[2020] IEHC 42

THE HIGH COURT

CIRCUIT APPEALS

2018 No. 289 CA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 28 OF THE EQUAL STATUS ACT 2000 (AS AMENDED)

BETWEEN

OLUMIDE SMITH

APPELLANT

AND

MARK COPELAND

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 4 February 2020

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The procedural history will be set out in more detail under the next heading below. For introductory purposes, it is sufficient to note that the appeal arises out of a complaint of discrimination which the Appellant had made to the Workplace Relations Commission. The complaint arose out of an email exchange between the Appellant and the Respondent in respect of a proposed short-term letting of a residential property. The Appellant contends that he was unlawfully discriminated against (i) on the grounds that he proposed to rely on a housing assistance payment to pay for the proposed letting, and (ii) on the grounds of race. Both the Workplace Relations Commission and the Circuit Court have dismissed this complaint on the basis that the Appellant had no real intention of renting the property.

2. The Appellant now seeks to appeal the decision of the Circuit Court to the High Court. Under the relevant legislation, the appeal to the High Court is confined to an appeal on a point of law only. It is necessary to emphasise this from the outset of this judgment in circumstances where the appeal, as formulated, seeks to set aside the findings of fact of the Circuit Court. As explained presently, the High Court only has a very limited jurisdiction to review findings of fact on an appeal on a point of law.

PROCEDURAL HISTORY

3. The Appellant made a complaint to the Workplace Relations Commission in respect of an incident of alleged discrimination in connection with the provision of residential accommodation. The discrimination is said to have occurred on 16 February 2017 when the Respondent declined to make a short-term letting of residential premises ("*the Premises*") to the Appellant. The letting was to be for a period of six to eight weeks only, pending the completion of a sale of the Premises to a third party.

4. The principal complaint made is that the Respondent allegedly discriminated against the Appellant by reference to two prohibited grounds as follows: (i) the Appellant intended to pay the rent for the proposed short-term letting by way of a housing assistance payment, and (ii) the Appellant's race. (The Appellant is an Irish citizen, and describes his racial or ethnic origin as Yoruba).

5. The Respondent has explained that the Premises had been owned by him and his sister. The Premises had been put up for sale in December 2016, and, as of February 2017, it was anticipated that a sale of the Premises would be agreed within a short period thereafter. The Respondent decided to offer a short-term letting of the Premises for a period of between six weeks and eight weeks pending the completion of the anticipated sale. The property was advertised on the website "Daft.ie" on 14 February 2017. On 16 February 2017, there was an exchange of emails as between the Appellant and the Respondent. In brief, the Appellant indicated that he would be relying upon a housing assistance payment ("*HAP*") to pay the rent. The Respondent indicated that he did not want to "get into" a social welfare scheme for a six-week lease, saying that it would be "way too much hassle".

6. The email exchange concluded with the following three emails.

> "Dear Marc
>
> Acknowledging your frank response but Refusing to accept tenants because of rent allowance is now illegal: As of the 1st January 2016, the Equality (Miscellaneous Provisions) Act 2015 has introduced 'housing assistance' as a new discriminatory ground. This means that people in receipt of rent supplement, housing assistance payments or other social welfare payments can no longer be discriminated against in relation to the provision of accommodation or related services or amenities.
>
> Please refer to the attached reference.
>
> Any thoughts?"

7. The Respondent replied to this email as follows.

> "Your tone has no (*sic*) become threatening – your emails will now be blocked."

8. The Appellant sent the following reply.

> "Please what is your racial or ethnic origin? Mine is Yoruba."

9. The Appellant's complaint was referred to a Workplace Relations Commission Adjudication Officer. An oral hearing was held on 10 August 2017. The Adjudication Officer made a written decision on the matter on 3 November 2017. The Findings and Conclusions are stated as follows.

> "The complainant stated that the local authority would pay the rent and the deposit directly to the Landlord. That is factually incorrect. As is set out on the HAP website
>
> > *'If your landlord requires a deposit, you will have to pay this yourself – the local authority will not pay it for you. In some circumstances, you may be*

eligible to apply for assistance from the Department of Social Protection to help with paying a deposit'

The complainant also stated that he wanted to move out of his current accommodation into the respondent's apartment albeit only for a six week period. However, those in receipt of HAP are required, save in certain specific circumstances to remain in the property for a period of two years.

