



THE COURT OF APPEAL

UNAPPROVED

**Appeal Number: 2021/141
Neutral Citation: [2022] IECA 99**

**Ní Raifeartaigh J.
Binchy J.
Barniville J.**

BETWEEN/

OLUMIDE SMITH

APPELLANT

- AND -

**THE OFFICE OF THE OMBUDSMAN AND ADAM KEARNEY AND BERNARD
TRAYNOR AND PETER TYNDALL**

RESPONDENTS

JUDGMENT of the Court delivered on the 27th day of April 2022

1. This is a judgment on an appeal from two decisions of the High Court (Simons J.), the first (dated 11th February 2020, neutral citation [2020] IEHC 51) being the substantive judgment, and the second (handed down on 5th May 2021) being a written decision on costs following on from the substantive judgment. While the appeal in respect of the latter was formally before this Court, all of the submissions of the parties were focused on the substantive judgment, and no arguments were advanced at all as regards the costs judgment.
2. The substantive judgment related to an appeal brought by the appellant from a decision of the Circuit Court, the latter being an appeal advanced pursuant to s.28(3) of the Equal

Status Acts 2000 – 2015 (the “Equal Status Acts”). The appeal to the High Court was, as required by the legislation, one on a point of law only.

3. In the substantive judgment, Simons J. provides a detailed account of the complex factual background giving rise to the proceedings. He identifies and analyses all relevant statutory provisions and analyses and discusses relevant authorities, before coming to his conclusion which was to dismiss the appeal. Since this Court finds itself in complete agreement with every aspect of the judgment of Simons J., it is not proposed to rehearse afresh the full details of the facts giving rise to proceedings or to conduct the same extensive analysis as that undertaken by the trial judge. Instead, this Court will focus on the issues that are necessary to dispose of this appeal.

4. Nonetheless it is necessary to refer briefly to the relevant facts which may be summarised as follows. In 2014, the appellant was involved in family law proceedings in the District Court, in respect of which he was granted a legal aid certificate by the Legal Aid Board (hereinafter the “LAB”). By reason of matters which are not relevant here, the legal aid certificate was revoked by the LAB in 2015. The appellant requested a review of that decision by the LAB, in accordance with its procedures. However, following this review, the decision to revoke the legal aid certificate was confirmed.

5. Arising out of this, the appellant made a complaint (the “First Complaint”) to the first named respondent (hereinafter the “Ombudsman”). Unfortunately, the details of the First Complaint are unavailable, because the file of the Ombudsman in respect of that complaint is missing. However, there is available a letter of 3rd December 2015 from the Ombudsman to the appellant in connection with the First Complaint, in which the Ombudsman records that the complaint was not upheld, and that the appellant appealed the decision not to uphold his complaint. This was an internal appeal to a different case officer within the office of the

Ombudsman. It is not a statutory appeal, but rather an informal appeal process developed by the Ombudsman.

6. The letter of 3rd December 2015 is the decision on that appeal. The letter records that, having investigated the complaint, the Ombudsman was satisfied that the LAB had refused the appellant a legal aid certificate in accordance with its governing legislation (the Civil Legal Aid Act, 1995) and the Ombudsman had not identified any administrative failing. This letter was issued to the appellant by the fourth named respondent, Mr. Bernard Traynor. In the letter he states that having reviewed the original decision of the Ombudsman, as issued by a Ms. Moore, he could find no evidence that she had failed to examine the First Complaint properly, or that she had failed to understand the First Complaint or that the decision of the Ombudsman was incorrect or unreasonable.

7. The litigation in which the appellant was involved, and in respect of which he had applied for a legal aid certificate, continued, and it appears that he was involved in both District Court proceedings (in the context of maintenance and access to children) and Circuit Court proceedings (in the context of a divorce application). While it is not entirely clear either when or in what context, the appellant decided to issue judicial review proceedings, apparently with a view to quashing an earlier decision of one of those courts, and he sought legal aid in connection with those proceedings. This was refused by a letter of the LAB of 10th November 2017. The appellant appealed that decision by way of an internal appeals process operated by the LAB, but the LAB, by letter of 22nd January 2018, rejected the appeal.

8. Arising out of this refusal, the appellant made a further complaint to the Ombudsman (the "Second Complaint"). The Second Complaint was rejected by the Ombudsman in a letter dated 6th March 2018. This letter sets out a summary of the Second Complaint, the response of the LAB to that complaint, the analysis of the Ombudsman and the conclusion

of the Ombudsman which was to reject the Second Complaint. The letter was sent to the appellant by Mr. Adam Kearney, the third named respondent, on behalf of the Ombudsman.

