THE HIGH COURT

[2024] IEHC 593

[Record No. 2023/ 126 CA]

BETWEEN

MICHAEL McNAMARA

APPELLANT

AND

AIDEEN McCORMACK AND STEPHEN MURRAY

RESPONDENTS

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 17th day of October 2024

1. This is the appellant's appeal from a decision of the Circuit Court of 10 March 2023 overturning a determination of the adjudication officer of the Workplace Relations Commission (hereinafter referred to as 'the adjudication officer') of 10 January 2022 in the appellant's favour arising from the appellant's complaint against the respondents pursuant to the Equal Status Acts, as amended (hereinafter referred to as 'the Acts').

2. The respondents have challenged the appellant's appeal as out of time. Both parties accepted and agreed before this court that the issue of time had been addressed by the Deputy Master and that the appellant's appeal was within time.

Appeal on a point of law

3. The appeal from the Circuit Court to this court pursuant to s. 28(3) of the Acts is on a point of law. The position is well set out by the Supreme Court in its decision in *Stokes v. Christian Brothers High School Clonmel* [2015] 2 IR 509 at para. 83:

> *"[T]here 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:-*
>
> > *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
> >
> > *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
> >
> > *(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
> >
> > *(d) 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 ...'"*

4. Such an appeal should be made (pursuant to O. 84C) by notice of motion specifying the points of law. Here, the appellant, who is a lay litigant, appealed the decision of the Circuit Court by Notice of Appeal dated 20 October 2023 and swore an affidavit on 13 June 2024 in which he averred, at para. 1, that the learned judge had *"made an error in a point of law by setting aside a decree of the workplace relations commission"*. No issue was taken

by the respondents, who are also lay litigants, with the format of the appeal. To the extent that the appeal did not comply with the procedural requirements of O. 84C, I adopt the same approach as that taken by Simons J. in *Smith v. The Office of the Ombudsman & ors* [2020] IEHC 51, where he stated, at para. 62, that, as the appellant was a litigant in person, he took *"the unusual step of addressing the substance of his appeal in any event, notwithstanding the fact that the appeal is procedurally irregular."*

The relevant provisions of the Equal Status Acts

5. Sections 3(1) and 3(3B) of the Acts provide:

"3.— [(1) For the purposes of this Act discrimination shall be taken to occur—

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation [on any of the grounds specified in subsection (2) or, if appropriate, subsection (3B),] (in this Act referred to as the 'discriminatory grounds') which—

(i) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned,

(b) where a person who is associated with another person—

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination,

or

(c) where an apparently neutral provision [would put a person] referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.]

…

(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')."

Section 6(1) provides:

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

(a) disposing of any estate or interest in premises,

(b) terminating any tenancy or other interest in premises, or

(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."

Section 38A(1) provides for the burden of proof to be shifted to the respondent where a claimant has established a prima facie case of discrimination:

"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."

Background

6. In 2015, the appellant entered into a tenancy agreement with the respondents. In November 2017 he was approved by Louth County Council for Housing Assistance Payment (hereinafter referred to as 'HAP') and thereafter asked the respondents to sign and return the landlord form to the council. They did not do so until July 2020 which meant that the appellant's HAP payments, which are paid directly to a qualifying tenant's landlord, did not commence until September 2020 which was almost three years after he had been approved for HAP by his local council. The appellant made a complaint to the Workplace Relations Commission pursuant to the Acts claiming that he had lost the benefit of almost three years of HAP. The adjudication officer made a finding in his favour. The appellant appealed to the Circuit Court for what is, pursuant to s. 28 of the Acts, a *de novo* appeal in which he challenged the decision of the adjudication officer to the Circuit Court on quantum and asserted an entitlement to the maximum monetary jurisdiction of €15,000. The respondents challenged the finding of the adjudication officer and also raised an issue about the adjudication officer's jurisdiction to award a remedy in respect of the entire period of discrimination.

Determination of the adjudication officer

7. The adjudication officer set out the relevant statutory provisions of s. 3(1), s. 3(3B), s. 6(1) and referred to section 38A of the Acts. She concluded that the appellant, as an applicant for HAP, was covered by the HAP ground as per section 3(3B). She was satisfied, on the evidence, that the respondents were aware since 2017 that the appellant had the HAP form which they were required to sign. She found the appellant had established *prima facie* evidence of discrimination and that the burden of proof, therefore, shifted to the respondents. She did not accept the respondents' excuses for not collecting the HAP form and said that the appellant was not responsible for chasing the respondents to sign the form. The adjudication officer concluded that the appellant had been less favourably treated on the HAP ground than another tenant who did not require housing assistance. She awarded compensation of €10,000 (less than the maximum monetary jurisdiction available to her, pursuant to the Acts, of €15,000) having found that her decision covered the period of six months from the complainant's complaint of 27 May 2020 and therefore went back to 28 November 2019. Because the appellant's complaint alleged ongoing discrimination from the date of the complaint, she held that her decision would be informed *"by reference to the entire period of the alleged discrimination."*

The Circuit Court hearing and decision

8. Both parties represented themselves before the Circuit Court. The limited pleadings before this court and the absence of any legal representation meant there was much less clarity than this court might usually have or expect to have about what occurred in the Circuit Court. The decision of the Circuit Court was given *ex tempore* and the only documentation that was made available to this court were the orders confirming the Circuit Court's decision to set aside the decree of the Workplace Relations Commission. In those unusual circumstances, this court took the step of listening to the DAR of the two Circuit Court hearings and informed the parties it had done so. From that, it was clear (and not disputed by the parties before this court) that the learned judge made a finding that it was not a breach of the Acts for a landlord to refuse to sign or delay in signing a HAP form where a tenant had been approved for the HAP payment and that unlawful discrimination on the HAP ground only occurred where a landlord refused to accept a HAP tenant to rent their property. The learned judge found the adjudication officer had no jurisdiction to determine that it was

unlawful discrimination for a landlord to refuse and/or delay in signing a HAP form. The learned judge accepted the appellant had been looking to have the HAP form signed but found this was not discrimination and that the appellant's remedy did not come within the Acts as the only Equal Status Acts claim that could be made was where a landlord refused to accept a HAP tenant.