> *'You will be expected to stay in your HAP accommodation for at least 2 years, but in some situations you may be able to apply for a new HAP payment elsewhere – for example, if you are offered a job in another town or if your family grows too large for the property. You will need to contact your local authority if you are thinking of moving'*

The complainant was guarded when asked why he was moving from his current accommodation. No evidence was adduced that he had to move due to termination of his current tenancy or anything of that nature. He simply said he wanted to move for personal reasons. The complainant was living in Balbriggan at the material time. He has three children. It is simply not credible, particularly in circumstances were the HAP was not applicable, that he wanted to move out of his home and move his children out of their school, to set up a home in Cherrywood in Dublin 18 for a six week period, when he could stay in the accommodation he was renting in Balbriggan with the assistance of the HAP and with no disruption for his children.

In circumstances where this six week lease did not meet the requirements for the HAP, no evidence was adduced in relation to the complainant having the deposit available and in the absence of any credible explanation as to why he wanted to move out of his current HAP applicable accommodation in Balbriggan to the other side of the city, I find that the complainant had no real intention of renting the respondent's accommodation. It is on that basis that I find that the Complainant was not in fact availing of a service within the meaning of the Equal Status Acts and that his complaint is contrived and disingenuous. In relation to the provision of services, Section 6 (1) *'A person shall not discriminate in— (c) providing accommodation or any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities'*. In circumstances where the complainant had no intention of availing of the service, the subject matter of his complaint, he cannot rely on that provision of the Act.

No evidence was adduced in relation to the complainant's 'race' claim.

In relation to the complainant's harassment claim, he stated that the emailed which stated '*Your tone has now become threatening – your emails will now be blocked'* he considered to be harassment. No further evidence was adduced in relation to the matter. It is on that basis that I find that the complainant is not well founded."

10. The Appellant then exercised his right of appeal to the Circuit Court. This appeal was heard by the Circuit Court (His Honour Judge O'Sullivan) on 5 July 2018. Having heard evidence from both sides, the Circuit Court made a finding of fact that the Appellant had no genuine intention of availing of the short-term letting, and that the complaint was a "try on" on the part of the Appellant.

11. The Appellant next instituted the within appeal to the High Court. The appeal had been brought outside time, but by order of the High Court (O'Hanlon J.) dated 21 January 2019, the time for serving and lodging a notice of appeal had been extended.

APPEAL ON POINT OF LAW

12. The appeal from the Workplace Relations Commission to the Circuit Court had been brought pursuant to section 28 of the Equal Status Act 2000 (as amended). That section provides as follows.

> 28.(1) Not later than 42 days from the date of a decision of the Director of the Workplace Relations Commission under section 25, the complainant or respondent involved in the claim may appeal against the decision to the Circuit Court by notice in writing specifying the grounds of the appeal.
>
> (2) In its determination of the appeal, the Circuit Court may provide for any redress for which provision could have been made by the decision appealed against (substituting the discretion of the Circuit Court for the discretion of the Director of the Workplace Relations Commission).
>
> (3) No further appeal lies, other than an appeal to the High Court on a point of law.

13. As appears from the foregoing, an appeal to the High Court is on a point of law only. This is to be contrasted with the appeal from the Workplace Relations Commission to the Circuit Court. That (first) appeal is in the form of a rehearing. In the present case, this involved the Appellant giving oral evidence to the Circuit Court, and being cross-examined.

14. The function of the High Court under section 28(3) is very different. The interpretation of section 28(3), and, in particular, the limitations of an appeal on a point of law have been considered in detail by the Supreme Court in *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13; [2015] 2 I.R. 509, [83] and [84] as follows.

> "[83] On the other hand, there are important features of s. 28(3) of the Act of 2000 which need to be considered. The first is that it is clear that the subsection is intended to permit only a limited form of appeal. The appeal is one 'on a point of law'. That is terminology which has been used to limit many forms of statutory appeal to, and within, the courts. For instance, s. 42(1) of the Freedom of Information Act 1997 provides for an appeal on a point of law to the High Court by a person affected by a decision of the Information Commissioner following a review under s. 34 of the Act of 1997; and s. 123(3) of the Residential Tenancies Act 2004 provides for an appeal on a point of law to the

High Court by any of the parties in respect of a determination of a tribunal of the Private Residential Tenancies Board. The principles applicable to the scope of such appeals have been summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, where he said at p. 452:-

> 'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> - it cannot set aside findings of primary fact unless there is no evidence to support such findings;
> - it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
> - it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
> - if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision ...'

[84] Thus, at least part of the purpose of subs. (3) must be designed to define the type of appeal which can be pursued to the High Court. In that context, it might be argued that the phrase 'no further appeal' is simply designed to limit the scope of appeal to the High Court rather than to preclude what would otherwise be a constitutionally conferred right of appeal to this court."

