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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERT JAMES PEIFER

Appellant;

-and-

SOUTHERN EDUCATION AND LIBRARY BOARD

and

DROMGLASS HIGH SCHOOL

Respondents

Mr Peifer made written submissions on his own behalf

Before: Morgan LCJ, Maguire LJ and Humphreys J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of an industrial tribunal given on 20 November 2019 to award the appellant compensation in the sum of £1063 comprising £500 together with interest thereon for victimisation. The appellant submits that the decision did not address the range and magnitude of unequal treatment to which he was subjected.

Background

[2] On 25 August 2005 the appellant presented a complaint to the Office of the Industrial and Fair Employment Tribunal alleging that he had been discriminated against in recruitment for the post of special needs class assistant by three Education and Library Boards and 10 schools to whom he had made application for some 35 posts. 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. It is common case that approximately 98% of those employed within the state education

system as classroom assistants are female. His claim form indicated that the respondents were guilty of direct discrimination but he suspected that there was probably also indirect discrimination. None of these applications related to the respondent school. The industrial tribunals decided to deal with these cases by managing each claim separately in relation to each school.

[3] The appellant applied for a classroom assistant post at Drumglass High School. The closing date for applications was 19 July 2005. He was invited to attend for interview on 1 September 2005. Ms X was selected for the post. She was already carrying out the duties of the post and being paid prior to the end of the interview process. The appointment was audited by the Southern Education and Library Board ("SELB") as a result of which a letter was sent to the school on 16 September 2005 indicating that the recruitment exercise contravened good practice. First, the selection panels were not quorate which meant that the processes for shortlisting for interview were not valid and secondly, the criteria on the shortlisting document were not discernible from those stated in the advertisements for the post. The school was advised to recommence the recruitment and selection processes starting from the receipt of applications stage.

[4] When the competition recommenced the appellant was considered not to have met the shortlisting criteria which included evidence that the candidate had received training in autism, ADHD or dyslexia. Ms X and Ms Y were shortlisted and Ms X was chosen as the successful candidate with Ms Y as the reserve.

[5] That process was again audited in November 2005. The SELB concluded that only two applicants met all the criteria which the panel used for the shortlisting. One of those withdrew from the process and the other was not recommended for appointment. The recommended appointee and the reserve candidates did not meet the criteria applied in shortlisting and were not regarded as suitable candidates. In those circumstances it was agreed between the Board and the school principal that no appointment should be made and the post should be re-advertised. The agreement was set out in a letter from the Board to the school dated 21 November 2005.

[6] On 23 November 2005 the appellant lodged his claim against the present respondents alleging both sex discrimination and victimisation. The case was listed for hearing before the tribunal on 2 September 2013. On the morning of the hearing counsel for the respondent admitted liability for unlawful discrimination on the grounds of sex. No written basis was submitted to the tribunal for that finding but it was indicated to the tribunal by the respondent that it was accepted that there had been a difference of treatment of persons of the opposite sex and the school was not in a position to call evidence to challenge the inference of sex discrimination. The tribunal decided to adjourn for a remedies hearing but did not address the victimisation claim.

[7] In connection with the pursuit of his claim the appellant had lodged questionnaires seeking information in relation to those who been employed as classroom assistants by the school in the 2005/06 school year. He received further information in relation to this on 29 August 2013 just prior to the tribunal hearing. He subsequently examined the figures and established that the principal of the school had not accepted the advice of the Education and Library Board to re-advertise the relevant posts but had proceeded by other means to employ eight female classroom assistants, including Ms X and Ms Y, in the course of that school year. His case was that this was a device to exclude him from applying and was evidence of victimisation. Part of his complaint is that he did not get an opportunity in the remedies hearing to raise this issue in connection with the victimisation claims. The remedies hearing on 18 August 2014 dealt only with the award for sex discrimination.

