Neutral Citation Number: [2010] IEHC 326

THE HIGH COURT

JUDICIAL REVIEW

2009 1309 JR

BETWEEN

IARNRÓD ÉIREANN

APPLICANT

AND

ORLAITH MANNION IN HER CAPACITY AS AN EQUALITY OFFICER

RESPONDENT

AND

MONICA MURPHY

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on the 27th day of July, 2010.

1. The applicant herein was the subject of complaints of alleged unlawful discrimination, harassment and victimisation made by the notice party herein. The respondent is an Equality Officer employed by the Equality Tribunal which is the body charged with investigating complaints of discrimination made pursuant to the Employment Equality Acts 2000 - 2008.

2. These proceedings arise out of a complaint to the Director of the Equality Tribunal by the notice party that the applicant had breached the Employment Equality Act 1998 – 2004 by discriminating against her on gender grounds in relation to her conditions of employment and in relation to access to promotion and further harassed and victimised her.

3. The notice party commenced work with C.I.E. in 1971. She trained as a computer programmer and worked in C.I.E.'s computer services department. She was one of three staff (and the only female) to be awarded a scholarship to U.C.D. to complete a degree in commerce. She attained first place in international marketing in her degree in 1984. C.I.E. sponsored her to do an MBS in international marketing the following year. She obtained first class honours. She joined C.I.E.'s marketing department and was involved with the task force that implemented the establishment of Iarnród Éireann. She complained that on her return from a career break in January 2003 her career trajectory took an unexpected and unexplained nosedive. She attributes this to discriminatory treatment on the basis of gender against her by the applicant.

4. Her complaint in that respect was received by the Equality Tribunal on 20th March, 2007. By a questionnaire dated 4th April, 2007 she requested information from the applicant pursuant to s. 76 of the Employment Equality Act 1998 as amended. The applicant did not respond to that questionnaire. They say this was due to "inadvertence". She provided detailed particulars of her complaint by way of written submissions dated 19th December, 2007. The applicant responded to those submissions on the 21st January, 2008. Further submissions were made by the applicant in writing on 27th February, 2008. On 22nd May, 2008, the Director of the Equality Tribunal assigned the complaint to the respondent for investigation in accordance with the provisions of the Employment Equality Acts 2000 – 2008. On request, an equality review document was provided by the applicant. An oral hearing of the investigation took place on the 3rd December, 2008. Both applicant and the notice party attended and were legally represented. At this hearing, the respondent requested further details from both applicant and notice party relating to the evidence given and the submissions made. A written list of all the required documentation was prepared and read out at the hearing. It was agreed by both parties that this documentation would be provided. The respondent further wrote to the applicant by letter dated 5th December, 2009 setting out in that letter the documentation agreed to be provided. By letter of 9th January, 2009 the applicant's solicitors responded enclosing some of the requested documentation. The applicant made further reply by letter of 13th January, 2009 and enclosed further categories of the requested documentation. Two of the categories that had been requested were not enclosed. These were:-

> (a) The issue of whether budgets were available to employees in the applicant's marketing section in circumstances where it was not denied that the notice party did not have any such budget.
>
> (b) Whether the applicant had paid professional fees and expenses for persons reporting to the director of strategy and business development.

These two categories of documents were never made available to the Equality Officer and have not been produced to this Court. No explanations were made to the Equality Officer in relation to these documents. In these Court proceedings their absence was explained as follows:-

> (a) Due to inadvertence the documentation under these two categories was overlooked. (Para. 9 of the grounding affidavit of Geraldine Finucane).
>
> (b) There may not have been any documentation held by the respondent under these two categories. (Para. 9 of grounding affidavit of Geraldine Finucane).
>
> (c) The reality is that the information sought would be extremely difficult to obtain and/or compile. (Para. 7 of replying affidavit of Geraldine Finucane).

5. By her decision dated 13th November, 2009 entitled *Monica Murphy v. Iarnród Éireann* EE/2007/128 the respondent decided that the applicant in these proceedings had breached the Employment Equality Acts 1998 – 2004 in the manner in which it had treated the

notice party to these proceedings. The respondent decided as follows:-

(1) The applicant discriminated against the notice party in relation to her conditions of employment on the gender ground.

(2) The applicant discriminated against the notice party in relation to access to promotion on the gender ground.

(3) The applicant victimised the notice party.

