Neutral Citation: [2014] IEHC 11

THE HIGH COURT

[2007 No. 42 IA]

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACTS 1998 TO 2004

BETWEEN

MARGARET KENNY, PATRICIA QUINN, NUALA CONDON, EILEEN NORTON, URSULA ENNIS, LORETA BARRETT, JOANNE HEALY, KATHLEEN COYNE, SHARON FITZPATRICK, BREDA FITZPATRICK, SANDRA HENNELLY, MARIAN TROY, ANTOINETTE FITZPATRICK AND HELENA GATLEY

APPELLANTS/CLAIMANTS

AND

THE DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM, THE DEPARTMENT OF FINANCE AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Mr. Justice Patrick McCarthy delivered on the 13th day of January 2014

1. This is an appeal on a point of law from a Determination of the Labour Court of 27th July, 2007 (EDA 13/2007) pursuant to the provisions of s. 90 of the Employment Equality Act 1998, as amended by the Equality Act 2004. At the request of the parties, I referred certain questions for determination by the Court of Justice of the European Union and it delivered its judgment on 28th February, 2013.

2. The claimants are established civil servants and in particular clerical officers. Their claim is for equal pay with the members of An Garda Síochána whose remuneration is higher. They say that the differential constitutes indirect gender discrimination, a claim rejected by the Labour Court.

3. Section 19 of the Act of 1998, as amended by the Act of 2004, provides for the right to equal pay for like work and that indirect discrimination occurs in the circumstances set out in s. 19(4). It provides, so far as material, that:-

> "Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender . . . at a particular disadvantage in respect of remuneration compared with other employees of their employer,
>
> [. . .] unless the provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary."

4. The burden of proof is upon a claimant to establish that an apparently neutral provision puts him or her at a disadvantage in respect of remuneration vis-à-vis other employees and on the basis of valid comparators but it is then a matter for the employer to show that the differential is "objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary".

5. In its decision, the Labour Court took the view that the Irish statutory definition did not comport "fully" with the concept as defined by Article 2(2) of Council Directive 97/80/EC of December 15th 2007 (itself the codification of the concept of indirect discrimination and elaborated by the ECJ). That provision states as follows:-

> "…indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless the provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."

6. Notwithstanding the different forms of words, I do not believe that there is any substantial difference between what is contemplated by the Directive or the statute, nor has the ECJ suggested it. Accordingly, whether one looks at the Directive or the statute, having regard to the burden of proof, effectively an employer is placed in the position of being afforded a defence of what is commonly called, for the sake of brevity, objective justification of an otherwise unlawfully discriminatory differential. It was on this issue that the Labour Court focused in the events which occurred.

7. The most startling fact about the present claim is that those established civil servants who are Clerical Officers engaged in clerical work for or in An Garda Síochána seek remuneration at the same level as that of the entire force though this fundamental fact is nowhere stated in terms. No statistic is available to me as to the size of the garda force, but it appears that the class of person engaged in pure clerical work (from whom the claimants' comparators are chosen), is a small minority and a Court must at all times look to the reality.

8. The claimants are assigned to what I will call "pure clerical duties" for the force. A number of gardaí are assigned to similar duties. Yet other gardaí are required to undertake duties which, though clerical in their nature, and to that extent similar, it is sometimes necessary that they be performed by gardaí. A third group of gardaí perform clerical duties in addition to what is described in the Determination as "normal police duties" – their clerical work is part-time. The term "the generality of comparator posts" was used to refer to all of these gardaí in the Reference (and hence, herein, "the generality"); however, it is only from the class of gardaí who perform pure clerical work that the claimants have chosen their comparators ("the claimants comparators").

9. The history of our present structure for the discharge of clerical functions in and for the police force is, firstly, that the Royal Irish Constabulary (an organisation with which the gardaí, at least in their early years, had much in common) had no outside clerical assistance – clerical work was performed by policemen. After a brief period following the foundation of the State where clerical officers were assigned to the gardaí the position thereafter was for many years that clerical duties associated with policing were

performed by gardaí. A process then described as "civilianisation" was mooted and ultimately put in hand. The process began with the recommendation of certain consultants appointed in 1975 to examine the possibility of employing civilians in clerical posts within the force. They recommended a reduction in the number of gardaí deployed on such duties. A working party subsequently established recommended that the number of posts designated as appropriate to members of the gardaí be 175. Subsequently in 1979, a body commonly called the Ryan Commission, having considered the matter, acknowledged that serving members of An Garda Síochána should always hold certain clerical posts within the force, based on the fact that the duties of certain posts required an individual to have knowledge and experience of policing and in some cases required the use of garda powers. Extensive evidence was given as to the reasons why gardaí must hold a certain number of posts. The reasons so given shade into or are relevant to the issues of whether or not the claimants' work and that of comparator class, as I have identified it, is like work and, if so, work in respect of which an otherwise unlawful differential of pay is legitimate. In fact there might, in principle, be factors relevant to both issues on the facts.

