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**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL**

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**BETWEEN:**

**GEOFFREY WILSON**

**Appellant**

**-AND-**

**ALLIANCE PARTY OF NORTHERN IRELAND**

**Respondent**

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**BEFORE: McCloskey LJ, McBride J and Humphreys J**

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**The Appellant appeared as a Litigant in Person**
**Respondent: Non-participating**
**Mr Tony McGleenan KC and Rachel Best (instructed by the Departmental Solicitor's Office) The Tribunal, *qua* interested party**

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**McCLOSKEY LJ (*delivering the judgment of the court*)**

## *Introduction*

[1] Geoffrey Wilson (the "appellant") brings this appeal arising out of unsuccessful proceedings in the Industrial Tribunal/Fair Employment Tribunal (the "Tribunal"). In brief compass, the appellant had made three applications to the Tribunal, withdrawing two of these. The application which he maintained (No A049/22) was, in common with the other two applications, brought against the Alliance Party of Northern Ireland (the "Alliance Party"). By this application he complained that he had been the victim of "direct age discrimination and direct political discrimination."

[2] In his "Grounds of Claim" the appellant recounts that he has been a member of the Alliance Party since 2012. Certain elements of the narrative which follows have not formed part of his case and the court will accordingly treat these as background information only. The most salient passages relate to the appellant's grievance about

how the candidate selection process of the Alliance Party was applied to him on multiple occasions. He asserts that between mid-2017 and September 2021 he applied to be a nominated Alliance Party candidate for certain elections: Belfast City Council (three times), Westminster (once) and the Northern Ireland Assembly (once). Each of these applications was unsuccessful. The ensuing Tribunal proceedings were initiated by him on 20 December 2021.

***Parties***

[3] As will become apparent infra, there were no inter-partes hearings before the Tribunal. The exercise was conducted entirely on paper. On appeal to this court the sole respondent, the Alliance Party, elected not to be represented. This decision was notified in correspondence from its solicitors.

[4] It is not possible for any court or tribunal to compel a party to litigation to participate actively in the proceedings. However, there are well settled practices, based on a combination of two main considerations. The first is that a party to any proceedings will normally have an intense interest in how they are conducted and determined and will participate accordingly. The second is the procedure which this court has laid down in its decision in *Re Darley's Application* [1997] NI 384.

[5] In *Darley*, which concerned unfair dismissal proceedings, the Tribunal struck out the application on account of the applicant's failure to comply with an order to provide further particulars of his claim. The applicant then applied to the Tribunal to review this decision, invoking a specific procedural rule. The Tribunal declined to do so on the ground that it had no power to this effect. The applicant successfully challenged this decision by judicial review. The respondent (employer) did not participate in these proceedings and the Tribunal was legally represented by counsel and solicitor. The tribunal challenged the decision of the High Court by appeal to the Court of Appeal, unsuccessfully. On the procedural issue of whether the tribunal was the proper legitimus contradictor, this court expressed itself in uncompromising terms, at 387C/E:

> "The tribunal itself appeared to defend the application in the court below and pursued the appeal, in order, as counsel informed us, to defend the challenge to its procedures. Counsel submitted that this was an appropriate course for the tribunal to adopt, but we are unable to agree. In our opinion the proper party to contest an appeal from a decision of an industrial tribunal or an application for judicial review is normally the opposing party in the proceedings before the tribunal whose decision is challenged. There may be circumstances when it is appropriate for a tribunal to be separately represented, for example if there were an allegation of personal misconduct on the part of the members of the tribunal, but such cases

> will be very rare. In the ordinary way we consider that the opposing party is the correct person to undertake the task of upholding the tribunal's decision and putting forward any necessary defence of its procedures. If in any case the opposing party does not appear to contest the appeal, it will be for the appellate court to determine whether it wishes to ask for other representation in some form so that the contrary case can be properly argued."

[6] *Darley* was decided some 26 years ago and has been consistently followed in this jurisdiction ever since. This court entertains appeals from a range of judicial organs – in particular (but inexhaustively) Magistrates' Courts, County Courts, specified judicial officers (for example Taxing Masters) and a variety of tribunals. The most typical scenario is that in the underlying proceedings there are two parties, one of whom is dissatisfied with the outcome and determines to exercise a statutory right of appeal to this court. It is the experience of this court that in such cases the successful party almost invariably participates actively in the appeal with a view to securing the affirmation of the first instance decision.

[7] In the present case the Alliance Party was the sole respondent to the Tribunal applications. Its reasons for declining to participate actively in this appeal are unclear. Its refusal to do so is inconsistent with the well-established practice which we have described. It is particularly unfortunate that this course was adopted in the context of a self-representing appellant. The effect of this decision is that this court has received no assistance whatsoever from the legal representatives who, in the normal course of events, would have been instructed by the respondent. Furthermore, the public purse has been adversely affected. This is regrettable. As noted, it is a fact that there were no *inter-partes* hearings at first instance. However, we take this opportunity to state emphatically that this is a matter of no moment regarding the non-participating stance which the respondent has elected to adopt.

