Neutral Citation Number: [2010] IEHC 307

THE HIGH COURT

2007 41 MCA

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT 1998 – 2004

BETWEEN

NEIL KING

THE PERSONS LISTED ON THE SCHEDULE ATTACHED HERETO

PLAINTIFFS/APPELLANTS

AND

THE MINISTER FOR FINANCE AND

CIVIL AND PUBLIC SERVICE UNION

DEFENDANTS/RESPONDENTS

THE LABOUR COURT AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

NOTICE PARTIES

JUDGMENT delivered by Mr. Justice O'Keeffe on 12th day of May, 2010

1. This is an appeal pursuant to s. 90 of the Employment Equality Act 1998 ("the Act") of a Determination of the Labour Court dated 16th February, 2007.

2. The appellants were at all material times Clerical Officers in the Civil Service. The appeal has its origins in a claim made in 1991 by 26 female clerical assistants for equality of pay, with a Civil Service grade then known as "Paperkeeper", a grade which was predominantly male. The original case on behalf of the 26 clerical assistants took almost fourteen years to complete, and was the subject of two references to the High Court.

3. The original claimants were joined by a further 2,200 then clerical assistants/clerical officers who also lodged claims for equality of pay.

4. At that time, there were 869 men in the clerical assistant grade. Their union, the Civil and Public Services Union ("CPSU") (the second named respondent) did not invite these men to apply for equality of pay on the basis that this was an equal pay claim for women only.

5. In 2003, the CPSU entered into an agreement with the Department of Finance that a sum of €34m would be paid by the Department of Finance in order to settle the matter. It was then a matter for the CPSU who would benefit from the settlement.

6. On 20th November, 2003, a legal agreement was signed incorporating the terms already agreed, and slightly increasing the settlement figure.

7. The largest group excluded from the settlement was composed of those persons who had been serving as clerical officers in October 1997, who had not made claims of discrimination in 1997 (or in the case of men, who had not been invited to make claims) and who had been promoted before 16th May, 2003 (the date of the settlement).

8. Between May 2003 and June 2004, some 1,849 individuals commenced proceedings under the Act claiming that they had been discriminated against on grounds of gender, martial status, family status and age within the meaning of s. 6 of the Act and in contravention of s. 8 of the Act. The claimants' case was that they had not benefited from the terms of the settlement and that the settlement was discriminatory towards them.

9. The appellants made an application to an equality officer pursuant to s. 77 of the Act and complained that the respondents discriminated against them on grounds of gender by excluding them from benefit under the said agreement. By a recommendation, dated 6th March, 2006, the Equality Officer rejected the appellants' application.

10. The appellants appealed to the Labour Court pursuant to s. 83 of the Act and by a Determination dated 16th February, 2007, the Labour Court rejected the appellants' appeal stating that no *prima facie* case of discrimination had been established.

11. The appellants appealed to this Court and contend that the Determination of the Labour Court is an error of law and seek:-

(a) An Order reversing or quashing the said Determination of the Labour Court;

(b) An Order that the said Determination be set aside; and

(c) A declaration that the Labour Court erred in law in rejecting the appellants' said claim for redress.

12. The female members who appealed to the Labour Court had their claim rejected. Such claimants had not appealed to this Court.

13. The Labour Court in its determination referred to the methodology of applying the test inherent in the definition of indirect discrimination as considered by the European Court of Justice in the case of *R. v. Secretary of State for Employment Ex Parte, Seymour-Smith and Peres* [1999] IRLR 253.

14. In its Determination the Labour Court noted from the statistics advanced by the claimants that 89.3% of the beneficiaries of the settlement agreement were women whereas 10.7% were men. It also noted that in respect of beneficiaries who had not previously lodged claims, 84.4% were women and 15.6% were men. The claimants in turn comprised of 62.3% women and 37.7% men. In all cases, a substantial majority of both the claimants and the beneficiaries were female.