9. By return email dated 7th March 2018, the appellant requested a review of that decision of the Ombudsman. This request for a review was rejected by a letter from Mr. Traynor dated 20th March 2018, in which he explained that, since the subject matter of the Second Complaint had been dealt with previously by the Ombudsman, there would be no review of the decision of 6th March 2018. In stating this, Mr. Traynor referred to the file reference quoted in the letter of 3rd December 2015, to which we have referred above, being file reference 056/15/1531. This file related to the First Complaint. We mention this because, as will become apparent, it is part of the appellant's case that the Ombudsman erred in mixing up his two complaints and/or in treating them as the same complaint. In the appellant's submission, the two complaints he advanced were separate and distinct, and related to two different legal proceedings.

10. Mr. Traynor also referred to s.4(6) of the Ombudsman Act, 1980 which provides:

“It shall not be necessary for the Ombudsman to investigate an action under this Act if he is of the opinion that the subject matter concerned has been, is being or will be sufficiently investigated in another investigation by the Ombudsman under this Act.”

11. The appellant wrote again to the Ombudsman by letter dated 22nd March 2018. The appellant informed the Ombudsman that he had made two separate complaints, and that the Ombudsman had mixed them up. He claimed the letter of the Ombudsman of 20th March 2018 violated his right to fair procedures, and he again requested a review of the decision of the Ombudsman. The Ombudsman replied by email dated 18th April 2018, stating that “a complainant may avail of one review and one review only in relation to this Office's handling of a particular complaint. This means that the Review Manager's decision on your request for review as set out in his decision letter dated 20 March 2018 is final.”

Complaint under the Equal Status Acts

12. By a notification in prescribed form dated 25th April 2018, the appellant notified the respondents of his intention to advance a claim under the Equal Status Acts 2000 – 2004 (Those Acts were the subject of further amendment in later years, and we hereafter refer to the all of those Acts collectively (as amended) as the “Equal Status Acts”). The appellant ticked the boxes on this prescribed form to indicate that he considered the respondents to have discriminated against and harassed him contrary to the Equal Status Acts, on grounds of race. He provides some considerable detail of his complaints, and refers specifically to the letters of 6th March 2018, 20th March 2018 and 18th April 2018 as being the occasions on which the treatment complained of occurred. Of some significance is that fact that section 4 of this form was left blank by the appellant. The prescribed introductory text to section 4 states:

“I think that this involved me being treated less favourably than others (on the ground(s) mentioned above) in the following way: ...”

This is of some significance because, as becomes apparent, this failure to identify any basis upon which he was treated less favourably than others has been central to the failure on the part of the appellant to succeed at every stage of the proceedings to date.

13. The Ombudsman replied to the notification of a complaint by an undated letter. The appellant maintains that this was deliberate because the response was received outside of the period prescribed by the Equal Status Act for a response, i.e. one month. In any case, in this letter the Ombudsman rejected the allegations of discrimination and harassment. Moreover, the Ombudsman states in the letter that the staff responsible for considering the complaints of the appellant were not aware of his racial or ethnic origin. The letter goes on to say that the complaints of the appellant against the LAB were unfounded because the Office of the

Ombudsman determined that the actions of the LAB were reasonable having regard to the applicable legislation.

14. Thereafter, the appellant filed his complaint against the respondents with the Workplace Relations Commission (the “WRC”) on 24th May 2018. In the complaint form ES 3, the appellant claims that by reason of his race, he was harassed and subjected to discrimination by the Ombudsman. The Equal Status Acts provide that such complaints are, in the first instance, determined by the WRC. The complaint came on for hearing before an Adjudication Officer appointed by the WRC on the 27th September 2018. The Adjudication Officer decided to treat the complaint as five separate identical complaints, one each against each of the above-named respondents, and a fifth against “The Office of the Ombudsman” as distinct from “Office of the Ombudsman”. He rejected the complaints against the second, third, and fourth named respondents on the grounds that, as they were employees of the Office of the Ombudsman, the latter would have vicarious liability for their actions pursuant to s. 42 of the Equal Status Acts 2015. As regards the complaint against “The Office of the Ombudsman”, the Adjudication Officer rejected the complaint stating:

“Turning to the complaint itself, then, and having reviewed the written communications and email chains between the complainant and the respondent which the complainant opened at the hearing, I cannot see the slightest evidence of racial discrimination, even taking the complaint at its height and granting the complainant the use of a hypothetical comparator. The reasons given by the officials of the respondent who examined the complainant’s complaints for his lack of success are cogent and underpinned by the provisions of the relevant legislation. It is the complainant’s contention that the respondent failed to follow up his complaints against the other state agency properly, but there is simply no evidence beyond the complainant’s allegations to support this. Furthermore, there is absolutely nothing to

indicate that a hypothetical white Irish person would have fared any differently in the same situation. Neither can I detect any racial animus, never mind discrimination within the meaning of the Equal Status Acts, in the fact that the complainant got cut off on the respondent's phone system, or that the named official who was dealing with his file was on annual leave during the school holiday period.

