THE HIGH COURT

Record Number 2018/309MCA

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

Between/

ROBERT CUNNINGHAM

APPELLANT

AND

IRISH PRISON SERVICE

RESPONDENT

AND

THE LABOUR COURT

NOTICE PARTY

Appellant's Skeleton Reply to Supplemental Submissions

18th May 2020

1. The Appellant received the Respondents supplemental submission on 12th May 2020.

2. In ease of the Court, the Appellant states that it will make the reply set out below.

3. The present case is indeed one of the interpretation of section 37(3).

4. In that regard, it is clear and unambiguous that section 37(3) – in contrast with section 37(5) - does not provide for a complete exemption for the Prison Service from the provisions of the Employment Equality Act.

5. The issue for this Court, therefore, is

   (i)What does Section 37(3) provide? and
   (ii) Was the Labour Court in error in deciding that section 37(3) was a complete defence to the Appellant's claim?

6. The Respondent submits at length on the subject of statutory interpretation. There is nothing, however, in the Respondent's submissions which considers that s.37(3) follows logically from s.37(2). They are subsections which interrelate, and which are based squarely on an objective justification standard of assessment. The Respondent does not refute this. These provisions are just another version of the objective justification (and proportionality) test that permeates employment law legislation both at EU level and in the Irish Statute Book.[1]

7. The Respondent does not appear consider either, in terms of simple interpretation of the ordinary and natural meaning of the legislation, that the same sequential reading is required of the Recital of the Framework Directive it relies so heavily upon, Recital 18. Recital 18, when read in sequence with Recital 17 is perfectly clear. Crucially, Recital 17 is expressly *'without prejudice to the obligation to provide reasonable accommodation'*. Recital 18 is entirely referable to Recital 18 and therefore equally without prejudice to the same obligation. Recital 17 begins with the words "*This Directive does not require …*". Recital 18 begins with the words "*This Directive does not require, <u>in particular</u> …* ." (emphasis added) These recitals mean that certain occupations have occupational requirements which can be the subject of limitations, but *without prejudice* to the obligation to provide reasonable accommodation. Whereas the Ireland went further, in implementing the Framework Directive with the Defence Forces in s.37(5) to exclude them from the Acts, it did not do so with the Prison Service. Therefore, the Acts *do apply* to the Respondent. A question studiously avoided by the Respondent is, if it is not therefore entirely excluded, then to what extent is it *included* within the duties and obligations imposed upon employers under the Acts?

---

[1] This standard of assessment of indirect discrimination can be found in one form or another in the Directive 2006/54/EC (recasting The Equal Pay and Equal Treatment Directives, together with Directives 86/378/EEC and 97/80/EC) and Directive 2000/43/EC and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and education, addressed discrimination on the grounds of religion or belief, disability, age or sexual orientation. In Ireland it is to be found in the Equal Status Acts 2000 to 2018, the Protection of Employees (Fixed Term Work) Act 2003, the Protection of Employees (Part-time Work) Act 2001, the Organisation of Working Time Act 1997, Protection of Employees (Temporary Agency Work) Act 2012 and of course the Employment Equality Acts.

Irish law must be interpreted in line with EU Law and UNCRPD

8. Irish law must be interpreted in line with EU law. That legal proposition is unassailable.

9. As established with the Courts settled case law, the rules of secondary legislation of the union must be interpreted and applied in compliance with fundamental rights. By virtue of Article 52(3) of the Charter of Fundamental Rights and Freedoms, EU law must also be interpreted to ensure consistency between rights contained in the Charter and the corresponding rights guaranteed in ECHR.

10. Article 52(3) of the EU Charter provides

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

11. Therefore, it is settled law that the Directive must be interpreted in line with the European Convention on Human Rights (the 'ECHR'), which it has directly referred to in the recitals, and following *Ring*, with the UNCRPD.

12. It is also settled that Irish law must be interpreted in line with EU law, so long as it can do so without a *contra legem* interpretation. Following *Ring* and the Supreme Court in *Nano Nagle,* it must also be interpreted in line with the UNCRPD. If Member State law cannot be interpreted in line with EU law- which in this case brings with it consistent interpretations with ECHR and CRPD, then the national courts must disapply national law.

EU law requires a balancing exercise of necessity and proportionality for Article 4(2) derogations, and permits judicial oversight

13. The Applicant will refer to *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*[2] which illustrates the need for a balancing exercise between the derogations for occupational requirements due to religious ethos protected in the Directive and the rights to equality. The necessary analysis required by

[2] *Egenberger v Evangelishes Werk Case* C-414/16 [2018] IRLR 762

section 37(3) is discussed by the CJEU and applied to another article 4(2) ground, namely religious ethos.

14. The need for a balancing process between occupational requirements and persons with disabilities - even for the armed forces- can be seen in *Glor v Switzerland.* [3]

15. If the UNCRPD and the EU Charter are taken into account, which they must be as a matter of law, then the extent to which the Directive provides for a complete derogation from the right of persons with disabilities is extremely limited. The EU has chosen to provide for a complete derogation only for service in the armed forces. As the limited nature of any exceptions to the right to persons with disabilities in EU law is underlined by external commitments of the EU. There is certainly no scope for an interpretation of Irish Law to allow a complete derogation for the Irish Prison Service in a manner which goes beyond the Directive and is contrary to the UN Article 27 rights for persons with disabilities.

