

**THE HIGH COURT**

[2023] IEHC 697

[Record No. 2022/225MCA]

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE  
EMPLOYMENT EQUALITY ACT 1998, AS AMENDED**

**BETWEEN**

**PETER ONYEMEKEIHIA**

**APPELLANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**AND**

**THE LABOUR COURT**

**NOTICE PARTY**

**JUDGMENT of Ms Justice Miriam O'Regan delivered on 8 December 2023**

**Issues**

1. The within matter comes before this Court on foot of a notice of motion of the appellant dated 29 August 2022 in which the appellant seeks the relief of setting aside a decision of the Labour Court of 20 July 2022 which decision concluded that the appellant's appeal before the Labour Court failed. The matter had come before the Labour Court on foot of an appeal to it dated 14 July 2017 from a dismissal of the appellant's claim by the adjudicating officer in the Workplace Relations Commission of 7 June 2017. The appellant had made two complaints to the Workplace Relations Commission respectively dated 18 May 2015 and 22 April 2016.

### **Background**

2. The appellant's grievance throughout relates to the fact that while working as a prison officer in Mountjoy Prison he was subjected to constant racial abuse by some prisoners. The complaints that were made by the appellant to the Irish Prison Service in respect of such racial abuse covers the period from 2009 to 2015, the appellant first commencing employment with the Irish Prison Service (hereinafter 'the IPS') in 2008. The appellant is a black man originally from Nigeria.

3. The hearing before the Labour Court took place between 17 October 2018 and 19 October 2018 and was resumed on 20 April 2021 until 22 April 2021.

4. Substantial submissions were lodged by the appellant to the Labour Court, bearing date 16 August 2017 and 12 April 2021, which made clear that the appellant's appeal to the Labour Court was confined to a claim that a defence under s.14A of the Employment Equality Act 1998 as amended ('section 14A') was not available to the appellant's employer

(the IPS) in addition the appellant was maintaining a claim of indirect discrimination pursuant to the provisions of Article 2(1)(b) of the Race Directive 2000/43/EC.

5. The Labour Court decision of 20 July 2022 was notified to the appellant on 25 July 2022. The decision ran to nine pages and set out the background to the appeal and the factual matrix. Thereafter, the Labour Court identified the issue in dispute between the parties to the effect that it was accepted that the appellant was subjected to racial abuse within the meaning of s.14A and complained that the IPS had not taken sufficient steps to discourage such behaviour and therefore could not rely on the provisions of s.14A. On the other hand, the respondent submitted that the prison environment was unique and what might be reasonably practicable in another environment may not be so in the prison environment. The respondent relied on the prison rules incorporating sanctions for prisoners who misconduct themselves as being sufficient to satisfy the reasonably practicable defence requirements contained in s.14A.

6. Thereafter the decision set out a brief synopsis of the evidence given by eight witnesses to the Court (four of whom gave evidence on behalf of the appellant and four gave evidence on behalf of the IPO). The decision set out brief details of the submissions made on behalf of the appellant and on behalf of the IPO and thereafter included a paragraph entitled “Discussion and Decision”, which paragraph reads as follows: -

“The Court accepts the thrust of the argument advanced on behalf of the Respondent in relation to the unique nature of the prison environment. In the Court’s judgment, section14A cannot be interpreted as imposing a one size fits all approach when it comes to an employer’s obligation to take reasonably practicable steps to prevent harassment and sexual harassment in the workplace.

The Court is satisfied, based on the evidence, before it that the Respondent has consistently taken a robust approach in dealing with allegations of racist behaviour by prisoners against officers – including the Complainant – and that the sanctions imposed under the P19 regime, in accordance with the relevant Guidelines, are meaningful and proportionate. In that regard, the Court’s judgment, is that the Respondent has an active anti-harassment policy in place which is known to, and understood by, prisoners and officers and can, therefore, rely on the defence of section 14A. The Complainant’s appeal, therefore, fails.

The evidence adduced from the Respondent’s witnesses indicate, in the Court’s view, that the Respondent’s approach to equality and diversity in the unique environment which is the prison system is an evolving one. It appears to the Court that there is some merit in the observation of Counsel for the Complainant to the effect that the issues of racism and racial harassment may have not, to date, been given the level of attention that they require by the Respondent, having been obscured in the generality of its approach to equality and diversity matters. In this regard, the Court directs that the Respondent conduct a thorough review of its anti-racism strategy and policies having regard to examples of international best practice in this area in the prison systems of other similar jurisdictions.

The Court so determines.”

