

THE INDUSTRIAL TRIBUNALS

CASE REF: 2345/01
3273/01
3274/01

CLAIMANT: Fidelma Sheerin

RESPONDENTS: 1. Frank Sumner t/a Strabane Garden Centre
2. Donal Gallagher

DECISION

1. The claimant and the first named respondent have resolved their differences. Accordingly, the proceedings against Frank Sumner in cases 2345/01 and 3273/01 are adjourned for six weeks, pending implementation of settlement.
2. The tribunal does not have jurisdiction to entertain claim number 3274/01, because the act complained of occurred in the Republic of Ireland.
3. The complaint of unlawful sex discrimination against Donal Gallagher in case 2345/01 is well founded and it is ordered that Donal Gallagher shall pay to the claimant the sum of £1,990 (which includes £490 interest).

Appearances:

The claimant was represented by Mr M Wolfe, Barrister-at-Law, instructed by the Equality Commission.

The first named respondent (Mr Sumner) was represented by Mr D Flannigan, Barrister-at-Law, instructed by J. Fahy & Company, Solicitors.

The second named respondent (Mr Gallagher) was not present and was not represented.

REASONS

1. The hearing on liability and remedies in these three cases was scheduled to take place during a four day period starting on 6 June and ending on 9 June 2005.
2. The claimant, Ms Sheerin, was employed by Mr Frank Sumner ("Mr Sumner") in Mr Sumner's small business in Strabane, for a brief period during 2001. While she was employed there, Mr Donal Gallagher ("Mr Gallagher") was also employed in that small business.

3. Case 2345/01 ("Case 1") is the first of the cases listed above. Mr Sumner and Mr Gallagher are both respondents to that case. In that case, the claimant complains of unfair dismissal from her post in Mr Sumner's business and she also complains of acts of sexual discrimination which, she says, occurred while she was employed there. Mr Sumner is the sole respondent to case number 3273/01 ("Case 2"). In that case, the claimant complains of victimisation by Mr Sumner which allegedly occurred after the termination of her employment. Mr Gallagher is the sole respondent to case number 3274/01 ("Case 3"). In that case, the claimant alleges that she has been subjected to victimisation discrimination by Mr Gallagher on a date subsequent to the termination of her employment.
4. During the morning of 6 June, a comprehensive settlement was achieved between the claimant and Mr Sumner. (Once that settlement had been concluded, Mr Flannigan BL took no further part in the proceedings). Accordingly, at the request of both of those parties, the tribunal adjourned the claims against Mr Sumner for six weeks, pending implementation of settlement. That settlement explicitly provided that it was without prejudice to the claimant's entitlement to pursue her proceedings against Mr Gallagher.
5. The remainder of this decision sets out our reasons for making the determinations listed on page 1 above in respect of the claims against Mr Gallagher in cases 1 and 3.
6. Mr Gallagher entered a Notice of Appearance in Case 1 and in Case 3. However, Mr Gallagher failed to attend or to be represented at the time and place fixed for the liability and remedies hearing in respect of the two cases against him. The tribunal was satisfied that he was aware of the time and place fixed for hearing. The tribunal disposed of the proceedings in his absence, having first considered his Notices of Appearance and the information contained in the claimant's bundle, to the extent that this information casts light upon Mr Gallagher's version of events.
7. Subject to the foregoing, we told Mr Wolfe (who appeared for the claimant) that we would have regard only to items in the bundle to which our attention was specifically drawn.

The claims

8. In Case 1, the claimant asserts that, while the claimant was employed by Mr Sumner, Mr Gallagher carried out two separate acts of sexual harassment against her, which constituted acts of unlawful sex discrimination within the meaning of the Sex Discrimination (NI) Order 1976 ("the 1976 Order") and that he is liable under Article 43 of the Order in respect of those acts.
9. In Case 3, the claim is that, after the termination of the claimant's contract of employment with Mr Sumner, Mr Gallagher carried out an act of unlawful victimisation discrimination, contrary of the 1976 Order, when he visited a public house in Lifford in County Donegal in which the claimant was working, and that he is liable under Article 43 in respect of those acts.
10. Article 42 of the 1976 Order provides that anything done by a person in the course of his employment is to be treated for the purposes of the Order as done by his employer as well as by him, whether or not it was done with the employers knowledge or approval. Article 43(1) provides that a person who knowingly aids another person to do an act made unlawful by the 1976 Order is to be treated for

the purposes of that Order as himself doing an unlawful act of the like description. Article 43(2) of the 1976 Order makes it clear that, for the purposes of Article 43(1), an employee for whose act the employer is liable under Article 42 is to be deemed to aid the doing of the act by the employer.

11. The claimant admits that, while she was working for Mr Sumner, no income tax or national insurance was being deducted.