Subsequent litigation

[8] The appellant appealed against the omission to deal with his victimisation claim and in a judgment delivered on 26 September 2017 this court directed that the claim should be heard by a fresh tribunal. That hearing commenced on 15 October 2018 and continued on various dates until 24 June 2019. The tribunal considered the scope of the claim at paragraph 4 of the ruling:

> "Having carefully considered the claimant's claim form in these proceedings, it is clear to us that the only acts which are within the scope of this case are as follows:
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> (1) Alleged unfairnesses, within the context of the conduct and outcomes of the recruitment process in respect of the relevant Drumglass High School classroom assistant vacancy (the vacancy for which the claimant applied), throughout the period from the date of the commencement of that recruitment process until the date in October when that process was abandoned.
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> (2) The omission, at the end of those two phases of the process, to appoint the claimant to the post."

[9] Having considered the relevant case law the tribunal properly identified the test in relation to the victimisation claim as whether the claimant could prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude in the absence of an adequate explanation that the alleged acts of victimisation discrimination had occurred.

[10] The tribunal identified Ms X and Ms Y as appropriate comparators. It recognised that the appellant had been treated less favourably than those comparators in respect of the recruitment process which had been abandoned. It

was common case that the proceedings lodged in August 2005 constituted a protected act and the issue to which the tribunal turned was whether that prohibited ground had been a significant reason although not necessarily the main reason for the relevant mistreatment.

[11] The tribunal recognised that the key issue was whether it could properly conclude in the absence of a relevant non-discriminatory explanation being proved by the respondents that the commencement of the August 2005 proceedings was a significant reason for the unfair preferences. It was satisfied that there was *prima facie* evidence that prior to the making of the relevant decisions during the course of the recruitment exercise one or more of the alleged perpetrators of the discrimination knew of the fact that the claimant had begun the August 2005 proceedings. That was sufficient to satisfy the statutory test.

[12] The tribunal then turned to the issue of whether the claimant sustained financial loss as a result of the victimisation. That issue turned on the evidence indicating that the appellant would have taken up the post if it had been offered to him. The tribunal noted that the salary for the post was close to the statutory minimum wage and that the distance from the appellant's home to the school was approximately 50 miles. The tribunal did not accept his testimony that if he had succeeded in getting the job he would have moved. They noted that since 2005 his life has been devoted to pursuing his industrial tribunal claims largely in Belfast but he had not moved to Belfast.

[13] The tribunal carefully considered whether this was a case in which exemplary damages might be awarded. We can see no error of law in the approach of the tribunal to this issue. This was not oppressive, arbitrary or unconstitutional action by agents of the government nor could it be said that this was an abuse of governmental power.

Consideration

[14] This is an appeal on a point of law. The role of the Court of Appeal in such a proceeding was summarised by Coghlin LJ in the case of Miskelly v The Restaurant Group [2013] NICA 15 as follows:

> "[24] The tribunal constituted the appropriate industrial court instituted for the purpose of resolving relevant employment issues and this court is confined to considering questions of law arising from the tribunal decision. The tribunal has the advantage of seeing and hearing the witnesses at first instance and it is fundamental to understanding the function of this court to appreciate that it does not conduct a general rehearing. Article 22 of the 1996 Order provides that a party to proceedings before an industrial tribunal who is

> dissatisfied *in point of law* (our emphasis) with a decision may appeal to this court. We remind ourselves of the observations of Girvan LJ in Carlson Wagonlit Travel Ltd v Robert Connor [2007] NICA 55 when he said at paragraph [25]:
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> > 'In this case the decision of the Tribunal must stand unless the Tribunal made an error of law in reaching its conclusions; based its conclusions on material findings of fact which were unsupported by the evidence or contrary to the evidence; or the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have reached such a decision.'"

[15] DB v Chief Constable of PSNI [2017] UKSC 7 [2017] NI 301 considered the review of findings made by a judge at first instance. The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a tryout on the road to an appeal. Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, while perhaps not as strong where no oral evidence has been given, remains cogent.

[16] This was a case in which oral evidence was heard by the tribunal. The findings of fact and the inferences drawn by the tribunal are clearly evidenced in the decision. In particular there is no proper basis for us to call into question the conclusion of the tribunal that the appellant would not have taken the position up if he had been offered the post. We recognise, however, that the tribunal found that this case was a particularly serious example of unfair recruitment practices and that by purporting to rely on powers which should not have been used for that purpose, the principal of the school appointed Ms X to the relevant post.