10. Reference has been made to so-called designated posts: these are reserved for gardaí. Some are held by gardaí though the work involved could equally be undertaken by civilians: the evidence is to the effect that only "a small number" of purely clerical posts are held by gardaí of whom 298, with a planned reduction to 215 in all were in service.

11. In the ordinary course of events, obviously, in a claim of this kind, the Labour court should first address the issue of identity of those with higher remuneration who are chosen for the purpose of comparison by the claimants. This was not done but, at its instigation, the parties consented to proceed on the basis that the work of the claimants and the comparators chosen by them was like work. Twelve persons were chosen from amongst the gardaí engaged in pure clerical work.

12. On the face of it, accordingly, one might have thought that the respondents had placed themselves in a position where they could not reopen for the purpose of defence of the proceedings, the issue of the comparators who were chosen. They did, however, do so, when advancing the case that the differential was objectively justified. Effectively, they said that the comparators were drawn from too narrow a class and ought to have been drawn from the generality of gardaí involved in clerical duties to a greater or lesser extent; the Labour Court accepted this proposition.

13. The justification relied upon pertained to the operational necessity for the deployment of gardaí to clerical posts on the assumption, it seems, that if such deployment was justified, *ipso facto*, the differential was justified. The respondents also sought to rely upon industrial relations considerations, whether separately or as part of the justification for deployment if such deployment was pursuant to agreements made with gardaí. Ultimately, the matters in issue pertained to the choice of comparators, the basis upon which the Labour Court addressed the issue of objective justification, and the fact that it was alleged that in substance it had failed to address the reason for the differential and the significance attached to industrial relations.

14. In light of these matters and by consent of the parties, I referred the following questions to the ECJ for a preliminary ruling:-

> "(1) In circumstances where there is *prima facie* indirect gender discrimination in pay, in breach of Article 141 EC … and Council Directive [75/117], in order to establish objective justification, does the employer have to provide:
>
> (a) Justification in respect of the deployment of the comparators in the posts occupied by them;
>
> (b) Justification of the payment of a higher rate of pay to the comparators; or
>
> (c) Justification of the payment of a lower rate of pay to the [appellants in the main proceedings]?
>
> (2) In circumstances where there is *prima facie* indirect gender discrimination in pay, in order to establish objective justification, does the employer have to provide justification in respect of:
>
> (a) The specific comparators cited by the [appellants in the main proceedings] and/or
>
> (b) The generality of comparator posts?
>
> (3) If the answer to Question 2(b) is in the affirmative, is objective justification established notwithstanding that such justification does not apply to the chosen comparators?
>
> (4) Did the Labour Court, as a matter of Community Law, err in accepting that the "interests of good industrial relations" could be taken into account in the determination of whether the employer could objectively justify the difference in pay?
>
> (5) In circumstances where there is *prima facie* indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the [respondent]? Should such concerns have any relevance to an analysis of objective justification?"

15. The ECJ answered those questions as follows:-

> "On those grounds, the Court (Third Chamber) hereby rules:
>
> Article 141 EC and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women must be interpreted as follows:
>
> Article 141 EC and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women must be interpreted as follows:
>
> - employees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation, which it is a matter for the national court to ascertain;
>
> - in relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators;

- the employer's justification for the difference in pay, which is evidence of a *prima facie* case of gender discrimination, must relate to the comparators who, on account of the fact that their situation is described by valid statistics which cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and which, in general, appear to be significant, have been taken into account by the referring court in establishing that difference, and

- the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality."

16. Since the choice of comparators must be the first step I turn to it. In para. 42, the ECJ referred to the fact that there is a *prima facie* case of sex discrimination where:-

> "the two groups in question perform duties of equal value and the statistics describing that situation are valid".