The issues

12. The key issues in this case can be summarised as follows:
 - (1) Despite the tax evasion, does the tribunal have jurisdiction to entertain these cases against Mr Gallagher?
 - (2) Does the tribunal have jurisdiction in respect of the act of alleged victimisation discrimination which forms the basis for Case 3?
 - (3) Are the claimant's allegations of sexual harassment against Mr Gallagher true in substance and, if so, did the relevant acts constitute acts of sex discrimination within the meaning of the 1976 Order?
 - (4) If so, was the claimant subjected to "any other detriment" within the meaning of Article 8 of the 1976 Order?
 - (5) If either of the claimant's claims is well founded, should compensation be awarded to her?
 - (6) If so, how much compensation should be awarded?

The facts

13. The claimant was "working the double" when she was working for Mr Sumner. Accordingly, she is a person who, in the past, has behaved in a dishonest manner. In assessing the credibility of her testimony in these proceedings, we have taken account of that factor.
14. We have not had the benefit of hearing or seeing any evidence presented by or on behalf of Mr Sumner, for the very good reason that Mr Sumner had already resolved his differences with the claimant. For the purpose of determining the claimant's proceedings against Mr Gallagher, it has been necessary for us to arrive at conclusions in relation to the allegations of misconduct against Mr Sumner. However, it has been unnecessary for us to come to any conclusion as to whether Mr Sumner's conduct amounted to unlawful discrimination under the 1976 Order.
15. We received oral testimony from the claimant. In the course of that oral testimony, she reiterated the points set out in the first of the witness statements which she made in connection with these proceedings. We are satisfied that the claimant's testimony was truthful and accurate.
16. From the evidence which we have seen and heard, we made the following relevant findings of fact:

- (1) The claimant worked for Mr Sumner, at his business premises in Strabane from 12 March 2001 until 30 May 2001. During that period, she was "working the double". During that period, no tax or national insurance deductions were being made from her salary, which amounted to between £120 and £130 per week.
- (2) While she was employed there, Mr Sumner made a number of comments which had a sexual innuendo. These included comments such as "I could sit here all day and look at you" and comments such as "walk in front of me so I can look at your backside". He also frequently commented on her body and physical appearance, as well as commenting on what she was wearing.
- (3) On another occasion he asked the claimant what she was going to do when she got home from work. She explained that she would be looking after her children, she would give them dinner and that she would probably cut the lawn. In response, he told her that he would be in his bathroom at that time, thinking of the claimant. He also made a lewd comment in that connection.
- (4) The claimant told Mr Sumner to stop making such comments but he never did.
- (5) On one occasion, Mr Sumner pulled the claimant over to sit on his knee when she was in the kitchen of the business premises. Mr Gallagher was present when that incident occurred. His response was to invite the claimant to sit on his own knee. The making of that remark by Mr Gallagher is the first of the two acts of sex discrimination which, according to the claimant, were perpetrated by Mr Gallagher.
- (6) In early April 2001, the claimant was at the shop counter talking to a sales representative. Mr Sumner was behind her. During the conversation he commented to the representative that she was "an added bonus to look at". He then pushed her over the counter face down, reaching under her tee-shirt and pulled hard at her bra strap. She told him to get off, but he made no reply, just laughing in her face.
- (7) On 29 May 2001, she was in the kitchen buttering some bread. Mr Sumner asked her to go into his office to see a closed circuit television which he was installing. She went into the office. As she went in, Mr Gallagher, who had been in the office, left the office, bolting the office door from the outside. This meant that she could not get out and was locked in and trapped in the room with Mr Sumner. She was frightened. She did not know what Mr Sumner intended to do. Mr Sumner shouted to Mr Gallagher that the claimant had "a knife" and told Mr Gallagher to open the door, which he did. (The closing of the door by Mr Gallagher is the second of the two acts of alleged sex discrimination which constitute the basis of the Case 1 proceedings against Mr Gallagher).
- (8) On 30 May 2001, there was a confrontation with Mr Sumner and his wife, regarding his misbehaviour. As a result, the claimant's employment terminated on that date.
- (9) Later that day, Mr Gallagher sent the claimant a text message, which was to the following effect:

"Too guilty to answer the phone. You tell Sheila [Mr Sumner's wife] about me. Must be the first time you have not answered the phone. What you mean I am another Frank. If I hear any stories from you I have got you on video. I'll go to the DSS myself. Donal".