[8] The refusal of the Alliance Party to participate actively in these appeal proceedings left this court in a difficult situation. Its only recourse, which was duly adopted, was to invite the Tribunal to participate. This elicited a positive response. An avoidable burden on public funds has resulted. The court is grateful for the assistance which in consequence was provided by the solicitor and counsel concerned.

***The underlying proceedings***

[9] The Tribunal made two separate, inter-related decisions. The first was a species of summary dismissal. This decision was made within the framework of Rule 11 of The Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 (the "*Rules*"), which provides:

"**Rejection**

11.—(1) The Secretary shall refer a claim form to an employment judge if—

(a) it is not made on a prescribed form;

(b) it does not include the information specified in rule 9(3); or

(c) the Secretary considers that the claim, or part of it, may be—

(i) one which the tribunal has no jurisdiction to consider;

(ii) one which includes insufficient information to enable the basis for the claim to be established or is in a form which cannot sensibly be responded to or is otherwise an abuse of process; or

(iii) one which, although starting relevant proceedings—

(aa) confirms that an early conciliation exemption applies where no such exemption applies; or

(bb) records a name or address for the claimant or the respondent differing materially from the name or address recorded for the prospective claimant or the prospective respondent (as the case may be) on the early conciliation certificate to which the early conciliation number relates.

(2) The claim, or part of it, shall be rejected if the employment judge considers that it is of a kind described in paragraph (1), except that the claim shall not be rejected—

(a) if paragraph (1)(a) applies and the employment judge considers that the information provided in the claim form is substantially the same as the information which would have been provided had the prescribed form been used or if the claim relates to the proceedings specified in regulation 15(2);

(b) if paragraph (1)(c)(iii)(bb) applies and the employment judge considers that the disparity between the information provided, respectively, in the claim and the early conciliation certificate is not such as to cast doubt on the identity of the claimant or respondent and that it would not be in the interests of justice to reject the claim.

(3) If the claim is rejected, the rejected claim form shall be returned to the claimant together with a notice of rejection giving the employment judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

[10] This decision was conveyed to the appellant by a letter dated 25 January 2022 signed by the Secretary of the Tribunals. This stated in material part:

> "The claim form has been referred to an Employment judge who has decided that it cannot be registered for the following reason: ….
>
> The claim cannot be registered as it appears from the claim form that there is no employment relationship between you and the respondent. The Tribunal therefore does not have power to consider the claim in accordance with Rule 11(1)(c)(i) …"

The letter continues:

> "In accordance with Rule 11(1)(c)(ii), the claim cannot be registered as it appears that there is insufficient information to enable the claim to be established. In particular the claim relating to: …
>
> **Age discrimination** cannot be registered as it does not include all of the relevant information required relating, in particular, to any detail of unequal treatment by the respondent on the ground of the claimant's age."

The letter also contains the following noteworthy passages:

> "I am therefore returning the form to you. If you wish to make a new claim you must provide this information on a new form to the tribunal office …

> You have the right to apply for a reconsideration of **the rejection of the claim** on the basis that **the decision to reject** was wrong or the notified defect can be rectified …
>
> You also have the right to appeal the decision to the Court of Appeal if you believe it is wrong on a point of law."

[11] This is not the decision under appeal to this court. However, the text of the aforementioned letter invites the following observations. First, it describes the decision of an unidentified Employment Judge as determining that the claim "cannot be registered." This is both inaccurate and misleading. "Registration" is not the language of rule 11. Rather this rule is concerned with **rejection**. The headline message in this letter, therefore, was not harmonious with the statutory language. In the later passages of the letter highlighted above, the terminology altered to that of rejection. It did not, however, state that the claim had been rejected. Rather the word "rejection" appeared in the middle of a sentence informing the recipient of a right to reply for "reconsideration." While one finds within the same sentence the terminology "the decision to reject", this cannot be linked to anything in the preceding passages of the letter.

[12] It is unfortunate that the communication of a judicial decision with serious and possibly irreversible consequences for the appellant was couched in such unsatisfactory terms. Furthermore, it is not clear why the mechanism of a letter purportedly signed by the Secretary of the Tribunals was employed for this self-evidently important purpose. We say "purportedly" because the letter has no physical signature and contains the abbreviation "pp." The requirement of a judicial decision imposed by Rule 11(2) is barely visible in the letter. Furthermore, it is unclear why the normal format of a tribunal judicial decision, duly signed and dated by the judicial author, was not employed. One of the consequences of the foregoing was that the appellant was unaware of the identity of any judge who had made any material decision. It is a fundamental requirement in all forms of litigation that the identity of the judicial author be disclosed. This is essential, inter alia, to enable the affected party or parties to assess issues of *vires*, procedural regularity and bias.

[13] There is a further concern about the letter dated 25 January 2022. It is crafted in blunt, unreasoned and conclusionary terms. It appears to be a letter of the boiler plate variety. The indicia of a properly considered and prepared judicial decision are minimal. It stands in stark contrast to the form, appearance and content of the Tribunal decisions to which this court is accustomed, evidenced by the impugned decision to which we shall now turn.