9. The Act was not opened and no legislative provisions were discussed during the hearing, something that might be seen as unusual in a statutory appeal. The court did not have the benefit of legal submissions as both parties focussed on the evidence far more than the law. The learned judge was at a disadvantage in not being addressed on the Acts which involve complex issues, including issues of European law around direct and indirect discrimination and in what circumstances something that would otherwise be unlawful discrimination can be justified.

10. There was a factual dispute between the parties about the circumstances in which the appellant had requested the respondent to sign and return the form. It is not necessary for this court to determine that conflict of evidence as the learned judge accepted the appellant's evidence that he had been looking to have the HAP form signed for some time before the respondents eventually signed and returned it. That finding of fact by the learned judge is binding on this court and forms the evidential basis on which this court approaches the appeal.

Discrimination on the HAP ground

11. The learned judge was correct in finding that a landlord's refusal to accept a HAP tenant, or indeed a decision to evict a tenant because they have been approved for HAP, would constitute unlawful discrimination on the HAP ground and constitute an actionable breach of the Acts. However the question raised in this appeal is whether the HAP protection in the Acts also gives a tenant the right to require their existing landlord to sign the HAP form so as to enable them to secure the benefit of the HAP payment for which they have been approved, i.e., whether a landlord's failure to sign a HAP form after they have been informed of their existing tenant's approval for such a payment, is unlawful discrimination pursuant to the Acts.

12. Section 6(1) sets out the wide circumstances in which a person is protected from discrimination on the HAP ground, including the termination or the provision of a tenancy. The first of the circumstances identified in the section in which a person shall not be subject

to discrimination is stated to be in *"disposing of any estate or interest in premises"*. A tenancy is an interest in a premises, an interest that attracts statutory protection not only from the landlord and tenant legislation but also from the Acts. Therefore, the disposal of that interest by entering into a tenancy arrangement with a tenant and the conditions under which that is done cannot discriminate against the tenant on the grounds prohibited by the Acts, including the HAP ground, as defined at s. 3(3B) of the Acts.

13. The HAP payment is paid directly by the council to the landlord, not to the tenant, which is why a landlord has to sign a form setting out, *inter alia*, their bank details. Once an applicant for HAP has been approved by their local council for the payment, they are a person in receipt of the payment and are therefore covered by the HAP ground as set out in section 3(3B). A tenant does not have to have had the actual HAP payments paid by the local council to their landlord in order to come within the protection of the HAP ground. Otherwise, a tenant approved by their local council for HAP could be denied the protection the Oireachtas intended to confer on them by a decision of their landlord not to sign the form that is required for the council to make the payments to that landlord. That cannot have been the intention of the legislature.

14. The restrictive interpretation of the Acts that was applied by the learned judge would remove many HAP approved tenants from the protection of the Acts. It was not the intention of the legislature to limit protection to tenants who had previously secured the financial benefit of the HAP payment. The protection was intended by the Oireachtas to cover a tenant who was approved for HAP payment, including during an existing tenancy. The appellant was such a person.

15. The fact, as found by the adjudication officer and the learned judge, that the appellant had been looking for the respondents to sign and return the HAP form since July 2017 establishes a *prima facie* case of discrimination on the HAP ground, thereby shifting the burden of proof from the appellant to the respondents pursuant to section 38A(1). The respondents' excuses for not signing and returning the form sooner than they did, were not considered by the learned judge as the court had already determined that a breach of the landlord's obligations to sign the form (as found by the learned judge) did not constitute discrimination. The learned judge did find that a landlord had an obligation to sign the form which he suggested formed part of statutory landlord and tenancy law and/or part of the contract between the landlord and tenant but that a landlord's failure to comply with this

obligation did not constitute a breach of the Acts. The learned judge was wrong in law in finding that this was not a breach of the Acts. Insofar as the learned judge found, on the evidence, that there had been a failure by the respondent landlords to sign and return the form, I am satisfied that that evidence did not allow the respondent landlords to discharge the burden of proof shifted to them to rebut the inference of discrimination on the HAP ground.

16. The appellant was covered by the HAP ground and was entitled to invoke the protection of the Acts against his landlord who had failed to sign and return the form. He did not receive the financial benefit of his HAP entitlements until nearly three years after he had been approved by Louth County Council as a recipient of the payment, which required execution of the form by his landlord. The loss of that financial benefit for which the appellant was approved by the council was due directly to the respondents' unlawful failure to sign and return the form.

Conclusions and Remedy

17. For the reasons set out above, I set aside the decision of the Circuit Court as constituting an error of law and remit the matter to the Circuit Court for a rehearing of the appeal. For the avoidance of doubt, I make no findings in relation to the quantum and jurisdiction issues raised by the parties in relation to the amount of compensation awarded by the adjudication officer as those points were not the subject of the appeal before this court and remain to be determined by the Circuit Court.

Costs/Outlay

18. Both parties represented themselves. I do not consider it appropriate to direct either party to make any contribution towards the outlay of the other and so I make no order in relation to either side's outlay.