



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 11

[2016 No. 67]

Ryan P.
Finlay Geoghegan J.
Birmingham J.

In the Matter of the Employment Equality Acts, 1998-2011 on the application of Nano Nagle School

An Appeal pursuant to s.90(1) Against Termination EDA 1430 by the Labour Court dated the 12th August, 2014

Between/

Nano Nagle School

Appellant

and

Marie Daly

Respondent

Judgment of Ms. Justice Finlay Geoghegan J. delivered on the 31st day of January 2018

1. This appeal raises difficult and important questions of construction of s.16 of the Employment Equality Act, 1998 as amended by the Equality Act, 2004. The section has subsequently been further amended but it was the section as amended by the 2004 Act which applied at the time of the decision of the Labour Court which gave rise to these proceedings.
2. The judgment delivered by the President has set out in full the background to the proceedings, the decision of the Labour Court, of the Equality Officer and of the High Court which I gratefully rely upon and do not propose repeating save as necessary.
3. I am in agreement with the President that the appeal should be allowed and the construction of s.16 of the 1998 Act by the Labour Court and upheld by the High Court was not correct.
4. In this judgment I only wish to make some additional comments on the proper construction of s.16 of the 1998 Act (as amended).
5. Section 16 of the 1998 Act as amended by the 2004 Act insofar as relevant provides:

"(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or

(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.

(2) . . .

(3)(a) For the purposes of this section, a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if, the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as "appropriate measures") being provided by the person's employer.

(b) An employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability –

(i) To have access to employment

(ii) To participate and advance in employment,

(iii) To undergo training,

unless the measures would impose a disproportionate burden on the employer.

(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of –

. . .

(4) In subsection (3)—

"employer" includes . . .

'appropriate measures', in relation to a person with a disability—

(a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,

(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but

(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself;"

6. The Equality Act, 2004, which inserted the provisions under consideration as appears from its long title was enacted *inter alia* for the purpose of giving effect to the State's obligations pursuant to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Directive"). Section 16 gives effect to Art. 5 of Directive 2000/78. Article 5 provides:

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

7. The dispute in relation to the construction of s.16 and this appeal arose from the following facts. Ms. Daly was employed by the Nano Nagle School ("the School") as a Special Needs Assistant ("SNA") from 1998. Unfortunately in 2010 she suffered serious injuries in a road traffic accident as a result of which she is confined to a wheelchair by reason of paraplegia. She is obviously a remarkable person. She was a well respected and admired SNA. She was anxious to return to work and approached the School in January 2011 with a view to returning to work. The School is one which caters for children with profound disabilities, extreme care needs and for challenging children on the autistic spectrum. It had approximately 77 pupils, 12 teachers and 27 SNAs.

8. Following Ms. Daly's request to return to work as an SNA the School had her initially assessed by Dr. Madden, the School's occupational physician and subsequent risk assessments were conducted, as recommended by Dr. Madden by Ms. McGrath an occupational therapist. The report of Ms. McGrath sets out in table 1 "the duties an SNA performs in Nano Nagle's School" which as in a note she explains "is not a finite list of SNA duties but the main duties determined by this assessor from the information and reports provided to her". There does not appear to have been any dispute that the 16 duties identified by Ms. McGrath were main duties of an SNA in the School. In relation to each of the 16 duties Ms. McGrath then identifies one or more task demands relating to the duty and states whether such task would be suitable for Ms. Daly and finally whether in relation to those which were suitable whether adaptations or equipment were required. Her finding was that there were seven duties which were not suitable for Ms. Daly or to put another way were duties which Ms. Daly was unfortunately now unable to perform. There were nine duties which she could either fully or partially perform some of which required some adaptations of the physical environment or equipment.

9. Ms. McGrath recommended that Ms. Daly "could act as a floating SNA". There was at the time no such position or job in the School. The report made clear unfortunately that Ms. Daly was unable to perform a significant number of the duties or main duties of the position of an SNA in the School and no adaptations or equipment could make her capable of doing so.

10. Dr. Madden subsequently advised that she was unfit to return to work and the School so informed her.

11. Ms. Daly made a complaint to the Equality Tribunal that the School failed to provide her with reasonable accommodation for her disability so as to allow her to continue in employment. That complaint was rejected and she thereafter appealed to the Labour Court.

12. The decision of the Labour Court which gives rise to the dispute between the parties as to the proper construction of s.16 of the 1998 Act is evident from the commencement of its conclusion on p.33 of its decision. There the Labour Court stated:

"There is no doubt that [Ms. Daly] was severely limited by her disability and the range of tasks that she could perform. She could not carry out all of the duties attaching to the role of an SNA. But she could undertake many of those tasks. It appears from the evidence adduced that the [School's] response to that position was based on the belief that its duty was confined to providing [Ms. Daly] with such accommodation as might enable her to undertake the full range of tasks expected from a SNA. Regrettably, no amount of accommodation could produce that result. In that respect the [School] construed its duty too narrowly and took a mistaken view of what the law required in the prevailing circumstances."