7. It is common case that the evidence before the Labour Court, on behalf of the appellant, was to the effect that the prison rules procedure was inadequate, that sanctions imposed on the prisoners within that system were either never implemented or briefly implemented and he was of the view that the sanctions were inadequate to deal with the racial abuse involved. The appellant accepted that the vast majority of prisoners do not engage in

racial abuse. Witnesses on behalf of the appellant indicated that the focus on rules and sanctions was a too narrow response and suggested that education and a more visible (to the prisoners) policy would be required.

8. On behalf of the IPO it was indicated that there was a diversity and equality training programme in 2012 and 2013 and ninety percent of staff had participated in same.

Furthermore, since the incidents grounding the appellant's grievance raised within the prison system an anti-discrimination poster campaign has been posted on the noticeboard of the landings within the prison complex. There is also an eighteen-minute anti-racism video available to prisoners which they could access from their cells.

It is clear from the foregoing therefore that there was a dispute between the parties before the Labour Court as to the consistency of the approach taken by the IPO, the efficiency of the sanctions system under the P19 regime and the existence or not of an anti-harassment policy.

9. There is no reference in the decision to indirect discrimination although as aforesaid the claim was incorporated within two sets of submissions on behalf of the appellant.

Furthermore, in a synopsis of the submissions on behalf of the complainant made to the Labour Court and recorded in the decision it is stated that the issue to be determined was as to whether or not a defence was available under s.14A of the Act. However, the synopsis of evidence on behalf of the Applicant includes mentions of an absence of a specific policy on harassment, the unavailability of sufficiently significant sanctions and the asserted inadequate response on the part of the respondent. In addition, it was claimed that there was not an appropriate focus on racism per se.

### **Legislation**

**10.** Section 14A of the Act provides that where an employee is harassed in the workplace or in the course of his or her employment *inter alia* by a contact of his/her employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or, harassment has occurred and either the victim is treated differently or it could reasonably be anticipated that he or she could be treated differently, such harassment constitutes discrimination by the employer.

If harassment of the victim would but for sub. (2) be regarded as discrimination by the employer, it is a defence by the employer to prove that the employer took such steps as are reasonably practicable to prevent the harassment and to prevent the victim from being treated differently.

**11.** Indirect discrimination is defined by Article 2(1)(b) of the Race Directive 2000/43/EC as occurring “where an apparently neutral provision...would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision,...is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

### **Jurisprudence Relied On**

**12.** In *Sheffield City Council v Norouzi* [2011] IRLR 897, being a judgment of the UK Employment Appeals Tribunal under the Race Discrimination Directive aforesaid, the claimant was of Iranian origin, was a social worker in a small home for troubled young people and he suffered a number of incidents of racial abuse. The IPS relies on this decision and identifies that there are environments including prisons where employees may be subjected to a level of harassment on a prescribed ground which cannot easily be prevented or eradicated. In such cases an employer should not too readily be held liable for conduct of

third parties which is in truth a hazard of the job. The Tribunal should be prepared to focus on precisely what could have been done. A suggestion was made that appropriate support and guidance could have been afforded to the claimant - in this regard the IPS point to the fact that the within appellant was offered the employee assistance programme which was rejected by him.

**13.** The appellant points out that evidence was adduced to the effect that an education programme and a poster awareness programme were matters identified to the Labour Court as what could have been done in the circumstances of the within matter.

**14.** It is noted that the 2012 and 2013 education programme was available to prison officers but there is no evidence to the effect that it was available to prisoners. Furthermore, the poster programme introduced into prisons post-dated the within appellant's complaints and the appellant argues that the IPO has thereby effectively identified additional steps which it could have taken.

**15.** In *Attorney General v Davies* [2018] 2 IR 357 McKechnie J in the Supreme Court discussed the points of law which can legitimately be raised in an appeal (such as the instant matter) which is limited to points of law.

At para. 54 McKechnie J indicated satisfaction that subject to context a statutory right of appeal on a point of law will if its wording does not otherwise prescribe include

- (a) errors generally understood;
- (b) errors including illegality, irrationality, defective or no reasoning;
- (c) errors in the exercise of discretion; and

(d) errors of fact.

**16.** McKechnie J then goes on in para. 55 of the judgment to identify what issues of fact may be regarded as issues of law.

**17.** The IPS point out that the appellant cannot establish an error of fact identified by McKechnie J at para. 55 aforesaid. On the other hand, the appellant argues that para. 55 deals only with issues of fact which might be regarded as issues of law and does not avoid the other errors of law as identified in para. 54. In this regard the appellant is relying on the defect created by irrationality and of no reasoning.