15. These principles have been more recently affirmed by the Supreme Court in *Cahill v. The Minister for Education and Science* [2017] IESC 29; [2018] 2 I.R. 417 at [58] and [109].

16. The proper procedure for making an appeal to the High Court pursuant to a statutory appeal on a point of law is prescribed under Order 84C of the Rules of the Superior Courts. The appeal is to be made by way of originating notice of motion. Crucially, the notice of motion must state concisely the point of law on which the appeal is made. See Order 84C, rule 2(3) as follows.

> (3) Where the relevant enactment provides only for appeal to the High Court on a point of law, the notice of motion shall state concisely the point of law on which the appeal is made.

17. The appeal in the present case does not comply with these requirements. Instead of issuing an originating notice of motion pursuant to Order 84C, the Appellant instead issued a notice of motion in general terms on 25 July 2018. This motion was, in effect, treated as an application for an extension of time. Thereafter, following the order of the High Court on 21 January 2019 extending time, a second notice of motion was issued

dated 4 February 2019. Neither of the two notices of motion identifies the point(s) of law to be relied upon.

18. The form of appeal is irregular and, strictly speaking, the failure to comply with the requirements of Order 84C would, in and of itself, be good reason to dismiss the appeal in its entirety. In circumstances, however, where the Appellant is a litigant in person, I have taken the unusual step of addressing the substance of his appeal in any event notwithstanding the fact that the appeal is procedurally irregular.

BURDEN OF PROOF

19. Section 38A of the Equal Status Act (as amended by section 64 of the Equality Act 2004) provides as follows.

Burden of proof.

38A.—(1) Where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.

(2) This section is without prejudice to any other enactment or rule of law in relation to the burden of proof in any proceedings which may be more favourable to the person.

(3) Where, in any proceedings arising from a reference of a matter by the Authority to the Director of the Workplace Relations Commission under section 23(1), facts are established by or on behalf of the Authority from which it may be presumed that prohibited conduct or a contravention mentioned in that provision has occurred, it is for the respondent to prove the contrary.

20. Section 38A is intended to give effect to *inter alia* the requirements of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*"the Racial Equality Directive").*

21. Recital 21 of the Racial Equality Directive reads as follows.

(21) The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

22. Article 8 of the Racial Equality Directive reads as follows.

Article 8 / Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent

authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

23. Similar provisions in relation to the burden of proof are to be found under two related EU Directives which govern employment equality, namely Directive 2000/78/EC and Directive 2006/54/EC. The interpretation of these latter provisions has been considered in a number of judgments of the Court of Justice of the European Union ("*CJEU*"). The essence of these judgments has been summarised as follows by Advocate General Mengozzi in Case C-415/10, *Meister* ECLI:EU:C:2012:8, [22].

> "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. In other words, as the Court has already held in its judgment in *Kelly*, (13) the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant. Central to the provisions referred to in the first question referred for a preliminary ruling is therefore the burden of proof that, although somewhat reduced, nevertheless falls on the victim. A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions."

DETAILED DISCUSSION

24. The Appellant alleges a breach of Section 6 of the Equal Status Act 2000 (as amended). Insofar as relevant, the section reads as follows.

6.—(1) A person shall not discriminate in—

[...]

(c) subject to subsection (1A), providing accommodation or any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities.

25. As appears, the section provides *inter alia* that a person shall not discriminate in providing accommodation. The concept of discrimination in this context bears an extended meaning as a result of section 3(3B) of the Equal Status Act 2000 as follows.

> (3B) For the purposes of section 6(1)(c), the discriminatory grounds shall (in addition to the grounds specified in subsection (2)) include the ground that as between any two persons, that one is in receipt of rent supplement (within the meaning of section 6(8)), housing assistance (construed in accordance with Part 4 of the Housing (Miscellaneous Provisions) Act 2014) or any payment under the Social Welfare Acts and the other is not (the 'housing assistance ground').

26. The effect of these provisions is that, subject to certain statutory exceptions, it is unlawful to discriminate against a prospective tenant on the ground that he or she is in receipt of housing assistance.

27. Both the Workplace Relations Commission, and the Circuit Court on appeal, had dismissed the Appellant's complaint on the narrow factual ground that he did not have a *bona fide* intention to avail of the "service" at issue, namely the short-term letting of the Premises.