The [School] has a duty to fully consider the viability of a reorganisation of work and a redistribution of tasks among all of the SNAs so as to relieve [Ms. Daly] of those duties that she was unable to perform. That, in effect, was what had been proposed by Ms. McGrath. At the material time [Ms. Daly's] interest was being represented by her trade union..."

13. As appears from the above and a full consideration of the determination, the Labour Court concluded that the School was under an obligation to consider redistributing certain of the tasks attached to the job of an SNA amongst other SNAs so as to remove from job in which Ms. Daly would return to work those duties she was not capable or competent to perform and in substance permit her to return to a modified job which Ms. McGrath had termed "a floating SNA".

14. The School disputed that it has any such obligation pursuant to s.16 of the 1998 Act (as amended) and appealed to the High Court. In the High Court Noonan J. upheld the Labour Court's construction of section 16. He did so in part in reliance upon the judgment of the Court of Justice of the European Union in *HK Danmark, acting on behalf of Ring (Applicant) v. Dansk Almennyttigt Boligselskab* (Respondent) & ors (Cases C-335/11 and C-337/11) of 11th April 2013 to which he referred as "*Ring*".

15. Noonan J. referred to the change in position by the School in its submissions and its ultimate submission to him that s.16 only required the School to consider and implement appropriate measures as defined in s.16(3) as would render Ms. Daly capable of fulfilling all the duties of the job of an SNA and that since no amount of reasonable accommodation or appropriate measures could ever achieve that situation the School had no further obligation to Ms. Daly by reason of s.16(1)(b). Having referred to the judgment of the CJEU in *Ring* he stated at paras. 59 – 62:

"59. At first blush, a literal interpretation of s.16 (1) (b) considered on its own appears to support the position adopted, initially at least, by the School. However, when read in conjunction with s. 16 (3) and (4) insofar as they apply to this case, it is clear that a person with a disability is, for the purposes of the Act, to be regarded as fully competent to undertake and fully capable of undertaking the duties of a given job if such person would be so competent and capable on the distribution of tasks associated with that job being adapted by the employer. As held by the CJEU in *Ring*, the adaptation of patterns of working time must include the elimination of some of that working time, subject always to the caveat that the measures must not impose a disproportionate burden on the employer. The adaptation of the distribution of tasks must also where appropriate include the elimination of tasks since otherwise the section would fail to achieve the objective for which the legislation was enacted.

60. In considering *Ring*, the Labour Court concluded that by parity of reasoning it is also for the national court to assess if a redistribution of tasks represents a disproportionate burden on the facts of a particular case in which that question arises. I can find no fault with that logic. The adaptation of the distribution of tasks must in an appropriate case include a consideration of whether a reduction of those tasks may be necessary in order to comply with s. 16. Indeed the School has acknowledged as much in conceding that it may be necessary to strip out some peripheral tasks from the job. Of course whether, and to what extent, a reduction in tasks is required to comply with s. 16 must necessarily depend on the facts of each case. It may or may not be relevant to consider whether a point is reached when the appropriate measures transform the job into something entirely different from that which originally existed. Some of the English authorities appear to go as far as suggesting that under the equivalent, and admittedly different, English legislation which pre-dates the Directive, the requirement to reasonably accommodate a disabled employee may extend to transferring him or her to an entirely different position within the same organisation – see *Archibald v. Fife Council* [2004] UKHL 32 and *Chief Constable of South Yorkshire Police v. Jelic* [2010] IRLR 774.

61. While the School in its submissions criticises what it submits are various errors of law in the Labour Court's interpretation of the national and European case law, even if same were made, which I do not determine, these do not appear to me to undermine the ultimate outcome. The fundamental determination of the Labour Court here was that the School failed to engage with its duty to consider whether or not Ms. Daly could reasonably be accommodated by the implementation of appropriate measures. The Labour Court did not conclude that Ms. Daly could be so accommodated but rather it was the failure to even consider a redistribution of her tasks as a SNA that rendered the School in breach of s. 16. It seems to me that on the evidence, the Labour Court was perfectly entitled to reach the conclusion that there had been no adequate consideration or evaluation of these issues by the School and a phone call to the NCSE about funding, the content of which was never precisely determined, was an insufficient effort on the part of the School to comply with its statutory obligation.

62. These are all conclusions which in my view were open to the Labour Court on the evidence and it could not in any realistic sense be suggested that these were irrational or based on an erroneous interpretation of the law."