The complainant also did not adduce any evidence of harassment on the grounds of race. ...”

15. The Adjudication Officer also rejected a separate complaint advanced by the appellant of indirect discrimination pursuant to s.3(1)(c) of the Equal Status Acts on the grounds of lack of evidence.

Appeal to the Circuit Court

16. The appellant then appealed to the Circuit Court. Although he had filed an affidavit providing the evidence upon which the claim was based, the Circuit judge required the appellant to give oral evidence. A transcript of the proceedings before the Circuit Court was obtained and was available for the hearing before Simons J., although both in the High Court and at the hearing of this appeal, the appellant took issue with the accuracy of that transcript. The Court will return to that issue presently, but what is apparent from that transcript is that the Circuit judge asked the appellant, on numerous occasions, to explain the basis upon which he claimed that the respondents, in their decisions of 6th and 20th March 2018, had treated the appellant less favourably because of his race. The appellant failed to adduce any evidence in support of his claim and as a result the Circuit judge dismissed the claim on the basis that he had received no evidence of discrimination. He held that it was for the plaintiff to satisfy the court that the respondents had a *prima facie* case to answer. Had he done so, then it would have been for the respondents to justify their actions, but in the absence of any evidence of discrimination, he was required to dismiss the claim. The Circuit judge made

express reference to and relied upon ss. 3(1)(a) and 38A(1) of the Equal Status Acts (the reference to s.38A(1) in the transcript is mis-typed as s.3(8)(a)(1), and this is clearly a typographical error as there is no s.3(8)(a)(1) in the Equal Status Acts).

Judgment of the High Court

17. The appellant then exercised his right of appeal to the High Court which, as we have already mentioned, is an appeal on a point of law only. At para. 60 of his very comprehensive judgment, the trial judge observed that the proper procedure for making an appeal to the High Court pursuant to a statutory appeal on a point of law only is prescribed under O. 84C of the Rules of the Superior Courts, which requires the appeal to be made by way of an originating notice of motion, which notice of motion must specify the points of law the subject of the appeal. The appellant did not comply with these requirements, instead filing a notice of appeal in the form prescribed under O. 61 of the Rules of the Superior Courts, being the form used in what the trial judge described as “conventional” appeals from the Circuit Court to the High Court. The trial judge observed that strictly speaking the failure to comply with the requirements of O. 84C would in and of itself be good reason to dismiss the appeal in its entirety. However, taking account of the fact that the appellant is a litigant in person, the trial judge decided to excuse this failure to comply with the Rules of the Superior Courts, and proceeded instead to take what he described as the “unusual step” of addressing the substance of his appeal.

18. Before addressing the grounds of appeal, the trial judge addressed an issue, raised by the appellant, arising out of the fact that the appellant’s complaint to the WRC identified five respondents, two of whom were different iterations of the name of the Office of the Ombudsman, one of whom was the Ombudsman in person (i.e. Mr. Tyndall) and the other two of whom were individual employees, namely Mr. Kearney and Mr. Traynor. While, as mentioned previously, the Adjudication Officer of the WRC thought it better to address this

issue by issuing five separate determinations (to which the appellant objected), the Circuit judge had considered it expedient to treat the five complaints as a single appeal. Having noted that the latter was the “determination” under appeal for the purposes of s.28(3) of the Equal Status Acts, the trial judge adopted the pragmatic approach of the Circuit judge and decided to deliver a single omnibus judgment and to make a single order arising out of the appeal from the Circuit Court. We agree with the approach of both the trial judge and the Circuit judge in this regard and will take the same approach to this appeal.

19. The trial judge then went on to address the grounds of appeal of the appellant. He noted (at para. 72) that:

“The gravamen of the appeal is that the *findings of fact* made by the Circuit Court are so unreasonable and/or disproportionate as to amount to an error of law.”

20. The Court pauses here to mention that at the hearing of this appeal the appellant submitted that the Circuit judge made no findings of fact. This is not correct. The Circuit judge clearly found that there was no evidence that the respondent discriminated against the appellant, or that it treated the appellant any differently to anybody else. On that basis, he determined that the appellant had failed to establish a *prima facie* case of discrimination, contrary to s. 3(1)(a) of the Equal Status Acts and having regard to s. 38A(1) of the same.