28. The Circuit Court accepted, in principle, that had there been a *bona fide* or genuine intent to secure accommodation, then the prohibition on discrimination on the "housing assistance ground" (as defined) would apply. The Circuit Court dismissed the complaint on the basis that the Appellant was not, in fact, seeking to avail of a "service" under section 6 (above). The Circuit Court attached weight to the fact that the Appellant was unable to produce written evidence to the effect that a housing assistance payment would be made in respect of a six week letting. The only written material properly before the Circuit Court in respect of eligibility refers to a normal period of *two years.*

29. The Appellant had sought to rely on a letter from Dublin City Council dated 3 March 2017. This letter indicates that the Appellant is eligible for the housing assistance payment. It is to be noted that the letter *postdates* the email exchange of 16 February 2017 by a number of weeks. By definition, the letter is not one which could have been seen by the Respondent at that time.

30. (As an aside, it is to be noted that the letter does not address the question of a short-term letting at all. The letter expressly refers to the fact that the deposit and two months' rent in advance will be paid on receipt of a complete HAP application. This language appears to be more consistent with the standard two year letting, rather than a six to eight week short-term letting).

31. The Circuit Court judge ruled that the letter of 3 March 2017 was inadmissible as documentary hearsay, and that if the Appellant had wished to establish that Dublin City Council would have provided housing assistance payments in respect of a short-term letting of six to eight weeks, then the Appellant should have called a witness from Dublin City Council.

32. Having found, as a matter of fact, that the Appellant did not have a *bona fide* intention to avail of the "service" at issue, it was then unnecessary for the Circuit Court to address any argument as to the interpretation and application of these statutory provisions in the context of a short-term letting. The decision of the Circuit Court did not involve the determination of any "point of law".

DECISION

33. The Appellant has filed a notice of motion and a very detailed affidavit dated 24 July 2018 setting out his various grounds of appeal. The Appellant read out his affidavit at the hearing before me. Having carefully considered the content of same, I am unable to identify any "point of law" which is amenable to appeal under section 28(3) of the Equal Status Act 2000 (as amended).

34. The Appellant is dissatisfied with the findings of fact made by the Circuit Court. The High Court does not, however, have jurisdiction under section 28(3) of the Equality Act 2000 (as amended) to entertain an appeal on the merits nor to overturn the findings of fact made by the Circuit Court, save in the limited circumstances identified by the Supreme Court. (See paragraph 14 above).

35. The structure of the legislative scheme is that the parties to a complaint are provided with two full hearings in relation to same, namely before the Workplace Relations Commission and the Circuit Court. Thereafter, there is a second appeal to the High Court on a point of law only. The existence of this second appeal allows for the possibility of an error of law to be corrected by the High Court. Any judgment of the High Court will then serve as a precedent for future decision-making.

36. In the present case, no point of law emerges from the decision of 5 July 2018 precisely because the Circuit Court determined the appeal on a finding of fact, namely that the Appellant did not have a *bona fide* intention to avail of the "service" at issue, i.e. the short-term letting of the Premises.

37. Applying the principles governing an appeal on a point of law, as set out by the Supreme Court in *Stokes v. Christian Brothers High School Clonmel*, I am satisfied that there is no basis for saying that the findings of fact made by the Circuit Court were unsupported by evidence, unreasonable or based on an incorrect interpretation of documents.

38. The findings of the Circuit Court turn, to a very large extent, on the credibility of the Appellant as a witness. The Circuit Court judge had the benefit of hearing oral evidence from the Appellant. The Appellant declined to explain why it was that he wished to move himself and his children from their existing long-term rented accommodation into short-term accommodation in a different part of the city (Balbriggan to Cherrywood). The Appellant insists that he is entitled to privacy, and that he does not have to disclose this information. No witnesses from Dublin City Council were called to substantiate his claim that he would be granted housing assistance payment for a short-term letting of some six to eight weeks.

39. The Circuit Court, as with any other court, can only act on the basis of the evidence before it. The burden of proof to establish a *prima facie* case of discrimination lies with the Appellant as complainant. See section 38A of the Equality Act 2000 (as amended), (discussed at paragraphs 19 *et seq.* above).

40. It was open to the Circuit Court to find, on the basis of the very limited evidence adduced by the Appellant, that the Appellant had failed to establish a *bona fide* intention to avail of a "service" for the purposes of section 6 of the Equal Status Act 2000 (as amended).

CONCLUSION AND FORM OF ORDER

41. For the reasons set out above, I have concluded that the decision of the Circuit Court of 5 July 2018 does not disclose any error on a point of law for the purposes of section 28(3) of the Equal Status Act 2000 (as amended). In reaching this conclusion, I have applied the principles identified by the Supreme Court in *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13; [2015] 2 I.R. 509, [83] and [84].

42. The appeal is, accordingly, dismissed.