6. The applicant's complaint in this case is limited to that part of the decision in which the respondent found the applicant had discriminated against the notice party in relation to her conditions of employment on the gender ground. In the course of that part of the decision, on two occasions, the respondent stated that the applicant had failed to supply information or documents which she had sought and went on to draw inferences from that failure. The relevant passages are as follows:-

> *"4.4 I am satisfied the complainant was isolated from the rest of the marketing department (2.3 and 3.3). Her salary was paid out of the Human Resources allocation. She has not received any increments since 2003 as she is at the top point of graded scale. I requested the budgets available to Mr. A.'s direct reports as well as Mr. G. from 2003 to 2006. This information was not supplied to me so I may draw appropriate inferences. I accept the complainant's contention (and the respondent did not deny this) that she was given no budget to spend on marketing campaigns. She had no staff reporting to her. The staff suggestion scheme which was her main duty was left dormant since January 2004 until Ms. Murphy was assigned it in March 2005. It clearly was not a business priority for Iarnród Éireann. This was not a role commensurate with the complainant's marketing skills and experience. In direct evidence, Mr. A. admitted that since 2003 the complainant does not have a proper job title."*

> *"4.7 From the start the complainant saw the issue of non-payment of subscriptions in Iarnród Éireann as one of gender discrimination (2.7 and 3.2). … Ms. Murphy named a number of male colleagues in her area of work whose subscriptions continued to be paid. Iarnród Éireann did not dispute this. Iarnród Éireann did not present to me a written protocol for paying professional membership subscriptions for employees. Of course, Mr. A., as Ms. Murphy's Line Manager has a right and responsibility to ensure public money [is] spent wisely. I requested the details of professional fees paid to all direct reports to Mr. A. from 2003 to 2008 to include sanctions and refusals of same. This information was not supplied to me and again I may draw appropriate inferences. I accept the complainant's contention that professional fees were paid for her male colleagues. I find that the complainant has been treated less favourable than her male peers in the commercial area in relation to this issue. This along with Mr. A.'s refusal to sign off on annual leave and other expense claims (no evidence was presented that male direct reports were treated in the same way) and the exclusion of the complainant at the CILT dinner while entertaining male colleagues constitutes less favourable treatment on the ground of gender."*

The essence of the applicant's complaint is that the respondent drew what she described as appropriate inference from its failure to supply details of budgets made available to Mr. A. and Mr. G. and also of its failure to provide details of any written protocol for paying professional membership subscriptions for employees.

It is to be noted that Iarnród Éireann did not at the hearing before the Equality Officer dispute that a number of named male colleagues of the notice party did have professional subscriptions continuing to be paid.

7. The case made by the applicant at this hearing was that the inferences made were the basis of the decision in respect of this particular aspect of the claim. They say that this decision by reason of the inferences made was *ultra vires* and in breach of fair procedures.

The Decision of the Court

8. *Ultra vires*: The applicant argues that because the Equality Officer has power by statute to order information and materials to be produced she is precluded from making inferences in situations such as herein where the documentation was agreed to be produced. It is argued that where the documents are not produced she may not make inferences but must instead invoke those statutory powers.

9. Fair procedures: The applicant argues that the respondent should have warned the applicant that she intended to make such inferences.

10. It seems to me that the first matter to be considered herein is as to whether the inferences made by the respondent in her decision did in fact form the basis of that decision. In this regard, apart from the inferences of which the applicant complains, the Equality Officer in addressing whether or not the notice party was discriminated against in relation to her conditions of employment, also noted that she was satisfied that the complainant was isolated from the rest of the marketing department, that her salary was paid out of Human Resources allocation, that she had not received any increments since 2003, that she had no staff reporting to her, and that the main duty assigned to her was one which had lain dormant since fifteen months prior to being assigned to Ms. Murphy. She noted that Mr. A. had admitted that since 2003 the complainant did not have a proper job title. The information agreed to be but not provided was as to what budgets were available to equivalent colleagues to Ms. Murphy. It was not denied by the applicant that she was given no budget to spend on marketing campaigns. It is clear therefore that this complaint in relation to the lack of a budget, is very far from being the only complaint upon which the respondent made her decision. Moreover, an inference that there were budgets available to Mr. A. and Mr. G. would appear to be inescapable from the fact that although asked to provide details of the same in the light of the non-availability of the same for the complainant, the applicant herein had provided no such information and no explanation for failing to do so. As to the second part of this complaint, the applicant had not in fact disputed that a number of Ms. Murphy's male colleagues did have their professional subscriptions paid. No issue therefore arises in relation to this finding. No inference was necessary to prove something on which there was no disagreement. In the result it is clear that in the decision she made, the inference related to only one part of the grounds on which she found against the applicant. There was ample additional evidence. Moreover, the inference in respect of budgets seems an inevitable one to be made and beyond criticism. This finding on its own disposes of the case. However, as the other matters hereafter were extensively argued before me I think I should express a view on them:-