15. At p. 14 of its Determination, it was stated:-

> *"However, what is required by the established test is that a significantly higher proportion of men than women are disadvantaged by the requirement to have been in service on 16th May, 2003, irrespective of the fact that the majority of both the advantaged and the disadvantaged group are women."*

16. The Determination stated that in considering the question of statistics, the court must decide which "*pool*" to choose for consideration. The Determination at p. 14 stated:-

> *"The Court has come to the view that the optimum total pool from the Claimants' point of view, as well as the most logical, is that which is composed of the group who received payment, but did not claim, having no legal actual or potential entitlement to benefit from the settlement and who were C.O's in October 1997, in addition to the Claimants, who equally did not claim, were C.O's in October 1997, but did not benefit. The pool, as indicated in the case of Ruthford v. Secretary of State for Trade and Industry [2004] IRLR 829 is therefore composed of the aggregate of the Advantaged and Disadvantaged groups as set out above. The following table sets out the relevant figures in the manner adopted in Ruthford (after Seymour-Smith)."*

17. *"Total Pool: 6450*

Men Women Gender Ratio W/M

Disadvantaged 685 1165 1.7: 1

Advantaged 736 3864 5.25: 1

Total Pool 1421 5029 3.5: 1

Disadv. As % 48% 23% 0.48: 1

of Pool

Adv. As % 52% 77% 0.67: 1

Of Pool

> *While the above statistics, when considering the advantaged group in particular, would appear to disclose some disproportionate impact as between men and women, the question as to whether this impact is sufficient to justify a finding of discrimination is another matter. In the view of the Court, the level of disproportionate discriminatory effect shown by the statistics is not sufficient to justify such a finding.*
>
> *In this instance, the Court is of the view that there is an inherent vulnerability in statistics taken at a fixed time or period which could be influenced by purely fortuitous factors. Any consideration of such statistics must also be influenced by the undisputed fact that both the Advantaged and Disadvantaged groups are composed predominantly of women; also, there is the undisputed fact that a finding that the statistics indicated a degree of discrimination would result in men benefiting from a case which was originally taken as a general discrimination claim by women. It is therefore difficult in logic to see how the statistics could support a finding of discrimination.*
>
> *Given that the onus of proof is on the Claimants, the Court has come to the view that the available evidence, including statistics, does not go far enough to establish a prima facie case of discrimination.*
>
> *It should be noted that the statistics are but an aspect for consideration and would not in any event, be decisive in themselves. This principal was enunciated by the E.A.T. in Ruthford and quoted with approval by the House of Lords in their consideration of the same case.*
>
> *It is established case law that it is for the National Court to satisfy itself that any set of statistics provide a sufficiently reliable evidential base of prima facie discrimination."*

18. Mr. William Hannigan, the Assistant General Secretary of the CPSU stated on affidavit that it was of central importance to the claimants' case that the Labour Court miscalculated the ratio of advantaged males as a proportion to advantaged females. He claimed that there was a serious error in the last row of the table set out at p. 15 of the Labour Court Determination. The gender ratio of women to men in the row entitled Disadvantaged as a percentage of the pool was 48% of men and 23% of women. However, he claimed as advised by Dr. Jane Horgan, a Senior Lecturer in Statistics at Dublin City University that a serious error occurred in the fifth row which concerns the advantaged as a percentage of the pool. This row disclosed 52% of men who are in the advantaged group as compared to 77% of women who were in the advantaged group. The gender ratio of women to men was then set out in the Labour Court Determination at 0.67:1. He stated that the correct ratio is in fact 1.48:1.

19. Mr. Hannigan also stated he was advised by Dr. Horgan that statistics provide a tool, known as the chi-squared test, for answering the question as to whether or not discrepancies suggest bias or could have occurred by chance. He was advised that generally a chi-squared test would establish whether the difference between rows and columns are due to random variation or are indicative of a real or significant difference. He said that Dr. Horgan had performed a chi-squared test on the data containing the correct ratios and that the result of the test was found by her to be "*highly significant*" and meant that the proposition that there was no difference in the ratio between men and women was not sustainable. He said that he believed that Dr. Horgan's interpretation of the chi-squared result was that there was significant differences in the proportions of men and women in the groups and that the greater proportion of men in the disadvantaged group combined with the lower proportion of men in the advantage group was due to something other than random variation.

20. In his affidavit, Mr. Blair Horan on behalf of the second named respondent stated that the appellants sought to introduce this evidence after the court completed its hearing and that the court refused to hear it. It was asserted that the appellants cannot now introduce such evidence.