21. At this point it would be helpful to set out such of the provisions of the Equal Status Acts as are relevant for the purposes of these proceedings:

“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,

[...]

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.

(2) As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are:

[...]

(h) that they are of different race, colour, nationality or ethnic or national origins (the 'ground of race').

[...]

5.(1) A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.

[...]

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.”

Appeal on a point of law

22. Returning to the judgment of the High Court, the trial judge quoted in full s. 28 of the Equal Status Acts, subsection 3 of which provides that the appeal from the Circuit Court to the High Court is an appeal on a point of law only. The trial judge went on to consider the principles applicable to such appeals, as articulated by the Supreme Court in *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13; [2015] 2 IR 509. Those principles make clear that in such appeals, the appellate court:

- (i) cannot set aside findings of primary fact unless there is no evidence to support such findings;
- (ii) ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision-making body could draw;
- (iii) can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and
- (iv) may also set aside a decision which has resulted from a conclusion reached on an erroneous view of the law.

The trial judge noted that these principles had been more recently affirmed by the Supreme Court in *Cahill v. The Minister for Education and Science* [2017] IESC 29; [2018] 2 IR 417.

Burden of Proof

23. In this Court and in the High Court the appellant relied on a number of authorities in support of his appeal(s). These include *Mitchell v. Southern Health Board* [2001] 12 ELR

201, *Citibank v. Ntoko* [2004] 15 E.L.R. 116 and *Campbell Catering Ltd. v. Rasaan* [2004] 15 ELR 310. Having examined these authorities, the trial judge observed, at para. 82 of his judgment:

“As appears, it is a consistent theme of the domestic determinations and decisions relied upon by Mr Smith that the initial burden of proof lies with a complainant. A complainant is required to establish facts which give rise to an inference of discrimination. It is only then that the burden of proof shifts to the respondent. A similar approach has now been transposed into domestic law under section 38A of the Equality Act. In determining the within appeal, the High Court must, of course, apply the legislation currently in force. In particular, this court must have regard to the actual language of section 38A.”

24. Having examined the relevant legislative provisions and the authorities, the trial judge concluded, at para. 85, that the only point of law which might potentially arise for consideration on the appeal before him was whether the Circuit Court applied the correct legal test in respect of the burden of proof. If it did so, then its findings of fact could only be disturbed on an appeal on a point of law in circumstances where: (i) there is no evidence to support the Circuit Court’s findings of primary fact; or (ii) the inferences drawn by the Circuit Court were either unreasonable or based on an incorrect interpretation of documents.

25. At paras. 88 and 89 the trial judge held:

“88. Section 38A gives effect to article 8 of the Racial Equality Directive (Directive 2000/43/EC). The complainant must establish a prima facie case of discrimination, i.e. the complainant must establish facts from which it may be presumed that there has been direct or indirect discrimination. The effect of these legislative provisions is that a complainant is required to discharge a reduced burden of proof, and once this is done, the burden of proof is reversed. As explained by Advocate General Mengozzi in Case

C415/10, *Meister* ECLI:EU:C:2012:8, [22], the effect of the burden of proof provisions under the Racial Equality Directive (and other related Directives) is that a measure of balance is maintained between the parties, enabling the complainant to claim his or her right to equal treatment but preventing proceedings from being brought against a respondent solely on the basis of the complainant's assertions...

89. Where it is alleged that discrimination has occurred on the ground of race, it is necessary to establish a prima facie case that the complainant has been treated less favourably than another person is, has been or would be treated in a comparable situation, on the ground that the complainant is of a different race, colour, nationality or ethnic or national origin.”

26. The trial judge concluded that there was no basis for saying that the findings made by the Circuit Court were unsupported by evidence, unreasonable or based on an incorrect interpretation of documents. He further concluded that the Circuit judge properly applied the correct evidential test as required under s.38A of the Equal Status Act (as amended). He found that there was nothing in the evidence – written or oral – before the Circuit Court which suggested that the manner in which the appellant's complaint was dealt with by the Ombudsman was other than in accordance with its regular and normal procedure.

27. The trial judge noted that the appellant had adduced no evidence to suggest that the approach taken by the Office of the Ombudsman in March 2018 was anything other than the standard practice of the Office of the Ombudsman. In other words, there was nothing before the Circuit Court to suggest that the appellant's complaint had been treated any differently from any other complaint.