16. Before this Court, the School as appellant, maintained its submission that s.16 of the 1998 Act (as amended) did not oblige the School to consider removing from the position or job of an SNA in the School certain of the duties which Ms. Daly, unfortunately, was unable or not competent to perform by reason of her disability and redistribute those duties or all the tasks associated with those duties to other SNAs within the School. The submissions made on behalf of Ms. Daly sought to uphold the opposing construction adopted by the Labour Court and upheld by the High Court that s.16 did oblige the School to consider the redistribution of those tasks or duties.

17. The School also submitted that the Labour Court and High Court incorrectly approached the construction of s.16 by making reference to and considering the recitals to the Directive.

Conclusion on interpretation of Section 16

18. Section 16 of the 1998 Act (as amended) is enacted to give effect to the Directive. It must therefore be construed insofar as its wording permits in a manner consistent with the Directive which it seeks to implement: *Marleasing SA v. La Comercial Internacional de Alimentación SA* [1990] ECR 4135. That principle as correctly submitted on behalf of the School has limitations and cannot serve as a basis for an interpretation of national law *contra legem*: *Albatross Feeds Ltd v Minister for Agriculture* [2007] 1 IR 221 per Fennelly J at 243-244.

19. The relevant obligation imposed on the School as Ms. Daly's employer is imposed by s.16(3)(b) to take "appropriate measures, where needed in a particular case, to enable a person who has a disability... to participate ... in employment ... unless the measures would impose a disproportionate burden on the employer." There are, however, in s.16 of the 1998 Act two limitations to the obligation on the employer to take such appropriate measures to enable a person with a disability participate in employment. The first is specified in sub-s.16(3)(b) itself namely that the measures would not impose "a disproportionate burden on the employer."

20. The second limitation is in s.16(1) to the effect that nothing in the Act is to be construed as "requiring any person to ... retain an individual in a position ... if the individual ... is not (or, as the case may be, no longer) fully competent and available to undertake and fully capable of undertaking, the duties attached to that position having regard to the conditions under which those duties are, or may be required to be performed." The question is how to construe that limitation on the obligation placed on the employer in a manner consistent with the obligations imposed by s.16(3)(b) to take appropriate measures, where needed, to enable a person who has a disability to participate in employment and having regard to s.16(3)(a) which provides that a person who has a disability is to be considered as fully competent to undertake, and fully capable of undertaking, any duties if, the person would be so fully competent and capable on appropriate measures being provided by the person's employer..

21. As already stated s.16(3)(b) is intended to implement Art. 5 of the Directive. The extent of the obligation imposed by Art. 5 of the Directive may be interpreted taking into account the recitals to the Directive. As correctly pointed out by the Labour Court the recitals do not form part of the Directive and do not have binding force but may be considered in the interpretation of the Directive.

22. Recital 17 of the Directive provides:

"This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligations to provide reasonable accommodation for people with disabilities."

23. It appears probable that Recital 17 informed the approach of the Oireachtas in enacting s.16(1) of the 1998 Act. Hence while s.16(1)(b) provides that a person be fully competent and capable of undertaking "the duties attached to that position" such "duties"

may only be intended to include the duties attached to a position which may be considered to be "essential functions" of the position in question.

24. It is not necessary to consider further this aspect of the construction of s.16 on the facts of this appeal. It was not in dispute before the Labour Court that the sixteen duties identified by Ms. McGrath as being the main duties attaching to the position of an SNA held by Ms. Daly prior to her accident and to which she was seeking to return formed part of the essential functions of such SNA position in the School.

25. The question of construction is what the School is obliged to do before it decides whether or not Ms. Daly, with her disability, is or is not fully competent and capable of undertaking the duties attached to the position of SNA having regard to the conditions under which those duties are, or may be required to be performed. On the facts of this appeal the duties of an SNA must be performed under conditions which include that the pupils of the School are themselves persons who suffer from physical or mental or behavioural disabilities.

26. It is correctly not in dispute that the School as employer was obliged, subject to it not being a disproportionate burden, to take appropriate measures, where needed and available, which would enable Ms. Daly undertake the duties of the position of an SNA in the School. This follows from s.16(3)(a) and (b). The question is do those appropriate measures include the removal from the position of an SNA (by distribution of tasks to others) those duties which regrettably Ms. Daly with no amount of adaptation or provision of equipment is now unable to perform.

27. That question must be resolved by the wording of the section when considered in the context of its purpose to implement Article 5 of the Directive. On behalf of Ms. Daly particular reliance is placed upon the inclusion amongst the "effective and practical measures" referred to in the definition of appropriate measures in s.16(4) "patterns of working time and distribution of tasks". Again in this definition it appears that the Oireachtas had regard to Recital 20 of the Directive which describes appropriate measures as "effective and practical measures to adapt the workplace to the disability" and then states "for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources".