The appellants' submissions
21. The appellants submitted that the statistical information employed by the Labour Court was erroneous. They relied on the error as outlined by Dr. Horgan in the fifth row of the table which concerned the advantage as a percentage of the pool. It was submitted that this error constituted a serious underestimation of the ratio of women to men in the advantage group. Reliance was placed on a statistical tool known as the chi-squared test, in order to determine whether discrepancies were due to random variation or were indicative of real or significant difference.

22. It was submitted that the erroneous statistical information was central to the Labour Courts finding that there was no *prima facie* case of discrimination. It was submitted that had the correct figure of 1.48:1 women to men in the advantage group being properly considered to, the level of disproportionate discriminatory effect shown by the statistics would have been sufficient to justify a finding of discrimination.

23. It was accepted by the appellants that in drawing its conclusion from the statistical information before, the Labour Court took a number of factors into account. It was submitted that the import which should have attached to the Labour Courts consideration of the ratio of men to women was diminished by virtue of the inaccuracy of the data as presented.

24. The appellants relied on the decision of the Supreme Court in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] IESC 40 where Geoghegan J. stated:-

> *"A statutory appeal on a question of law is not a judicial review and a question of law includes the question of whether the evidence supports only one conclusion…*
>
> *Clearly, on the authorities the High Court or this court on appeal is entitled to consider whether it was open to the appeals officers to come to the decision which she did arrive…"*

25. They further relied on the decision in *National University of Ireland Cork v. Ahern & Ors* [2005] IESC 40, where the court stated:-

> *"The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered or taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)."*

26. It was submitted that erroneous data was the dominant factor taken into consideration. It was submitted that the use of statistical data as a central consideration in determining whether a *prima facie* case of discrimination had been established consistent with the methodology employed by the European Courts of Justice at paras. 58 – 62 of Case 167/97 in *R. v. Secretary of State for Employment, ex parte Seymour – Smith and Perez* [1999] ECR 1-00623. In that case the House of Lords made a preliminary reference to the European Court of Justice. Two female claimants were dismissed by their employers after more than one but less than two years employment. The relevant English legislation (s. 64(1)(a) of the Employment Protection Consolidation Act 1978) prescribed that the right not to be unfairly dismissed did not apply to a dismissal which takes place after less than two years employment. The claimants complained that a two year qualifying period indirectly discriminated against women because in practice they found it more difficult to qualify than men. The claim sought to quash the order on the grounds that it was contrary to Article 5 of the Equal Treatment Directive (76/2007/EEC). The question posed to the European Court of Justice was:-

> *"What is the legal test for establishing whether a measure adopted by a Member State has such a degree of disparate effect as between men and women as to amount to indirect discrimination for the purposes of Article 119 of the Treaty unless shown to be based upon objectively justified factors other than sex?"*

At para. 60, the court stated:-

> *"As the court has stated on several occasions, it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule was justified by objective factors unrelated to any discrimination based on sex…It would be… for the national court to determine the conclusion to be drawn from such statistics."*

27. It was submitted that in the instant case the decision of no prima facie case of discrimination was based on misleading and inaccurate statistical information. As such it was argued that the Labour Court failed to give proper consideration to the surrounding circumstances or underlying facts.

28. They further relied on the decision of Kenny J. in *Mara v. Hummingbird* [1983] ILRM 421. In that case, the High Court in

dealing with the review of facts, Kenny J. said:-

> *"If the conclusions from the primary facts are one which no reasonable Commissioner could draw, the court should set aside his findings on the grounds that he must be assumed to have directed himself as to the law or made a mistake in reasoning."*

29. They also relied on the following passage from *Seymour-Smith and Perez* where the judgment stated at para. 62:-

> *"It is also for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short term phenomena, and whether, in general, they appear to be significant…"*

The First Named Respondent's Submissions

30. He submitted that the procedure to be adopted by the parties in making an appeal, limited to a point of law, under a statute was considered by the Supreme Court in *Bates v. the Model Bakery* [1993] I.R. 359 where Finlay C.J. in the Supreme Court stated:-