28. While the appellant had complained that the Ombudsman's Office was in error in treating with the Second Complaint as being the same complaint, or in relation to the same matter as the First Complaint (and for that reason, declined to review his decision on the

Second Complaint) this, the trial judge held, was not evidence of discrimination. While the trial judge considered that it was open to the Ombudsman to conclude that the two matters were closely connected, and that the two complaints made to the Ombudsman covered the same subject matter for the purposes of s.4(6) of the Ombudsman Act, 1980, he said that the question upon a claim of racial discrimination is not whether that decision was right or wrong, but whether the procedure applied to the appellant differed from the approach applied to other complainants generally. The trial judge concluded that the appellant had failed to adduce any evidence before the Circuit Court which suggested, even on a *prima facie* basis, that the Ombudsman had treated the appellant any differently than it would have treated any other complainant. This was in contrast to the cases of *Citibank v. Ntoko* and *Campbell Catering Ltd. v. Rasaan* (which were relied upon by the appellant), in which the Labour Court had found that a work place policy had been applied with full rigour to the complainants in those cases when it was not generally enforced against other employees of a different racial origin.

29. Finally, the trial judge also addressed a complaint by the appellant that the Circuit Court had failed to address his complaint of a violation of s. 5(1) of the Equal Status Acts. However, the trial judge noted that s. 5 is not a stand-alone provision and, having been satisfied that the appellant had failed to establish a *prima facie* case of either direct or indirect discrimination for the purposes of s.3(2)(h) of the Equal Status Acts, it was self-evident, on the facts of this case, that there was no discrimination for the purposes of s.5(1).

Grounds of Appeal

30. The appellant sets out 16 grounds of appeal in his notice of appeal. For the most part, these are expressed in the most general, and at times disparaging, terms. For example, ground number 4 states: “the High Court’s Judgments and final Order treated me with disproportionate bias, partiality and unfair treatment on the ground of racial or ethnic origin

in breach of Article 35.2, Article 40.1 and Article 40.3.2 of the Constitution of The Republic of Ireland. Having filed numerous complaints against several State Actors, the Presiding Judge's Judgments and Order represents a continuum of victimisations.”

31. The appellant claims that the trial judge erred in failing to apply principles and tests identified in a range of authorities, to which he refers expressly, but without identifying specifically the principles or tests established by those authorities which he claims the trial judge failed to apply. The closest the appellant comes to being specific in the grounds of appeal is in ground number 8 in which he states that the trial judge erroneously applied the principles referred to in the case of *Stokes v. Christian Brothers High School Clonmel*. The appellant claims that the trial judge erred by failing to apply the principles identified by the Supreme Court at para. 43 of its judgment in *Cahill v. Minister for Education and Science* [2017] IESC 29 (grounds 8 and 15). He claims that the High Court erred in failing to find that the Circuit Court erred in failing to find primary facts upon which reasonable inferences could be drawn, in breach of Articles 2(1), 2(2)(a), 2(2)(b), 2(3), 2(4), 3(1)(h), 8(1), 8(2), 8(5) and 9 of Council Directive 2000/43/EC, and in breach of Article 47 of the CFREU, Articles 6 (1) and 13 of the ECHR, Articles 8 and 10 of the UDHR and Article 35.2 of Bunreacht na hÉireann (ground 15).

32. At ground 13, the appellant states that the trial judge exceeded his jurisdiction in reviewing the DAR. He further claims that the trial judge erred and “found non-existent faults, ridiculed and blamed [the appellant] for using the due process i.e. institute High Court proceedings via SI number 428 of 2018 form...”. This we take to be a reference to the fact that the appellant did not file his appeal, being an appeal on a point of law, in accordance with the Rules of the Superior Courts.

33. At ground 17 the appellant states that the “High Court’s Findings, Conclusions, Judgments and Order represent perversion of justice, fairness, fair procedures, and equal

treatment on the ground of racial or ethnic origin in breach of the CFREU, ECHR, UDHR and the Constitution of Ireland as above.”

Arguments on this appeal

34. At the hearing of this appeal, the appellant contended that the trial judge had erred, *inter alia*, in failing to set aside the decision of the Circuit Court, because it had erred, firstly in reaching no conclusions at all as to fact, and secondly in concluding that there was no evidence of discrimination against him.

35. The appellant’s submissions, both written and oral, are very difficult to follow. A flavour of the appellant’s conduct of these proceedings can be gathered from para. 5 of his written submissions, which is the first paragraph of his written submissions under the heading “The Issues to be decided on appeal on the ground of racial or ethnic origin”. In the opening line of this paragraph, he states, as regards the decision of the High Court:

“The presiding Judge misdirected himself; disproportionately failed to properly allude to relevant Facts; manipulated, manufactured, misconstrued, distorted, doctored, concealed, selected and misrepresented relevant Facts; erred in law; erred in the non-dysfunctional use of the relevant Legal Tests [...] erred in the Findings of Primary Facts, Conclusions, Determinations and Final Order”.