Ultra vires

It seems to me that the fact that the Equality Officer has powers to compel parties to provide documents or information could never

be taken to mean she cannot request and accept an agreement to provide them. A commonsense approach to the conduct of administrative proceedings which allows them to proceed in as informal a way as is possible is, generally, the right approach. The powers that are provided are to enable the Equality Officer deal with recalcitrant parties. Nothing in the statute prohibits the Equality Officer from requesting and accepting informal agreement to provide documentation. Where subsequently one of the parties fails to honour their agreement to provide some of that documentation, basic principles seem to me to dictate that she could do either one of two things. She could make an order under s. 94 or she could proceed without any order to draw any reasonable inference from the failure of the party in question to provide such documentation or an explanation in their absence. The obvious inference is that the document either does not exist or is not supportive of the case the party seeks to make. Such inference may be made in any decision making process. There can certainly be no duty on any deciding officer when coming to draft their decision following a hearing to revert back to such a defaulting party seeking an explanation of their default. The hearing is ended, the opportunity to provide agreed documentation has been given and responsibility rests upon the head of the defaulting party in respect of any reasonable inferences that may properly be drawn from their failure to provide agreed documentation.

11. Fairness of procedures
The list of cases cited to me does indeed establish that parties before administrative tribunals are entitled to fair procedures. This is well established law and needs no further elaboration. None of these cases, however, refer to circumstances similar to those that exist here. The Irish case law shows that the fairness of procedures inevitably varies according to the nature of those proceedings. In determining cases of alleged discrimination, it is well recognised that special evidential difficulties may arise from the very nature of discrimination itself. This is often hidden or unrecognised by the party alleged to discriminate. In *King v. Great Britain China Centre* [1992] I.C.R. 516 at 528 – 529, Neill L.J. stated as follows:-

> *"(2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers would be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'.*
>
> *(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw … from an evasive or equivocal reply to a questionnaire."*

This statement of the law was approved by the House of Lords in *Glasgow City Council v. Zafar* [1998] 2 All E.R. 953 where Browne-Wilkinson L.J. stated at p. 958 that complaints of racial discrimination:-

> *"… present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them."*

Both of these decisions were cited with approval by Quirke J. in *Davis v. DIT* (Unreported, High Court, 23rd June, 2000). I also gratefully adopt the rationale of these two decisions.

12. Inferences are a legitimate part of any decision making process. There are undoubtedly limits. However, to show on judicial review that inferences made were a violation of a party's right to fair procedures it would be necessary for the party so alleging to show those inferences were not properly made. To do this, the applicant would have to show by some evidence that the inference made was clearly wrong and was an essential part of the ultimate decision made. Neither element has been shown here. In the first place the inference obviously drawn was that the documentation in question did not support the applicant's case. In the light of the fact that the documentation has never been produced even at this hearing when it was central to the application, demonstrates beyond doubt in my view that such an inference was correct. As to the second part of the above, it is clear on any reading of the decision that the inference was but a small part of the reasoning behind the decision that the applicant discriminated against the notice party in relation to her conditions of employment. By no stretch of the imagination could it be regarded as essential.

13. It must be noted that the applicant in these proceedings, including during the hearing when questioned about it, has studiously avoided any reference to the contents of the documentation in question. This silence is impossible to justify. If the documentation is of no evidential value or does not exist then the Equality Officer and this Court should have been told so. If the documentation does exist but is unfavourable to the applicant, then the applicant is concealing evidence from both the Equality Officer and this Court. If the applicant as stated in the replying affidavit of Geraldine Finucane considers it would be too much trouble to comply with their agreement to produce, then this is a manifest disrespect to the Equality Officer who is exercising functions with which she is charged by the Oireachtas. It is also manifestly disrespectful to this Court. Any one of the above scenario constitutes conduct by the applicant so unacceptable that I cannot conceive of any Court exercising its discretion in judicial review in their favour even were it persuaded that the application had any merit. In my view however, for the reasons outlined above, this application is devoid of merit either in law or on the facts.

The application is refused.