> *"It is of importance to point out, however, that having regard to the clear terms of the two sections providing for a final and conclusive decision by the Tribunal, subject only to an appeal to the High Court on a question of law, that what would appear to be the appropriate procedure is the summons as provided for in O. 105, which should state the decision being appealed against, the question of law which it is suggested was in error, and the grounds of the appeal, and that it should be supported only by an affidavit or affidavits exhibiting the determination of the Employment Appeals Tribunal, including any findings of fact or recital of evidence made by it, and, in effect, identifying the parties and the grounds on which the aggrieved party seeks a determination of a question of law. There does not appear to be any room, however, in the procedure, having regard to the terms of the two sections involved, for repeating and, in particular, for adding to or supplementing evidence which was given before the Employment Appeals Tribunal concerning the circumstances of the dispute which had been referred to that Tribunal."*

31. Reliance was also made on the decision of Clarke J. in *Ashford Castle v. SIPTU* [2006] ELR 201 where he stated:-

> *"It does not appear to me to be appropriate for affidavits filed either in support of or against appeals of this type to include any additional materials whether by way of argument or background. "*

32. The first named respondent emphasised that the Labour Court were the authors of the statistical table and it was the Labour Court that drew its conclusion from the statistical table. The error was not made, it was submitted, by any of the parties. The error of the Labour Court, it was submitted, was in the nature of a presentational or typographical error. The existence of the error did not disclose an error in law, it was submitted. The Labour Court had before it all of the raw statistical data. It was the Labour Court who had assembled the data into the table and determined on the raw statistical data that there was no *prima facie* case. It also set out that it was not just the statistics that led it to the conclusion. There had been no error in the interpretation of the facts by the Labour Court. What was being advanced by the appellant was an attempt to introduce new evidence through Dr. Horgan. The Labour Court did not rely exclusively on statistics as stated by it. It referred to and relied upon all the statistical evidence and not merely its known tabulation of that material.

The Second Respondent's Submissions

33. The second respondent submitted that the Labour Court had set out the test for determining whether indirect discrimination had occurred and the methodology for applying such test which had not been challenged in this appeal. Furthermore, it was contended that the Labour Court made a primary finding of fact on the numbers of males and females comprising the advantaged and disadvantaged groups and that such findings had not been challenged. In relation to the percentages given by the Labour Court, no challenge was made save for one ratio which it was submitted was in error. It was submitted that the erroneous ratio is neither a finding of fact nor an inference of fact. It is no more than a presentation of a finding of fact set out previously in the determination which itself is not challenged. Secondly, it was contended that the information which was erroneously presented in one cell of the statistical table (namely the ratio of advantaged women to men) was correctly presented elsewhere in the table, particularly in those cells which show the percentage of advantaged women and advantaged men. It was submitted that notwithstanding the error of the correct information was readily apparent. It was also submitted that the error itself was readily apparent from the information presented elsewhere in the table.

34. It was submitted that it was clear from the Labour Court's determination that it did not rely upon the error in reaching its determination. It was submitted that the court considered that when considering the advantage group in particular, there was a disproportionate impact upon men, but that the impact was insufficient to establish a *prima facie* case of discrimination. It was submitted that if the court had regard to the error alone, it would have reached the conclusion that there was a disproportionate impact upon women and not upon men and that in fact men were advantaged by the agreement.

35. The second named respondent objected to the evidence in relation to the *chi-rho* test being introduced in the course of an appeal on a point of law.

36. It was submitted that the Labour Court in holding that the statistics showed that there was a disproportionate impact upon men but that the impact was insufficient to establish a *prima facie* case of discrimination and that the statistics were inherently vulnerable were conclusions of the Labour Court having applied its own expertise. This was the expertise of a specialist Tribunal in evaluating all of the evidence before it, including the statistics.