At para. 43, there is a further elaboration on the concept of what might or might not be valid statistics. In particular, a court is required to assess:-

> ". . . whether they cover enough individuals, whether they illustrate purely fortuitous or short term phenomena and whether, in general, they appear to be significant".

It went on to say at para. 44 that :-

> ". . . a comparison is not relevant where it involves groups formed in an arbitrary manner so that one comprises predominantly women and the other predominantly men with a view to carrying out successive comparisons and thereby bringing the pay of the group consisting predominantly of women to the level of that of another group also formed in an arbitrary manner so that it consists predominantly of men . . ."

It then said (at para. 45) that it followed from those propositions that:-

> ". . . the employer's justification for the difference in pay, which discloses a *prima facie* case of gender discrimination, must relate to the comparators who, because of the fact that their situation is described by valid statistics, which cover enough individuals, do not illustrate purely fortuitous or short term phenomena, and which, in general, appear to be significant . . ."

17. That court did not, in terms, answer questions 2(a) and (b), but rather set out the general principles applicable. Nor did it explicitly say whether or not the same comparators ought to be used for all purposes. Contrary to what was submitted on their behalf, I cannot see that it decided that the choice of comparators made in this instance by the claimants was a valid or lawful choice.

18. The Advocate General, in his opinion of the 29th November, 2012, addressed the issue and his observations assist in understanding the principles involved, as elaborated by the ECJ:-

1. At para. 44 he pointed out that equality was "a relative or relational concept" and was:-

> ". . . nothing more than a right to be treated on the same terms as someone in an equivalent legal situation. Thus, it is a right which is always predicated on a comparison between at least two subjects . . ."

and made the fundamental point (at para. 45) that:-

> "[t]o be able to refer to a comparator in a way which demonstrates the difference complained of is therefore the key element in actually proving that difference."

and also stated that of course:-

> "[i]f the difference is born of the comparison, then its existence depends on the correct identification of the elements compared"

and then (at para. 46) that:-

> "the comparator is the element of comparison by virtue of which the difference requiring justification is revealed."

2. He also considered that the claimant must provide:-

> "a valid comparator demonstrating the existence of a group of persons who, in an equivalent situation to their own, receive different treatment in terms of their rates of pay."

and (at para. 50) of crucial importance is that in this case he did not think:-

> ". . . that the question is so much whether the relevant comparators should be the specific comparators cited by the appellants or the generality of comparator posts."

but that:-

> ". . . the deciding factor is, rather, whether the appellants have been able to show that there is a representative number of workers, who, although they do work that is equivalent to the work done by the appellants, are nevertheless paid at a higher rate".

and added thereafter (at para. 52):-

> ". . . the important point is whether the appellants have been able to provide an appropriate comparator for the purposes of establishing the existence of 'a relatively large number of employees' who do the same work as the appellants but are paid at a higher rate."

3. Further, (at para. 54) he said that what the claimants must establish was that:

> ". . . a 'relatively large' number of men, or 'enough' of them, are engaged in equivalent work and are paid at a higher rate than . . .[the appellants]."

and, in conclusion on that point (at para. 55) that:-

> "The important thing, in my opinion, is that, using the information provided by the appellants, the national court should be in a position to reach the firm view, in accordance with the applicable rules of evidence under the national procedural law, that the claimed difference actually exists, since [on the basis that] an unequivocally representative number of men who perform the same work as the appellants are nevertheless paid at a higher rate."

19. *National University of Ireland Cork v. Ahern and Others* [2005] 2 I.R. 577, is also relevant to the choice of comparators. There certain persons engaged in security work alleged an unlawfully discriminatory differential in pay *vis-à-vis* certain part-time switchboard operators (they had once been full-time, but because of family commitments were permitted to work on a part-time basis). It appears that those who I might call the remaining full-time telephonists also engaged (I infer as a subsidiary task) in work pertaining to accounts at a given stage. The Labour Court concluded that the work of such part-time telephonists and the claimants was like work, on the basis of the claimants comparators. Subsequently that court had to determine whether or not the differential was attributable to a factor other than gender pursuant to a separate provision in the same Act – the Anti-Discrimination (Pay) Act 1974. The Supreme Court held that adjudication on the latter involved:-

> "A different approach to the position of the comparators and, in particular, of the context in which they were employed."