- (10) The sending of the text message is not an act which is the subject of complaint against Mr Gallagher in the present proceedings.
- (11) However, on 31 May 2001 the claimant made a complaint to the police regarding the conduct of Mr Sumner and regarding Mr Gallagher's conduct. Although the investigating officer believed the complainant's version of events, no prosecution was initiated.
- (12) The police investigation concentrated primarily upon the misconduct on the part of Mr Sumner which has already been described above. However, Mr Gallagher was the subject of an adult caution in respect of the text which he sent to the claimant.
- (13) During June 2001, the claimant commenced proceedings in the County Court against Mr Sumner and Mr Gallagher. In those proceedings, she sought damages for personal injuries, loss and damage allegedly sustained by the plaintiff by reason of assault, battery and trespass to the person of the plaintiff carried out by Mr Sumner and Mr Gallagher. In the same proceedings, she sought an injunction restraining the two defendants from "further assault, molesting, harassing or pursuing any conduct which amounts to harassment and which is contrary to Article 5 of the Protection from Harassment (NI) Order 1997..."
- (14) An interim injunction was granted against the two defendants. Ultimately, the proceedings were settled on a basis which was agreed upon the parties. According to the terms of settlement, Mr Sumner was to pay the claimant £1,750 in compensation and Mr Gallagher was to pay her £250.
- (15) On 22 September 2001, the claimant was working in Michael McBrearty's bar, in Lifford, County Donegal. (At that time, she was not "working the double", but Mr Gallagher thought she was). Mr Gallagher came into the bar with his sister at 9.00pm on that date. They had a drink. At about 9.30pm, Mr Gallagher stood up and began to take flash photographs of the claimant at work. He then left the bar. Mr Gallagher took the photographs because he was annoyed at the fact that the claimant had commenced Case 1 against him.
- (16) We were informed by Mr Wolfe (and we accept) that, in the agreement whereby the industrial tribunal proceedings against Mr Sumner were settled, Mr Sumner agreed to pay to the claimant the sum of £1,500 and that the claimant is not entitled to receive any other economic benefits pursuant to that agreement.

The law and our conclusions on the tax evasion issue

17. As Mr Wolfe pointed out, the leading cases on this issue are *Hall v Woolston Hall Leisure Limited* [2000] IRLR 578 and *Vakante v Addey & Stanhope School* [2004] ICR 231. Both of those cases are decisions of the English Court of Appeal. From those two decisions, it is clear that the approach to be applied by employment

22. The task of this tribunal is to apply the law that is actually in force, not to arrive at conclusions as to what the law should be. However, the tribunal wishes to draw attention to the fact that, under current legislation, a women in Northern Ireland employment will be adequately protected under Northern Ireland law against sexual harassment by her employer in the course of a business trip to Ballymena, County Antrim, but would not be adequately protected against similar harassment, in the same circumstances, if that harassment takes place on a business trip to Buncrana, County Donegal.

The law and our conclusions on the sex discrimination issue

23. Article 3(2) of the 1976 Order provides that a person carries out an act of sex discrimination against a woman if, in any relevant circumstances:

“(a) On the ground of her sex, he treats her less favourably than he treats or would treat a man...”

Accordingly, the definition of sex discrimination involves two elements. First, the alleged discriminator must treat the alleged victim less favourably than he treats, or would treat, an appropriate comparator. Secondly, the less favourable treatment must be accorded on the ground of her sex.

24. It is obvious that, in this case, a hypothetical comparator is being used. The circumstances of an appropriate hypothetical comparator must be the same as (or not materially different to) the circumstances of the claimant. (See Article 7 of the 1976 Order).
25. There were sexual overtones to both of the alleged acts of sex discrimination of which complaint is made. We are satisfied that neither of those acts would have occurred if the claimant had been a man; the claimant's gender was a factor in the decision to treat her in the manner of which she complains. A man, in the same circumstances, would not have received the relevant treatment. Accordingly, the requirements of the definition of sex discrimination are met in this case.

The law and our conclusions on the detriment issue

26. A women is subjected to "any other detriment", within the meaning of Article 8 of the 1976 Order if a reasonable worker would or might take the view that the treatment accorded to her had in all the circumstances been to their detriment. (See *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).
27. In applying that principle, we are satisfied that, on account of the relevant acts, the claimant did take the view that the treatment accorded to her had in all the circumstances been to her to detriment; we are also satisfied that a reasonable worker would be likely to take that view in the particular circumstances of this case. Accordingly, we are satisfied that, because of the carrying out of the relevant acts, the claimant has been subjected to a detriment within the meaning of Article 8.

The law and our conclusions on the choice of remedies

28. Where an industrial tribunal finds that a complaint presented to it is well founded, the tribunal has a duty to make available such of the following remedies as it considers to be just and equitable:

- (1) a declaration
- (2) an award of compensation
- (3) a recommendation.

29. The claimant is already entitled to compensation pursuant to the agreement whereby her County Court proceedings were compromised. (See sub-paragraph (13) of paragraph 16 above). However, the County Court proceedings were for "personal injury, loss and damage" in respect of "assault, battery and trespass"; they did not incorporate any claim for aggravated damages. We note that her industrial tribunal proceedings against Mr Sumner (in Cases 1, and 2) have been compromised. However, we also note that, under that compromise, Mr Sumner is to pay to the claimant the sum of £1,500, and that the claimant is not entitled to receive any other economic benefits pursuant to that agreement.
30. Against that background, we are satisfied that it is just and equitable to award compensation to the claimant against Mr Gallagher in respect of the relevant act.