**18.** The appellant relies on *Nano Nagle School v Daly* [2019] 3 IR 369, being a judgment of MacMenamin J in the Supreme Court. In para. 74 of the judgment MacMenamin J states that there is no doubt, but significant and relevant evidential material was not recorded or evaluated by the Labour Court and thereafter states that a tribunal or other decision maker should make an outline of the relevant facts and evidence upon which the reasoning is based and set out such evidential material which is fundamentally relevant. Reference is made to the statutory duty under which the Labour Court operates. Under s.88(1) of the 1998 Act where the Labour Court is requested by any of the parties to give a statement of reasons why it reached its decision or determination must do so. MacMenamin states:

“Parties to a decision are entitled to know why they have won or lost, as a matter of fair procedure, and in order to decide whether to appeal. But parties are also entitled to be assured that, in making a decision, an administrative or curial tribunal has had regard to very relevant evidence which arguably has the potential to be potentially determinative of an issue, if not the claim, before it.”



**19.** At para. 84 MacMenamin states: -

“Part of that process must be that a deciding tribunal is seen to engage with the relevant evidence, and, in its decision, address it one way or another within the prism of the applicable law.”

**20.** The IPS relies on the judgment of Humphreys J in *Trasdev v Caplis* [2020] IEHC 403 where Humphreys J indicated his view that what the Labour Court did in its determination in that matter was to cut to the chase and to correctly identify the actual crucial point of difference between the parties. At para. 11 of the judgment it is indicated that the caselaw on reasons establishes that the reasons must relate to the principal important controversial issues or the main issues in dispute, not necessarily to every point in the case. Humphreys J noted that the Labour Court was set up to consist of industrial relations experts and is entitled to some degree of recognition of that fact. The court was of the view that looking in the round one cannot say that the process of rational decision making is so lacking as to make the decision unlawful or amount to a point of law which would permit the court to allow the appeal. A losing party is entitled to the gist of the reasons for the decision. Humphreys J was satisfied in that matter that the reasons were apparent from the decision.

**21.** In response to the IPO’s above argument the appellant relies on two judgments namely: -

(a) *The Boards of Management of Scoil An Chroí Ro Naofa Íosa & Ors. v Helen Donnelly & Ors.* [2020] IEHC 550 when Hyland J noted at para. 54 that the court should show appropriate curial deference to the Labour Court when it deploys its particular expertise on industrial relations issues. However, where there is a clear error of law the law makes it manifest that no deference is due to a specialist tribunal on an error of law for obvious reasons;

(b) *The State of Kuwait v Kanj* [2021] IEHC 395, a judgment of Barr J. At para. 50 the Court identified that the Court of Appeal in *Bank of Ireland Mortgage Bank v Heron* [2015] IECA 66 makes it clear that where there is a conflict of evidence between the parties it is essential that the decision maker engages with the evidence and resolves the conflict one way or the other. Kelly J quoted from *Flannery v Halifax Estate Agency Limited* [2001] WLR 377 where it was stated that the extent of the duty to give reasons as to what is required to fulfil that duty depends on the subject matter:

“But where the dispute involves something in the nature of an intellectual exchange with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other”.

**22.** Barr J was satisfied that it was incumbent on the decision maker to state clearly why it was accepting certain evidence and rejecting other evidence – the Labour Court was entitled to come to a conclusion of preference for one set of evidence but was obliged to set out its reasons why it was rejecting some or all of the evidence led by the appellant. Barr J was satisfied that the conclusion was a bald conclusion without saying why it had reached its decision and the Labour Court had not engaged with the conflicting evidence that had been led nor does it say why it had resolved the conflict in evidence in favour of the claimant.

**23.** The appellant refers to *BV (An employee)* DEC-E2004-002, a decision of an Equality officer where the complainant was an assistant chief officer within the prison service and complained of discriminatory conduct by a colleague. The employer was relying on the defence of having taken all reasonable steps to prevent the sexual harassment of employees. At the time of the offence the IPS did not have a policy in place and the complaint was dealt

with by means of the prison rules of 1996 which the Equality Officer considered to be totally unsatisfactory.

24. The IPS refers to the fact that such case did not involve a prisoner harassment case therefore is of limited authority. However as was pointed out on behalf of the appellant s.14A does not distinguish between harassment by employees and other parties with whom the victim is likely to come in contact with at work.