36. However, it is difficult to discern anywhere in the 28 subsequent pages of his submissions the specific errors of the trial judge relied upon by the appellant, although they are replete with disparaging remarks against just about everybody with whom he has had any contact at all in these proceedings and the events giving rise to them, including one remark about counsel for the Ombudsman whom he names and accuses of having “lied through his teeth” in the court below, for which accusation he offers no basis whatsoever. While he does refer to the trial judge as being in error in numerous paragraphs of his judgment, for the most part, he fails to identify *specifically* in what way or ways the trial

judge fell into error. He complains about the decisions of the LAB to decline him a legal aid certificate, but that is of only background relevance to the matters that were under consideration in the High Court. The High Court was not in any way engaged in a review of the decisions in respect of the legal aid certificates.

37. He complains that he had difficulty in identifying the precise legal identity of the Ombudsman and referred to “the Ombudsman’s dishonest practice where it hid its precise name in various dated and undated correspondences, caused me to file a single ESA complaint that named its applicable employees”. However, even assuming that the appellant had some difficulty in identifying the correct legal person against whom to make a complaint, this does not constitute evidence of discrimination of any kind, and there was no error on the part of the trial judge in his treatment of this issue.

38. The appellant included no less than four appendices to his submissions, which ran to more than one hundred pages. In appendix 4, he claims that the transcript of the Circuit Court proceedings was, *inter alia*, “manipulated, distorted, doctored and selected at my detriment”. Notwithstanding the very serious nature of these allegations, he does not identify in what respect he claims the transcript is inaccurate or fails to constitute a true record of the proceedings. The appellant had apparently made similar claims about the transcript in the High Court. The trial judge records in his judgment that, following upon the conclusion of the proceedings in the High Court, he played back the digital audio recording (DAR) of the Circuit Court proceedings in the course of preparing his judgment, as an exceptional measure and in light of the appellant’s vehement complaints in the High Court as to the accuracy of the transcript of the Circuit Court proceedings. The trial judge expressly found that the transcript was accurate, save only for typographical or equivalent type errors of a kind that are almost inevitable when the person preparing the transcript is doing so from a recording and did not have the benefit of being in court, as was the case here. It is apparent from the

judgment that the appellant did not merely complain of inaccuracies in the transcript, but alleged that it had been deliberately altered by the Office of the Ombudsman. At para. 46 of his judgment, the trial judge stated that “Any suggestion that the transcript may have been interfered with is entirely without merit, and should not have been made”, and at para. 53 the trial judge further stated that “it is most regrettable that [the appellant] took advantage of the privilege which attaches to submissions in legal proceedings to make entirely unwarranted allegations against the Office of the Ombudsman”. If it was regrettable for the appellant to have made such accusations at the trial before the High Court, then it is *a fortiori* regrettable that he should do so again in this appeal, in circumstances where the trial judge had taken the unusual and exceptional step of listening to the DAR of the Circuit Court proceedings in order to satisfy himself as to the accuracy of the transcript of the Circuit Court proceedings. The appellant’s submissions to this Court effectively invite the Court to provide the parties with the recording itself. However, as the trial judge pointed out, a transcript of proceedings that is prepared from the DAR, following an application by one of the parties to the proceedings, is prepared independently of the parties by a firm of stenographers approved by the Courts Service. It is certified as a “complete and correct transcript of the record of the proceedings”. The appellant’s request for the DAR itself is highly unusual. We are not aware of any circumstances in which any such a request has been granted. In the circumstances of this case, where the appellant has provided no basis at all for his repeated and scurrilous allegations, there is no basis for departing from the normal practice of relying upon the transcript of the DAR, as provided by court approved stenographers, as a true record of the relevant proceedings.

39. The appellant makes reference to the trial judge engaging in “inappropriate colour coding of human beings” at para. 41 of his judgment. In this paragraph of his judgment, the trial judge quotes from the decision of the Adjudication Officer, which we have also quoted

at para. 14 above in which he states that “there is absolutely nothing to indicate that a hypothetical white Irish person would have fared any differently in the same situation.” Two points should be made about this complaint. The first is that the trial judge was quoting from the decision of the Adjudication Officer. Secondly, it was necessary for the Adjudication Officer to refer in some way to the comparator person whom the appellant considers would have been treated differently and more favourably (by the Ombudsman) than the appellant himself. The appellant himself repeatedly uses the word “Caucasian” in his submissions (in reference to others involved in his various proceedings), and it is difficult to see any meaningful difference. Moreover, s.3(2)(h) of the Equal Status Acts defines discrimination by reference to skin colour. We do not think any reasonable person would consider that the manner in which the Adjudication Officer expressed his conclusion (or the trial judge in quoting the Adjudication Officer) was inappropriate.

