

**OFFICE OF THE DIRECTOR OF EQUALITY  
INVESTIGATIONS**

**EMPLOYMENT EQUALITY ACT, 1998**

**EQUALITY OFFICER'S DECISION DEC-E2002-036**

**PARTIES**

**A Complainant  
(Represented by Rosemary Connolly, Solicitors)**

**AND**

**A Company  
(Represented by IBEC)**

File ref: EE/2000/103  
Date of issue: 19 August 2002

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## 1. DISPUTE

**1.1** This dispute concerns the preliminary issue of whether a claim by a complainant that he was discriminated against by his employer on the grounds of gender and sexual orientation, contrary to the provisions of the Employment Equality Act, 1998, is within the jurisdiction of the Director of Equality Investigations. As an associated determination of the Labour Court has already issued without naming the parties (see 2.2 below), there appears to be no reason to identify them in this decision.

**1.2** The complainant referred a claim to the Director of Equality Investigations on 19 October 2000 under the Employment Equality Act, 1998. In accordance with her powers under section 75 of that Act, the Director then delegated the case to Anne-Marie Lynch, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act.

### **The question of jurisdiction**

**2.1** The respondent retail company, which had its head office in England, had stores in both the Republic of Ireland and Northern Ireland. In October 1998, the complainant was appointed to the position of Loss Prevention Officer, with responsibility for several stores in the Republic of Ireland. It was necessary to establish, as a preliminary issue, whether the complainant was an employee under the jurisdiction of Irish legislation. Submissions were sought from both parties on this preliminary issue.

The complainant's submission was received on 22 June 2001, and copied to the respondent for a response.

**2.2** The complainant had also referred a claim of discriminatory dismissal under the 1998 Act to the Labour Court, in accordance with section 77 (2) of the Act. In September 2001 the Court determined that it could not hear the complaint as the complainant was not an employee under the jurisdiction of Irish legislation (*A Retail Company and A Worker*, EED014, attached as an Appendix to this decision).

**2.3** Over a period of time, I issued several reminders to the respondent without reply, until in March 2002 a letter was received from the respondent's representative advising that as the "Appellate Court" had found it did not have jurisdiction the matter could not proceed further.

**2.4** It would appear that there was some misunderstanding on the part of the respondent's representative. Two separate complaints were involved in this instance. The complainant referred his complaint of discriminatory treatment, properly, to the Director of Equality Investigations in accordance with section 77 (1) (a) of the 1998 Act. He referred his complaint of discriminatory dismissal, properly, to the Labour Court in accordance with section 77 (2) (a) of the 1998 Act. The fact that an appeal from a decision of the Director may be referred to the Labour Court would not detract from the fact that there were two separate issues under consideration. The substantive complaints may have different facts and different outcomes. It is obviously possible, for example, to fail in a complaint of discriminatory dismissal but succeed in a complaint of discriminatory treatment, simply because the facts support one finding but not the other.

**2.5** As the case was formally delegated to me under section 75 of the Act, I concluded that I should issue a formal decision on the preliminary issue of jurisdiction and notified both parties of my proposed course of action. The respondent's representative, in a letter dated 10 June 2002, objected to me "seeking to either look or go behind" the Labour Court determination. The representative stated that if I proceeded as I had suggested, it would "give rise to an inherently and fundamentally flawed Determination" on my part. These suggestions did not alter my conclusion that a complaint had been properly referred to the Director, had been properly delegated to me and required a formal decision in accordance with the 1998 Act.

### **3. SUMMARY OF THE COMPLAINANT'S CASE**

**3.1** The complainant referred to the Contractual Obligations (Applicable Law) Act, 1991 which he stated was enacted to give force of law in this State to the Convention on the

Law Applicable to Contractual Obligations (the Rome Convention) signed at Rome in June 1980. The purpose of the Rome Convention was to establish uniform rules concerning the law applicable to contractual obligations within the then European Economic Community.

**3.2** Article 3.1 of the Convention provides that a contract shall be governed by the law chosen by the parties. This is qualified by Article 6.1, which provides that

*Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules which would be applicable under paragraph 2 in the absence of choice.*

“Mandatory rules” are defined in Article 3.3 as rules of law which cannot be derogated from by contract, and the complainant states that this clearly includes legislation such as the 1998 Act.

**3.3** Article 6.2 of the Convention provides that

*...a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:*  
*(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or*  
*(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;*  
*unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.*

**3.4** The complainant stated that, as he had no written contract of employment, no law was “chosen by the parties” pursuant to Article 3 of the Convention. He also submitted that, even if UK law were designated in the contract as the applicable law, the designation would

be overridden by Article 6.1 of the Convention and would not be able to deprive him of the protection of the “mandatory rules” applicable.

**3.5** The complainant submitted that his position was covered by Article 6.2, and that in the absence of choice his contract was governed by “the law of the country in which the employee habitually carries out his work in performance of the contract...”. The complainant stated that he was employed as a Loss Prevention Officer with responsibility for the Republic of Ireland from October 1998 until his dismissal in July 2000, and he worked four out of five days in this jurisdiction. He submitted therefore that he habitually carried out his work in this jurisdiction.

**3.6** In support of his arguments, the complainant referred to the Employment Appeals Tribunal case *McIlwraith v Seitz Filtration (GB) Ltd* (1998, ELR 105). The claimant in that matter had entered into a written contract of employment which defined his work area as the Republic of Ireland and Northern Ireland, and which provided that the contract would be governed by United Kingdom law. His employment was terminated after fifteen months. If the claimant was entitled to claim under Irish legislation, he would be able to pursue a claim for unfair dismissal. The equivalent United Kingdom legislation required two years’ service for eligibility. The Tribunal concluded that he was covered by the Unfair Dismissals Act, 1977, the primary consideration being that he ordinarily worked within the State.

