to establish a *prima facie* case of either direct or indirect discrimination, and held that his claims must be dismissed in their entirety. It is self-evident from this finding that there had been *no discrimination* that there can have been no breach of the prohibition against discrimination under section 5(1).

102. Finally, and as noted at paragraph 29 above, it seems to have been assumed both before the Workplace Relations Commission and the Circuit Court that the carrying out of an investigation pursuant to the Ombudsman Act 1980 represents the provision of a "service" within the meaning of the Equal Status Act. In circumstances where no argument to the contrary was addressed to the High Court, it is unnecessary to address

the correctness or otherwise of this assumption or concession. Nothing in this judgment should, however, be understood as necessarily endorsing the correctness of this approach. It is an issue which may require to be determined in another case.

CONCLUSION AND FORM OF ORDER

103. Having regard to the principles governing an appeal on a point of law, as set out by the Supreme Court in *Stokes v. Christian Brothers High School Clonmel*, I am satisfied that there is no basis for saying that the findings of fact made by the Circuit Court were unsupported by evidence, unreasonable or based on an incorrect interpretation of documents. The Circuit Court properly applied the evidential test as required under section 38A of the Equal Status Act 2000 (as amended). The Circuit Court was entitled to conclude, on the evidence presented, that Mr Smith had failed to establish even a *prima facie* case of discrimination.

104. Accordingly, Mr Smith's appeal to the High Court pursuant to section 28(3) of the Equal Status Act 2000 (as amended) is dismissed. For the reasons set out at paragraphs 65 to 70 above, the complaints against the five named respondents will be treated as one "complaint" and this judgment and order applies to all five respondents. The order of the Circuit Court of 18 April 2019 is affirmed.

105. I will hear the parties further on the question of costs.