Conclusion

37. In the hearing of an appeal such as this that the issue is whether there was an error of law, I propose to exclude all attempts to introduce by way of affidavit evidence additional materials by way of evidence argument or background. The evidence and conclusions of Dr. Horgan will therefore be excluded. The legal basis upon which the High Court should view this appeal is in the court's opinion set out by Clarke J. in *Ashford Castle v. SIPTU* [2006] ELR 201 where he stated:-

> *"5.1 An appeal on a point of law from an expert tribunal exists in a number of areas of Irish law. In Henry Denny & Sons (Ireland) Limited Trading as Kerry Foods v. Minister for Social Welfare [1998] 1 I.R. 34 at 37 Hamilton C.J. said the following:-*

> *'...the courts should be slow to interfere with the decision of expert administrative tribunals. Where the conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review'.*

5.2 In Orange v. Director of Telecommunications Regulation and Another (No. 1) [2002] 4 I.R. 159 at 184 Keane C.J. quoted with approval a passage from the judgment of the Canadian Supreme Court in Southan v. Director of Investigation and Research (1997) 1 FCR 748 in the following terms:-

> *'...(an) appeal from a decision of an expert tribunal is not exactly like an appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially) to the courts, it is because the tribunal enjoys some advantage that the judges do not. For that reason alone review of the decision of a tribunal should often be of a standard more deferential than correctness ...*
>
> *I conclude that the ... standard should be whether the decision of the tribunal is unreasonable. This is to be distinguished from the most deferential standard of review which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it'."*

38. What is challenged in the Determination of the Labour Court has to be considered. The only "*error*" complained of is the gender ratio of women to men for the advantaged group in relation to the Total Pool. No challenge is made to the actual percentage calculation of the advantage group as percentage of the Pool, namely 52% for men and 77% for women. It is manifest that the gender ratio is obtainable from these figures. That is the result that follows from dividing the 77% by 52% which gives the figure 1.48. (77%/52% = 1.48). It is manifestly clear that this figure is not 0.67:1 as the table incorrectly suggests. That this is so is also apparent from the manner in which the Gender Ratio for women to men is calculated by the disadvantage group in relation to the Total Pool (23%/48% = 0.48).

39. I accept the respondent's submissions that the erroneous ratio is itself neither a finding of fact nor an inference of fact. It is a presentation based on facts themselves set out in the table which facts themselves have not been challenged.

40. In my opinion, the erroneous calculation of the gender ratio of women to men does not amount to an error of law.

41. The Determination then proceeds to consider all the statistics furnished in relation to the Total Pool and says:-

> *"While the above statistics when considering the advantage group in particular, would appear to disclose some disproportionate impact as between men and women, the question as to whether this impact is sufficient to justify a finding of discrimination is another matter. In the view of the courts, the level of disproportionate discriminatory effect shown by the statistics is not sufficient to justify such a finding."*

42. In my opinion, it was open to the court to express its conclusions in the manner it did on the basis of the statistics as stated by it.

43. The court then went on to say that in its view there was an inherent vulnerability in statistics taken at a fixed time or period which would be influenced by purely fortuitous factors. Having regard to the specialised expertise of the Labour Court was entitled to so conclude.

44. The finding then stated that any consideration of such statistics must also be influenced by the undisputed fact that both the advantaged and disadvantaged groups were composed predominantly of women; also, that there was the undisputed fact that a finding that the statistics indicated a degree of discrimination would result in men benefiting from a case which was originally taken as a general discrimination claim by women. The Labour Court concluded that it was therefore difficult in logic to see how statistics could support a finding of discrimination. Again, I cannot see how this conclusion can be challenged. It was within the remit of the Labour Court to so conclude and it was not an error of law.

45. The Labour Court then stated that the onus of proof was on the claimants and that the court had come to the view that the available evidence, including statistics did not go far enough to establish a *prima facie* case of discrimination. In making this Determination, the court had already considered the statistics and had concluded that in themselves the level of disproportionate discriminatory effect shown by the statistics did not justify such a finding. This was a finding of law which the Labour Court was entitled to make on its assessment of the strength of the appellant's case.

46. The court quite properly noticed that statistics are but an aspect for consideration and would not in any event be decisive in themselves. The court properly relied on the principles enunciated in *Rutherford v. Secretary of State for Trade and Industry* [2004] IRLR 892. In conclusion it stated that case law established that it was for the national court to satisfy itself that any set of statistics provide a sufficiently reliable evidential basis of *prima facie* discrimination. This is what the Labour Court did in this case. This Court concludes that no error of law has been demonstrated by the appellants to have occurred in the determination of the Labour Court.