16. It is submitted, that applying the decision of the CJEU in *Egenberger,* the Respondent cannot self-certify without the need to look at necessity, possibilities and alternatives as to what is required to preserve the occupational capacity of the Prison Service. It cannot avoid the burden of assessment on a case by case basis (an assessment that can be subject to judicial scrutiny).[4] Any requirements imposed on workers which cut across their rights to equality have to be – in line with CJEU in *Egenberger* - capable of scrutiny by the Courts. There is a balancing exercise to be undertaken between the rights of the persons with disabilities to participate fully in all forms of work, protected by Article 27 of CRPD and Directive 2000 and the need of the Respondent to preserve its occupational capacity. The IPS are required to justify relying on facts that the requirement related to the disability in that particular case is required to preserve the occupational capacity of the IPS. (*Egenberger* para 46)

---

[3] *Glor v Switzerland* EctHR 30 April 2009. See also Disability Council International *Contribution to Office of the United Nations High Commissioner for Human Rights Thematic Study on "Work and Employment of Persons with Disabilities*", HRC, March 2013

[4] The standard of assessment, as set out in ss.37(2) and (3), is the following:

- (s.37(3)) given that it is an occupational requirement for members of the prison service to be fully capable of undertaking the range of functions that they may be called upon to perform so that the operational capacity of the prison service may be preserved,
- (s.37(2)) the Respondent must ask whether, by reason of the particular occupational activities concerned or the context in which they are carried out—
    - a full range of functions capability (*i.e.* the occupational requirement) is genuine and determining, and
    - whether the objective pursued by the Respondent in demanding full range of functions capability (*i.e.* the occupational requirement) is legitimate and proportionate.

The Paradigm Shift required by *Ring* and *Nano Nagle* and the UNCRPD regarding adapting the workplace to those with disabilities.

17. The law does require a mindset change of the Respondent - what is referred to in *Nano Nagle* as a paradigm shift. The Respondent is an organ of the State. The State has committed under the UNCRPD and is obliged by EU law generally to safeguard and promote the right to work for those with disabilities.

18. The issue for the Respondent is in fact how could it engage with those legal obligations? This is the paradigm shift which has taken place in EU since *Ring* and *Nano Nagle*'s endorsement of this, which is that the issue being tackled is not the disability but the assumption of incapability by reference to the work.

19. Therefore, with the Respondent's service, could there not be certain posts designated for persons with disabilities? Could work not reasonably be organized so that teams of persons who have contact with prisoners are made up of prisons officers with complimentary abilities? Is control and restraint readiness really necessary in its present form and to the present extent? Is such readiness required or necessary, on an objective assessment, of 100% of Prison Officers at all times?[5] The reality is that many prison officer roles do not undertake control and restraint. Many cannot (pregnant officers, disabled officers, more senior officers). Neither is the prison population 100% composed of prisoners who may require control and restraint. It also includes a wide population of non-violent offenders, juveniles, women, older and sicker prisoners, and those in more open prisons and of low risk. These are just some of the factors that should be taken into account on a case by case assessment as required by ss.37(2)-(3).

Factual evidence required for Assertions of the Respondent

20. It is a matter for the Respondent, as a matter of fact, to show why it is proportional and necessary for the preservation of the operational capacity of the service by reference to the nature of the activities it carries out and the context in which they are carried out across all portions of the Prison Service to impose a requirement on 100% of Prison Officers that they be able to perform control and restraint. The burden is on the Respondent to demonstrate, on reasonable enquiry, that this is a matter of fact, of statistical evidence and of objective demonstration.

[5] Is the wide assumption of the use of coercive force compatible with prisoner rights? (on which generally: *Council of Europe: Combatting Ill Treatment in Prison*).

21. In addition, the position and assertions of the Respondent must be capable of judicial oversight. To allow the Respondent to simply self-certify does not provide an effective judicial remedy as required by Article 9 of the Directive, Article 47 of the Charter or satisfy the burden of proof contained in Article 10 of the Directive.

22. In other words, while there is a derogation which might allow the Respondent to state that it has a requirement that all Prison Officers be able to do control and restraint in order to preserve its occupational capacity, it needs to prove the link between the requirement and the legitimate objective on the basis of transparent fact and also need to prove that the requirement is necessary and proportional to the objective to be obtained.

23. The Respondent states at paragraph 16 that,

> "In any event there is no reasonable accommodation which can render the Appellant fully competent and fully fit to carry out all of the duties which he may be called upon to perform as a Prison Officer. He is incapable of carrying out control and restraint duties and these duties are fundamental to the position of prison officer."

This somewhat facile remark provides a perfect illustration of a key point in this case. Where the Acts do not absolve the Respondent of all the duties and protections provided in the Acts (as it does for the Defence Forces), then what duties and protections are left? What is left is a prohibition on precisely this kind of superficial assessment of the compatibility of work and a worker, where the worker is not necessary incapable but, with reasonable assistance and adaptation, capable of fulfilling his or her role.

24. The Respondent has failed to prove on the basis of factual and expert evidence, the proximate relationship between its discriminatory requirement and the asserted need for the requirement on the operational capacity of the Prison Service. This matter must be returned to the Labour Court for it to do so, if it can, and to adduce evidence to prove its assertion. Self-certification – without factual or expert evidence- is contrary to the limited exception in the Directive and contrary to the ruling of the CJEU in *Egenberger.* It is also in violation of the rights of persons with disabilities contrary to national, EU and international law.

Clíona Kimber SC
Cathal McGreal BL
18 May 2020