The law and our conclusions in relation to the amount of compensation

31. If compensation is awarded in respect of sex discrimination, such an award can include damages for injury to feelings. However, the award must be made on the basis that, as best as money can do it, the claimant is to be put into the position she would have been in but for the unlawful conduct. Furthermore, in awarding compensation in relation to any particular acts of sex discrimination, account can only be taken of injury to feelings which has been caused by those particular acts.
32. In *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102, the English Court of Appeal gave guidance on the assessment of compensation in respect of injury to feelings caused by unlawful discrimination. According to the Court, three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury) can be identified:
- (1) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
 - (2) The middle band of between £5,000 and £15,000 should be used for serious cases which do not merit an award in the highest band.
 - (3) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
33. In a discrimination case, an employment tribunal has the power to make an award of compensation on a joint and several basis, so that each discriminator could be made liable to pay the whole of the award of compensation. (See the unreported Employment Appeal Tribunal case of *Crouch v Peter Way*, UKEAT/0614/04, 3 June 2005 and the explanation contained in that judgment in respect of the Court of Appeal decision in *Ross v Ryanair Limited* [2004] EWCA Civ 751).

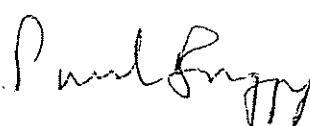
34. Article 160 of the Employment Rights Order (NI) Order 1996 makes explicit provision to prevent double recovery, through tribunal awards, in respect of a loss which constitutes both unfair dismissal and which also constitutes unlawful discrimination or harassment. It is noteworthy that no equivalent provision has been made with a view to preventing double recovery in circumstances in which one discriminator settles a claim in respect of a particular act of discrimination, leaving the claimant free to pursue a claim for compensation against the other discriminator in relation to the same act.
35. We can now apply those principles to this case:
- (1) It would not be lawful or appropriate to make any deductions from compensation to take account of the fact that the claimant is entitled, pursuant to the County Court settlement, and pursuant to the industrial tribunals settlement with Mr Sumner, to some relatively modest sums in respect of misconduct which occurred in connection with her employment.
 - (2) The relevant acts have to be seen against the background of the general pattern of misconduct, although the claimant is not entitled to an award of compensation against Mr Gallagher in respect of any acts other than the relevant acts. We are satisfied that the two relevant acts, carried out by Mr Gallagher, substantially heightened the claimant's injury to feelings.
 - (3) We consider that the injury to feeling attributable to the relevant acts falls within the third band of the *Vento* guidelines.
36. In all the circumstances of this case, we consider that an award of £1,500 is an appropriate award in respect of the relevant acts.

Interest as a constituent part of the tribunal award

37. The tribunal has power, under the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (NI) 1996 (SR 1996/581), to include interest on any sums awarded in respect of sex discrimination. We consider it appropriate, in the circumstances of this case, to award interest pursuant to those Regulations.
38. We award interest of £490, which has been calculated as follows. The interest period is the period from 1 June 2001 to 1 July 2005 (a period of four years and one month); the interest rate is 8%.

Industrial Tribunals (Interest) Order (NI) 1990

39. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (NI) 1990.

Chairman: 

Date and place of hearing: 6 and 7 June 2005, Belfast.


Date decision recorded in register and issued to parties: 11 AUG 2005

INTEREST NOTICE
INDUSTRIAL TRIBUNALS
INTEREST ON AWARDS IN DISCRIMINATION CASES

The Industrial Tribunals (Interest) Order (Northern Ireland) 1990 provides that interest shall accrue on a sum of money payable as a result of an award of an industrial tribunal where that sum remains unpaid in whole or part 42 days after the decision containing the award was issued to the parties. In relation to awards made under the Equal Pay Act (Northern Ireland) 1970, the Sex Discrimination (Northern Ireland) Order 1976, the Disability Discrimination Act 1995, or the Race Relations (Northern Ireland) Order 1997, the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 and the Race Relations (Interest on Awards) Order (Northern Ireland) 1997 determined that interest shall accrue from the day immediately following the day the decision containing the award is issued to the parties. However no interest is payable on the award if the full amount of the award is paid within 14 days after the day of issue of the decision to the parties. Interest does not accrue on costs or expenses awarded by the tribunal.

In this application, please note that -

1. the decision day is 11 August 2005 being the day the decision was sent to the parties;
2. the calculation day is 12 August 2005 being the day immediately following the decision day; and
3. the stipulated rate of interest is 8% being the rate of interest in force on amounts awarded by decree in the county court on the decision day.



Secretary of the Tribunals