40. Moreover, while he repeatedly claims that the decisions of the LAB constituted an application of different rules to comparable situations where (in the words of the appellant) “someone of the Ombudsman’s racial or ethnic origin would be treated differently and favourably in breach of equal treatment on the ground of racial or ethnic origin”, nowhere in his submissions, written or oral, does the appellant point to any evidence at all in support of this claim, never mind evidence to this effect that was not considered and properly taken into account by any of the Adjudication Officer, the Circuit Court or the High Court. This is unsurprising, because it is clear that he did not adduce any such evidence at all in any of those forums. He simply made allegations.

41. The appellant claims that the fact that the Ombudsman cannot locate his original file from the First Complaint is evidence of discrimination, but this is entirely unpersuasive. The trial judge observed that this was “unsatisfactory”, and there was little more to be said about

that issue. The absence of the file did not prevent the trial judge from addressing the appeal before him, or adjudicating on it fairly, impartially and appropriately.

42. The appellant claims that the Ombudsman was wrong to treat the First Complaint as being in relation to the same matter as the Second Complaint, but even if he is correct about this (which is far from certain), it amounts to no more than an error – it is not evidence of discrimination. As regards this issue, the appellant does make an identifiable argument that the trial judge erred in law, although it is misconceived. He contends that the trial judge erred in accepting that s.4(6) of the Ombudsman Act, 1980 applied to the decision of the Ombudsman not to review his decision on the Second Complaint. It will be recalled that s. 4(6) of the Ombudsman Act provides:

“It shall not be necessary for the Ombudsman to investigate an action under this Act if he is of opinion that the subject matter concerned has been, is being or will be sufficiently investigated in another investigation by the Ombudsman under this Act.”

The appellant contends that this is of no application to the Second Complaint, since it is a separate and distinct complaint from the First Complaint. He contends that the Ombudsman should have addressed the Second Complaint under ss. 4(1) and 4(2)(b)(iv), (v) and (vii) of the Ombudsman Act. The latter section was amended by the Ombudsman (Amendment) Act 2012. In his submissions, the appellant refers to the section as originally enacted. Nothing turns on this however, because the material parts of the section relied upon by the appellant remain the same, save only that subsection (vii) is now subsection (viii). These sections now provide as follows:

“4.(1) The Ombudsman shall be independent in the performance of his functions.

4.(2) Subject to this Act, the Ombudsman may investigate any action taken by or on behalf of a reviewable agency in the performance of administrative functions where,

having carried out a preliminary examination of the matter, it appears to the Ombudsman—

(b) that the action was or may have been—

[...]

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

[...]

(viii) otherwise contrary to fair or sound administration.”

43. The problem with this argument is that the Ombudsman did consider and address the Second Complaint, and he rejected it in his letter of 6th March 2018. Accordingly the appellant’s request for a review fell squarely within s. 4(6) of the Ombudsman Act, and he was quite entitled not to review his decision further, on the basis that the complaint had already been investigated. While the appellant had been afforded a review of the decision of the Ombudsman on the First Complaint, this was by reason of an informal review process operated by the Ombudsman, which he does not operate where a subsequent complaint, in the view of the Ombudsman, relates to the same subject matter. As already mentioned, the appellant complains that the two complaints were different, but this is, if anything, a judicial review point, and it most certainly does not constitute evidence of discrimination.

44. He complained that the Ombudsman, having received the response of the LAB in response to the Second Complaint, made his decision on the Second Complaint without affording the appellant an opportunity to reply. At its height, this is a fair procedures point, and there was no evidence at all that the respondent deals with the complaints of others any differently, which would be necessary in order to ground a claim of discrimination.

45. He also made a complaint that a person in the Office of the Ombudsman hung up the phone on him while he was engaged with that person in conversation. It is unclear to the

Court whether this ever formed part of the appellant's written complaint to the WRC, or was ever the subject of any evidence whether before the Adjudication Officer or the Circuit Court, and there certainly has been no finding of fact on this issue. However, even taking this complaint at its height, it would at most be evidence of rudeness and by itself would fall considerably short of a *prima facie* case of racial discrimination.

46. The appellant makes wide ranging arguments as to a violation of his rights under the European Convention of Human Rights, the Universal Declaration of Human Rights of the United Nations, and the Charter of Fundamental Rights of the European Union. None of these complaints fall for adjudication in these proceedings.

47. The appellant invites the Court to refer numerous questions to the Court of Justice of the European Union, but these proceedings raise no question of interpretation or application of European Union law that requires resolution for the determination of these proceedings.