20. It went on to say that the Labour Court ought to have:-

> ". . . looked at the position of the comparators, not only in isolation, but also in the context of the other persons in the same grade who had not been chosen as comparators . . ." [*i.e*. the full-time telephonists]

21. The court *inter alia*, held that the Labour Court had not dealt with the question of whether the relationship between the comparators and other (full-time) switchboard operators remained the same (when part-time work was introduced for family reasons).

22. This case is not authority for the proposition that different comparators may be used for different purposes, but, rather, when dealing with the same comparators for the purpose of addressing what I might shortly describe as justification for the differential (under the now repealed statute) one should, on given facts, have regard to context; on its facts that extended to considering the relationship between the properly chosen comparators and others, who had been rejected as valid comparators by the Labour Court.

23. Whatever else, I cannot see that different comparators could be used for different issues in a case: this would be a violation of principle (one would not, if nothing else, be treating like with like).

24. For the guidance of the Labour Court, and at the risk of repetition, I summarise the law as follows:

> (i) All issues arising in a claim of the present kind must be determined by the use of the same comparators.
>
> (ii) The comparators are valid comparators only if they cover enough individuals, do not illustrate purely fortuitous or short term phenomena and in general appear to be significant.
>
> (iii) Valid comparators cannot be based upon groups formed or individuals chosen in an arbitrary manner, or on an artificial or unrepresentative basis. In this context it is, of course, to state the obvious that the choice must be made from the whole cohort of persons with whom one seeks parity.
>
> (iv) One cannot simply discard a succession of persons or classes in the cohort to arrive, by process of elimination, at classes within the whole group whose members are performing the same work.
>
> (v) The comparators must be in an equivalent situation to the claimants.
>
> (vi) The comparators must constitute, as stated by Advocate General Cruz Villalón [at paras. 52-55]:-
>
> > "'a relatively large number of employees' who do the same work as the claimants but are paid at a higher rate… [*i.e*.] a 'relatively large number of men' or 'enough of them'."

The view formed, as to the claimed difference must be on the basis of:- "an unequivocally representative number of men who perform the same work."

25. I think that the comparators should be drawn from the generality (of those engaged in garda clerical duties) as submitted by the respondents. My reasons are as follows:

> (i) Gardaí and clerical officers are all performing clerical duties connected with policing.
>
> (ii) The present system or structure for performance of clerical duties has its origins in a policy of which all are beneficiaries.
>
> (iii) On the claimants' case gardaí who perform clerical work on a part-time basis perform like work.
>
> (iv) There is plainly a great deal of overlap in work between the gardaí who fill posts where garda membership or expertise is essential (of their nature) and that of clerical officers.

(v) The number of persons in the chosen comparators' class is precisely unknown but on any view of the evidence it is a modest proportion of the generality and an even smaller proportion of the total number of those involved in clerical work.

(vi) The class from which the claimants conparators are insufficient in themselves to be of significance for valid comparison.

(vii) To arrive at the chosen class of garda engaged in any pure clerical work involves the forbidden course of excluding successive classes to arrive at an unrepresentative one, favourable, it is conceived, to the claimants.

(viii) The choice pays no or no proper regard to the rationally relevant principles which have been elaborated above.

26. The parties confined themselves to the alternatives of choosing comparators from, on the one hand, the generality and, on the other, from the small class who perform pure clerical work. The view might be taken that a perfectly coherent argument can be advanced that the comparators should be drawn from the force as a whole since the reality of the case is that parity of remuneration is sought with all gardaí even if, superficially, it is confined to those engaged in pure clerical work or, perhaps, at least what has been called "the generality". This does not arise having regard to the views of the parties.

27. Turning now to the question of objective justification in seeking to establish that the principal factor relied upon by the respondents is, effectively, the necessity for the deployment of gardaí to certain clerical posts on operational grounds: I do not intend to repeat the evidence here. A secondary ground pertains to industrial relations. It seems to me that it does not matter why the posts in question are filled by gardaí - there is no restriction on the Commissioner in that regard. The fact that he has chosen, for whatever reason, to assign gardaí to these tasks cannot justify a differential in pay: it is merely the reason why a differential which has always existed between gardaí and clerical workers has been highlighted. The objective justification for a differential should not be confused with the practical reasons which have led to it. It would not matter if the assignments were completely arbitrary. As pointed out above the position of the respondents is effectively that since deployment of gardaí is objectively justified for operational reasons (to put the matter shortly), or, indeed, industrial relations reasons, *ipso facto* the differential is justified.