28. As appears from the decision of the Labour Court and judgment of the High Court and submissions made on behalf of Ms. Daly reliance is also placed upon the judgment of the CJEU in *Ring* in which it decided that "a reduction in working hours may constitute one of the accommodation measures referred to in [Art. 5 of Directive 2000/78]".

29. By parity of reasoning it was contended and held that the School as employer on the facts herein was obliged to consider a distribution of tasks as one of the appropriate measures to enable Ms Daly return to work in the position of an SNA.

30. My conclusion on the interpretation of s.16 is that it is correct to construe the obligation placed on an employer to take appropriate measures as potentially including an obligation to consider a distribution of certain tasks. However, whether it is obliged to do so in any given situation will depend upon the facts and in particular whether the tasks in question are or are not all the tasks demanded of a particular duty attached to the position in question. The School was not, in my judgement obliged to consider a distribution of tasks on the facts herein for the reasons next stated.

31. The obligation imposed on an employer by s.16 (3)(b) in the context of the limitation in s.16(1) means that an employer is only obliged to retain in a position a employee with a disability who is fully competent and capable of performing all the duties (subject probably to such duties being properly considered as essential functions) of the position concerned. However, in accordance with s.16(3)(a) the employee is considered as fully competent to undertake, and fully capable of undertaking, any duties if, the employee would be so fully competent and capable on appropriate measures being provided by the employer. Hence the employer is obliged, where an employee with a disability is unable or not competent or capable of performing certain duties attached to a position to consider whether there are appropriate measures which may be taken which would enable the employee be considered as fully competent and capable of performing the duty or duties in question attached to the position. That consideration, depending on the duty involved might include the distribution of one or more tasks associated with the duty to another employee.

32. Put simply the obligation imposed by section 16 of the 1998 Act (as amended) in relation to a particular position or job is to consider appropriate measures including, a redistribution of tasks associated with one or more duty or duties attached to the position such that it enables the disabled person be fully competent or capable of undertaking the duties attached to the position. However it does not extend to considering the removal from a position or job a duty or duties which may properly be considered as a main duty or essential function of the position concerned by the redistribution of all tasks demanded by that duty.

33. On the facts of this appeal, regrettably from Ms. Daly's point of view, it was not in dispute that there were seven main duties attached to the position of an SNA in the School, which she had previously occupied and to which she sought to return, which she was no longer competent and capable of undertaking even with appropriate measures. It was never contended that a redistribution of one or more tasks demanded of those seven duties would render Ms. Daly competent or capable of undertaking those duties. For the reasons stated, the section falls short of obliging the School to remove from the existing position of an SNA in the School those main duties, which Ms. Daly is, regrettably no longer capable and competent to undertake and redistribute them to others or in effect create a new position in the School to which Ms. Daly may return. It follows that if the School is not under an obligation to do so it cannot be under an obligation to consider doing so.

34. Mr. Quinn, S.C. on behalf of Ms. Daly submitted that if the Court were to so construe s.16 that it would enable employers in effect create positions and specify duties attached thereto which persons with a disability would be unable to perform and thereby preclude their employment. I do not accept that submission. As indicated the limitation imposed in s.16(1)(b) that a person be "fully competent" or "fully capable" of undertaking the "duties attached to that position" must be construed and interpreted, as far as possible, in the light of the wording and purpose of the Directive. As decided by the CJEU in *Ring* the Directive itself must be interpreted taking into account the recitals and as far as possible in a manner consistent with the United Nations Convention on the Rights of Persons with Disabilities which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009. If challenged, an employer may have to justify the inclusion of any duty which an employee with a disability cannot be considered fully competent or capable of performing regardless of appropriate measures as being an essential functions or main duty of the position concerned. No such challenge was made at any stage in these proceedings to the identified main duties of an SNA in the School. I simply draw attention to this in relation to the perceived consequences of my conclusion on the interpretation of s. 16 of the 1998 Act (as amended).

Relief

35. It follows from the above that the Labour Court erred in law in the obligation it considered that s.16 of the 1998 Act (as amended) imposed on the School as employer and that the High Court erred in upholding that decision. The appeal must be allowed

and the order of the High Court vacated. The next question is what order should be substituted therefore.

36. The Labour Court in its decision determined that Ms. Daly was entitled to succeed in her appeal to it from the decision of the Equality Tribunal. The only basis it did so was the School's failure to discharge an obligation under s.16 of the 1998 Act (as amended) which this Court has now decided did not exist. The Labour Court set aside the decision of the Equality Tribunal, substituted its determination and granted as redress an award of compensation in the amount of €40,000. The School appealed that decision to the High Court as an error of law. It appears to follow that the further order of this Court should be to substitute for the order of the High Court an order to set aside the determination of the Labour Court and vacate the award of compensation in the amount of €40,000.