[17] In respect of the claim for aggravated damages the tribunal correctly relied upon the conclusions of the majority of the court in McConnell v Police Authority for Northern Ireland [1997] NI 244. The principle established in that case was:

> "Aggravated damages were completely compensatory in nature and despite the difficulty in quantifying that for which they were awarded, it was clear that, except in the

> rare cases where exemplary damages are still allowed, any award had to be strictly justifiable as compensation for the injuries sustained. It followed that an award of aggravated damages should not be an extra sum over and above the sum the tribunal of fact considered appropriate compensation for the injury to the claimant's feelings."

We have already indicated that this was not a proper case for exemplary damages and we are satisfied that the tribunal was correct to conclude that no additional sums should be awarded by way of aggravated damages.

[18] It is abundantly clear that the conduct of this litigation has been deeply unsatisfactory. The application was initiated by the appellant on 23 November 2005. At that stage his complaint was in relation to the two competitions in which he had not succeeded. He was at that stage unaware of the subsequent use of an ad hoc procedure by the school principal to put in place effectively on a full-time basis the individuals who had been selected in the earlier processes together with additional female assistants, some of whom the appellant considered unqualified.

[19] The hearing of this case was not listed to commence until approximately eight years after the events to which it related. A matter of days before the proposed listing the respondent served further information in relation to the employment of female classroom assistants in the relevant period. To the surprise of the appellant the respondent then announced that it was conceding liability on the first day of the hearing. The original tribunal was presumably completely unsighted on the further information that had been provided shortly before the hearing relating to the additional staff who had been employed. If they had been aware things might have taken a different course.

[20] By the time of the remedy hearing in 2014 the appellant had been able to derive from the information provided shortly before the proposed hearing date that the school principal had "surreptitiously" managed to achieve what she had failed to do in the previous competitions by appointing Ms X and Ms Y while at the same time sidelining the appellant. The difficulty was that the tribunal at that stage was only interested in remedy.

[21] It seems clear that the appellant was making the case at the remedy hearing that the failure by the school principal to re-advertise the post as agreed with the Education and Library Board as evidenced by the correspondence on 21 November 2005 was victimisation. She had used her ad hoc powers effectively to achieve the outcome she wished. If the remedies tribunal had fully understood the appellant's position it seems to us likely that in the interests of justice the tribunal would have invited the appellant to amend his claim form in order to ensure that this issue could be properly explored.

[22] Any such application to amend would have been a discretionary decision for the tribunal taking into account the guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836. The principal objection would have been delay with the amendment being made 9 years after the original claim but that argument would be met by the fact that material justifying the amendment had only recently been provided. A claim of victimisation had already been made so no new cause of action was introduced. The bare facts were not in dispute. In our view the interests of justice would have required an amendment of the claim.

[23] Given the tortured background to this claim we have considerable sympathy with the position of the tribunal who heard the remitted victimisation claim. That position was not assisted by the fact that the appellant's submissions were prolix and diffuse and his language at times intemperate. In looking at the scope of the appeal the tribunal examined the claim form but did not take into account the previous unsatisfactory history of the conduct of this litigation. If the tribunal had done so we consider that it would have concluded that it was in the interests of justice for the tribunal even at that late stage to allow the appellant to amend his claim so as to extend his claim for victimisation to include the conduct of the school principal after the two failed appointment exercises.

[24] We are satisfied, therefore, that this personal litigant ought to have been advised of the need to amend his claim form in order to pursue the victimisation claim in the way that he wished and in those circumstances confining his claim to the period of the two failed competitions deprived him of a fair hearing and was unlawful.

Conclusion

[25] Our conclusion would normally lead to an immediate order for remittal to a tribunal to determine whether any additional sum of compensation should be awarded to the appellant for injury to feelings. Given, however, the highly unsatisfactory progress of this litigation we would be prepared to assess an appropriate award if the respondents were content to accept that the appellant should be compensated for the period in dispute. We will give the respondents 14 days to respond.