28. The view of the ECJ on this topic as set out in paragraph 38 is as follows:-

> "Contrary to what the referring court appears to accept [I think, here, the ECJ must have been referring to the Labour Court], it is therefore not a question of justifying the rate of remuneration paid to the different groups of comparators or the deployment of workers to one group or the other, but ***rather of justifying the difference in pay in itself***."[Emphasis added]

29. There may be many reasons for a differential and some one or more of those reasons may objectively justify it. The ECJ referred to a number of them, effectively by way of example. It is hardly surprising that it did so, having regard to what I have described as the startling nature of the claim. It stated (at para. 40) that:-

> "….. it must be noted that in relation to indirect discrimination, there may be diverse reasons for the difference in pay and the justification for such difference may be equally diverse and may relate to national legislation, agreements intended to regulate collectively paid labour or even to a practice or unilateral action of the employer with regard to his employees."

30. The Labour Court has and will hear evidence as to any such factors. Amongst those which have been touched upon to date, that are the subject of judicial notice or are likely to arise as a matter of common sense, and which might be relevant are: An Garda Síochána is a disciplined force (the nearest analogy to the discipline under which they serve being military discipline). The fundamental right of freedom of association of Gardaí is limited in that its members are prohibited from being members of trades unions, they cannot take strike action, are subject at short or, practically speaking, no, notice for operational reasons, to be transferred to other duties or service in other parts of the country (albeit with qualifications), have extensive training in police work (including in many instances in expert disciplines such as ballistics, forensics or fingerprints to identify only a few of the most obvious) and by virtue of being policemen have drastic powers over the rights of citizens (powers which subsist, incidentally, whether they are engaged in clerical duties or not).This is to say nothing about the nature of "normal" police duties or the fact that gardaí, even those transferred in an emergency to them, may not only be at risk of injury or death but in the best traditions of the force may positively act in disregard of their own safety. These may of course be relevant to both the issue of like work or objective justification or both. Gardai and clerical officers have, in the present context, in common only that they perform clerical work and apart from that are quite different.

31. I turn now to the question of industrial relations: in substance, it was submitted on behalf of the claimants that undue weight was given to this factor by the Labour Court. This proposition I reject. The extent to which they are relevant or the weight to be attached to them may differ when the Labour Court is called upon to consider the matter again. Since the reasons for the assignment of gardaí to the tasks in question are of no relevance, they arise only in the context of whether or not there is objective justification for the differential, something which, (at this juncture, appears to me to be unlikely), but I may or may not be proved correct in that view on the Labour Court's rehearing. The basic rule as to the consideration of industrial relations issues is set out in the answer given by the ECJ to Question (4) in the reference. That answer is as follows:-

> "The interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality."

32. It is clear (from para. 47) of the judgment that:-

> ". . . collective agreements, like laws, regulations or administrative provisions, must observe the principle laid down in Article 141 EC (see *Enderby*, paragraph 21)."

33. The Court pointed out that the Advocate General noted that the interests of good industrial relations are:-

> ". . . subject to the observance of the principle of non-discrimination between male and female workers in terms of pay. That concern cannot, therefore, of itself constitute the only basis justifying such discrimination."

34. Thus, that court's conclusion is that it may be one only of a number of factors rather than the only one, if it arises at all in a given case.

35. In light of my conclusions, I will remit the matter to the Labour Court. It should adopt the following approach when rehearing it, namely:-

(i) It should first choose comparators—all else follows from this. These should be drawn from the generality of all those engaged in clerical work for or as members of An Garda Síochána, that being the class for which the respondent's contend: they should be used for all purposes.

(ii) By reference to validly chosen comparators, it should then address the issue of whether or not the work performed by the claimants is like work.

(iii) If the work is held so to be the Court should then address the issue of whether or not the differential in pay is objectively justified. For the avoidance of doubt, this will not involve consideration of the reasons for the assignment of gardaí to certain posts as done at the instigation of the respondents when the case was before it.

(iv) Insofar as it may be necessary to deal with industrial relations issues, they cannot of themselves be the sole basis justifying a differential, but regard may be had to them as one of a number of factors.

(v) Consideration must be given to the context in which the generality work – by definition this will extend to taking into account the nature of not only the clerical work but all police work, including all incidents of service in An Garda Síochána.