48. In response to a question from the Court, the appellant agreed that in order to succeed with a claim of discrimination, he is required to establish, *prima facie*, that he has been treated less favourably than others, before the burden of proof shifts as to the other side to disprove the claim. However, the appellant contended that the trial judge erred in failing to hold that the Circuit judge had erred in failing to find any facts to support his claim of discriminatory treatment, the evidence of which, the appellant maintained, comprises the decisions of the Ombudsman themselves, i.e. the initial decision of 6th March 2018 and the subsequent refusal, on 20th March 2018 to review that decision. He submitted that the trial judge erred in failing to draw the correct inferences from these decisions, by which we understood him to submit that the trial judge should have inferred that those decisions were in and of themselves evidence of discrimination.

49. While there may well be circumstances where a decision of one kind or another will in and of itself constitute *prima facie* evidence of discrimination - such as where it is clear

that there is no other reasonable explanation for a decision - this is not such a case. The decision of the Ombudsman of 6th March 2018 was a reasoned decision, given after an investigation of the Second Complaint by the Ombudsman, and there is no reason to believe that the decision would have been any different regardless as to the identity, race or ethnicity of the complainant. Likewise, the decision of 20th March 2018 not to review the decision of 6th March 2018 had a basis in a well-established policy of the Ombudsman.

50. The appellant submitted that where there has been a violation of fair procedures, the Court is not constrained by the limitations of appeals on a point of law only, and by the principles adopted in *Stokes v. Clonmel High School*. He submits that the trial judge erred by failing to follow the decision of the Supreme Court in *Cahill v. Minister for Science*. However, there is no basis for the appellant's submission that *Cahill* in any way alters the test in *Stokes*, which in any case, as far as this issue is concerned, merely affirms the well-established principles applicable to appeals on a point of law only.

51. While the Court has summarised above what we perceive as the main issues raised by the appellant on this appeal, we have not attempted to summarise all of his submissions, many of which are nothing short of outlandish, not to mention gratuitously abusive of others. To attempt to summarise all of his submissions is unnecessary, but this does not mean that we have not considered all of his submissions. The Court has done so.

52. The many authorities relied upon by the appellant do not assist him, because, unsurprisingly, there is no authority which supports the proposition that a claim of discrimination can succeed on the basis of mere assertion. On the contrary, all of the authorities, including those relied upon by the appellant himself, make it clear that a complainant must adduce some evidence to establish primary facts which, *prima facie* give rise to an inference of discrimination.

53. The plain fact of the matter is that the appellant, before the Adjudication Officer of the WRC, and again before the Circuit Court, failed to adduce any evidence at all, never mind evidence sufficient to meet even the low threshold of a *prima facie* case, that he was in any way discriminated against by the Ombudsman in the manner in which he and his officials received, considered and adjudicated upon the Second Complaint, or in the subsequent refusal to review the decision on that complaint. The same applies as regards the appellant's complaint in relation to harassment. His claims amount to no more than mere assertion.

54. It is clear that the appellant has researched and fully understands the law and the legal principles applicable to the complaints that he has advanced under the Equal Status Acts. However, he resolutely refuses to accept that such complaints, in order to succeed, must be grounded on sufficient evidence to establish, in the first instance, a *prima facie* case of racial discrimination. It is difficult to avoid the conclusion that, faced with a decision that he does not like, or that is in some way adverse to his interests, the response of the appellant is invariably to accuse the decision-maker of racial discrimination. This is a wholly unacceptable abuse of process, is highly and gratuitously offensive to those against whom he levels such unsubstantiated complaints, and perhaps worst of all, is potentially undermining of the very processes put in place by the Oireachtas to root out discriminatory practices and to provide redress to those affected by such practices where they are truly warranted. This is so not least because of the very significant time required to be expended by various organs of the State in dealing with the appellant's spurious complaints. Moreover, apart from the matters giving rise to these proceedings, it is apparent from the papers that the appellant has previously made unsubstantiated complaints to the WRC about other matters. We make these remarks in the hope that the appellant will pause and reflect before making such complaints in the future, and that he will only do so again on the basis of evidence that meets at least the applicable low *prima facie* threshold.

55. For the reasons given, the Court dismisses the appeal in its entirety. As to costs, since the appellant has been wholly unsuccessful in his appeal, our indicative order as to costs is that the appellant should be ordered to pay the costs of the respondents incurred in connection with this appeal, the amount of which shall be determined by adjudication in default of agreement. If the appellant wishes to contend that a different order as to costs should be made, he may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. The appellant should note that in the event that he is unsuccessful in altering the provisional order for costs which we have indicated, he may be required to pay the costs of the additional hearing.