25. The appellant refers to the case of *Atkinson v Carty & Ors* (2005) 16 ELRI, a decision of Delahunt J in the Circuit Court where the judge indicated that it was for the employer to provide a safe place of work. In that matter there were no written procedures in place to provide the plaintiff with an avenue of redress and the respondent argues that such is not the case in the instant matter where there was a procedure under r.66 of the Prison Rules 2007 to lodge a P19 complaint. It does appear to me that the respondent's distinguishing argument between that case and the instant matter is well made.

26. During the course of the hearing before this Court the appellant did argue as to the limited efficacy of the Prison Act 2007 providing adequate sanctions or indeed an adequate policy. However, it appears to me that this is a matter for the Labour Court provided no error of law is made.

### **Irrationality**

27. The appellant's argument is to the effect that the decision is irrational in finding that the IPS has consistently taken a robust approach in dealing with racist behaviour, that the sanctions imposed under the P19 regime are meaningful or proportionate and that the IPS has

an active anti-harassment policy in place, but, nevertheless, indicates that there is some merit in the argument that issues of racism and racial harassment may have not to date been given the level of attention that they require, leading the Court to direct the IPS to conduct a thorough review of its anti-racism strategy and policies.

**28.** In resisting this argument, the IPS submits that reference to “some merit...to the effect that the issues of racism and racial harassment may have not, to date, been given the level attention that they require” is obiter and is not within the realm of a contradiction or blatant irrationality.

**29.** In my view it is difficult to reconcile the finding of a consistently robust approach, together with meaningful and proportionate sanctions on foot of an active anti-harassment policy with a view that there is merit in an argument to the effect that the IPS has not given racism and racial harassment the level of attention that they require, nor consistent with the need to direct the IPS to conduct a thorough review of its anti-racism strategy and policies.

This is all the more so in circumstances where the Labour Court did not in its decision explain why it believes that these apparent contradictions are in fact harmonious.

Furthermore, I cannot accept the IPS argument to the effect that reference to racism not being given the level of attention required was obiter given that such lack of attention was central to the appellant’s argument that the IPS system was insufficient to provide a defence to the IPS under s.14A.

**30.** To the extent aforesaid therefore I am satisfied that there is apparent contradiction within the decision and which has not been explained and is therefore irrational.

**Reasons**

31. Looking at the decision as a whole it is clear that the consistency of approach taken by the IPS was an issue between the parties as was the effectiveness thereof – the appellant arguing that the P19 system introduced sanctions which were too lenient whereas the IPS arguing that the sanctions were proportionate in particular when one has regard to the downstream consequences of potentially affecting parole. It is also the case that there was an issue between the parties the existence or otherwise of an anti-harassment policy in place. Although there was evidence before the Labour Court that would enable the Labour Court to come to the decision as mentioned aforesaid nevertheless there is no engagement by the Labour Court of the competing arguments made by the parties with regard to the decision made nor is there any explanation as to why the IPS argument was successful and the appellant's argument was not. There is in my view nothing in the decision as a whole or indeed in the discussion and decision section of the Labour Court determination to identify why the IPS argument was successful and in this regard, I am satisfied that the principles of curial deference does not arise. As occurred in the *State of Kuwait* case, it was effectively a bald conclusion without an expression of why the conclusion was reached or without engaging in the conflicting evidence by the parties within the prism of the applicable law.

I am satisfied therefore that the Labour Court did not fulfil its obligation to provide reasons in accordance with the jurisprudence.

**Indirect discrimination**

32. The appellant argues that this aspect of the appellant's claim remained before the Labour Court and was addressed in submissions. On the other hand, the IPS argues that no

evidence was led by or on behalf of the appellant in this regard. Furthermore, the IPS refers to recorded submissions within the decision made on behalf of the complainant to the effect that “the key issue” to be determined was the existence or otherwise of a defence under s.14A of the Act. The appellant argues that it is not necessary to provide statistical evidence or standalone evidence in this regard and reference is made in the submissions to “the key issue” as opposed to “the only issue”.

**33.** Given the extent of the submissions made in advance of the hearing and the fact that in the decision of the Labour Court the appellant clearly failed in his appeal in respect of the availability or otherwise of a defence under s.14A, the Labour Court should have made some reference to indirect discrimination as opposed to ignoring it completely.

### **Conclusion**

**34.** For the reasons set out above I am satisfied that the appellant is entitled to an order setting aside the determination of the Labour Court of 20 July 2022.

**35.** As this judgment is being delivered electronically, with regards to the issue of costs, as the appellant has been entirely successful, it is my provisional view that they should be entitled to their costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.