**3.7** The complainant also referred to the Jurisdiction of Courts and Enforcement of Judgments Act, 1998. This Act gives force of law in this State to the Brussels Convention of 1968 which regulates jurisdiction and enforcement issues in civil and commercial matters among member states of the European Union. Article 1 of the Convention provides that it shall apply in civil and commercial matters whatever the nature of the court or tribunal. Article 2 states the general rule that persons shall be sued in the state in which they are domiciled. This is qualified by Article 5.1 which provides that a person domiciled in a contracting state may be sued in another contracting state

*...in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually*

*carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated;...*

The complainant submitted, therefore, that the respondent may be sued by the complainant in this State and that the Equality Officer had jurisdiction to hear the claim. The complainant also pointed out that there was no provision in the 1998 Act which would exclude him from the protection of the Act.

**3.8** In summary, the complainant submitted he was entitled to invoke the protection of the Employment Equality Act, 1998 on the grounds that:

- he was entitled to rely on Irish law pursuant to Article 6.2 of the Rome Convention;
- he was entitled to refer this complaint to the Equality Officer, which had jurisdiction pursuant to Article 5.1 of the Brussels Convention; and
- he was not excluded by any provision of the 1998 Act.

#### **4. SUMMARY OF THE RESPONDENT'S CASE**

**4.1** As described previously, the respondent's representative declined to provide a submission or any other arguments to support its case, relying instead on the preliminary finding of the Labour Court that it did not have jurisdiction to hear the complainant's dismissal complaint.

#### **5. INVESTIGATION AND CONCLUSIONS OF THE EQUALITY OFFICER**

**5.1** In reaching my conclusions in this case I have taken into account all of the submissions, both oral and written, made to me by the parties. I have also considered the

Labour Court determination (attached as an Appendix to this decision), since the Labour Court received submissions on behalf of the respondent, as I did not.

**5.2** The Labour Court was satisfied that there were two points for it to consider: whether the Court had jurisdiction to hear the matter; and if so, whether the applicable law in Northern Ireland or the law in this State was the appropriate law in this case. I agree with the approach of the Court, and consider that the question of the applicable law is irrelevant unless I have jurisdiction to investigate this complaint. The complainant's initial arguments regarding the Rome Convention, which deal with the applicable law, are therefore not necessary to consider until the question of jurisdiction is finalised.

**5.3** The complainant referred to the Jurisdiction of Courts and Enforcement of Judgments Act, 1998, which gave the force of law to the Brussels Convention of 1968. Since 1 March 2002, that Act has been effectively replaced by the provisions of the European Communities (Civil and Commercial Judgments) Regulations 2002 (SI No 52 of 2002), which gave effect to Council Regulation (EC) No 44/2001 of 22 December 2000 (the "Brussels I Regulation"). Article 19 of Brussels I provides that an employer domiciled in a Member State may be sued in another Member State, if it is the place where the employee habitually carries out his work. To determine the jurisdiction, therefore, it is necessary to establish where the employee habitually carried out his work.

**5.4** The following facts were established at the Labour Court hearing:

- The complainant was employed by the respondent in Northern Ireland in July 1992.
- In October 1998 he was appointed to the position of Loss Prevention Officer.
- This position covered stores in the Republic of Ireland.
- The complainant's office was based in Northern Ireland. He started and finished each working week in Northern Ireland. All office work and company meetings were held in Northern Ireland. He made his reports in Northern Ireland, and his supervisor was based in Northern Ireland.
- The respondent provided the complainant with temporary accommodation in this State, with his permanent residence being in Northern Ireland.



- When working in Dublin, the complainant was paid mileage allowances and travel expenses.
- In common with all of the respondent's employees based in Northern Ireland, the complainant was paid in sterling, and paid his tax and social security contributions in Northern Ireland.

**5.5** The European Court of Justice, in the case *Rutten v Cross Medical Ltd* (Case C-383/95) said it was necessary to take “due account of the concern to afford proper protection to the employee as the weaker part of the contract.” The Court said that the place where the employee habitually carries out his work “must be understood to refer to the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend himself in such proceedings...When identifying that place..., which is a matter for the national court in the light of the facts before it, the fact that the employee carried out almost two-thirds of his work in one Contracting State - the remainder of his work being performed in several other States - and that he has an office in that Contracting State where he organised his work for his employer and to which he returned after each trip abroad...is relevant.”

**5.6** The Labour Court established that the complainant in this case spent approximately 60% of his working time in this jurisdiction. However, this factor is not the only matter to be taken into account. In *Rutten*, the claimant spent two-thirds of his working time in the Netherlands. He also had his home and office there, and returned there after each trip abroad. The complainant in this case had his home and office in Northern Ireland, and returned there after each trip to this jurisdiction. I agree with the Labour Court determination that the evidence is not sufficient to find that he habitually carried out his work in this State. It would also appear that, taking into account the European Court of Justice's comments on the protection of an employee as the weaker part of the contract, it would be least expensive for the complainant to commence proceedings in Northern Ireland, the jurisdiction in which he has his home.

**5.7** The complainant also referred to the Employment Appeals Tribunal decision in *McIlwraith*, where the Tribunal overruled a provision of the employment contract that it would be governed by United Kingdom law. I have examined this decision, and I note that one of the important reasons for the Tribunal's decision that the claimant ordinarily worked within the State was the fact that all of his tax and social insurance payments were made to the Irish authorities. This was not the case with the complainant in this matter, who made such payments to the Northern Irish authorities.

## **6. DECISION**

**6.1** Based on the foregoing, I find that I do not have jurisdiction to investigate this complaint under the provisions of the Employment Equality Act, 1998.

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Anne-Marie Lynch  
Equality Officer

19 August 2002