[14] The appellant, having received the aforementioned letter, exercised his right under Rule 12 to apply for a reconsideration. This stimulated the decision of the Tribunal impugned before this court. By this decision, dated 6 October 2022, the application was dismissed.

*Relevant Statutory Provisions*

[15] These are the following:

> **"The Fair Employment and Treatment (NI) Order 1998**
>
> ***Article 3***
>
> 3.—(1) In this Order "discrimination" means—
>
> (a) discrimination on the ground of religious belief or political opinion; or
>
> (b) discrimination by way of victimisation;
>
> and "discriminate" shall be construed accordingly.
>
> (2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of[F1 a provision of this Order, other than a provision to which paragraph (2A) applies,] if—
>
> (a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or
>
> (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but—
>
> (i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and
>
> (ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

[F1(2A) A person also discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of any provision referred to in paragraph (2B) if—

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but—

(i) which puts or would put persons of the same religious belief or of the same political opinion as that other at a particular disadvantage when compared with other persons;

(ii) which puts that other at that disadvantage; and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

(2B) The provisions mentioned in paragraph (2A) are—

(a) Part III;

(b) Article 27, so far as it applies to vocational training or vocational guidance;

(c) Article 32; and

(d) Part V, in its application to the provisions referred to in sub-paragraphs (a) to (c).]

(3) A comparison of the cases of persons of different religious belief or political opinion under paragraph (2)[F1 or (2A)] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(4) A person ("A") discriminates by way of victimisation against another person ("B") in any circumstances relevant for the purposes of this Order if—

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (5).

(5) The reasons are that—

(a) B has—

(i) brought proceedings against A or any other person under this Order; or

(ii) given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or

(iii) alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

(iv) otherwise done anything under or by reference to this Order in relation to A or any other person; or

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(6) Paragraph (4) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

(7) For the purposes of this Order a person commits unlawful discrimination against another if—

(a) he does an act [F1 other than an act of harassment] in relation to that other which is unlawful by virtue of any provision of Part III or IV; or

(b) he is treated by virtue of any provision of Part V as doing such an act…

*Article 19*

19.—(1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland,—

(a) where that person is seeking employment—

(i) in the arrangements the employer makes for the purpose of determining who should be offered employment; or

(ii) in the terms on which he offers him employment; or

(iii) by refusing or deliberately omitting to offer that person employment for which he applies; or

(b) where that person is employed by him—

(i) in the terms of employment which he affords him; or

(ii) in the way he affords him access to benefits or by refusing or deliberately omitting to afford him access to them; or

(iii) by dismissing him or by subjecting him to any other detriment.

[F1(1A) It is unlawful for an employer, in relation to employment by him in Northern Ireland, to subject to harassment a person whom he employs or who has applied to him for employment.]

(2) Paragraph (1)(b) does not apply to benefits of any description if the employer is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public comprising the employee in question, unless—

(a) that provision differs in a material respect from the provision of the benefits by the employer to his employees; or

(b) the provision of the benefits to the employee in question is regulated by his contract of employment; or

(c) the benefits relate to training.

[F1(3) In paragraph (1)(b)(iii) reference to the dismissal of a person from employment includes reference—

(a) to the termination of that person's employment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment is renewed on the same terms; and

(b) to the termination of that person's employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer.]…

***Article 20***

… 20.—(1) This Article applies to any work for a person ("the principal") which is available to be done by individuals ("contract workers")—

(a) who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal; and

(b) who, if they were instead employed by the principal to do that work, would be in his employment in Northern Ireland.

(2) It is unlawful for the principal, in relation to work to which this Article applies, to discriminate against a contract worker—

(a) in the terms on which he allows him to do that work; or

(b) by not allowing him to do it or continue to do it; or

(c) in the way he affords him access to benefits or by refusing or deliberately omitting to afford him access to them; or

(d) by subjecting him to any other detriment.

[F1(2A) It is unlawful for the principal, in relation to work to which this Article applies, to subject a contract worker to harassment.]

(3) Paragraph (2)(c) does not apply to benefits of any description if the principal is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public to which the contract worker in question belongs, unless that provision differs in a material respect from the provision of the benefits by the principal to his contract work.

***Article 20A***

20A-(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this Article applies, to discriminate against a person—

(a) in the arrangements which he makes for the purpose of determining to whom the appointment should be offered;

(b) in the terms on which he offers him the appointment; or

(c) by refusing to offer him the appointment.

(2) It is unlawful, in relation to an appointment to an office or post to which this Article applies and which is an office or post referred to in paragraph (8)(b), for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made, to discriminate against a person—

(a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or

(b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.

(3) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this Article applies, to discriminate against him—

(a) in the terms of the appointment;

(b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, or by refusing to afford him any such opportunity;

(c) by terminating the appointment; or

(d) by subjecting him to any other detriment in relation to the appointment.

(4) It is unlawful for a relevant person, in relation to an office or post to which this Article applies, to subject to harassment a person—

(a) who has been appointed to the office or post;

(b) who is seeking or being considered for appointment to the office or post; or

(c) who is seeking or being considered for a recommendation or approval in relation to an appointment to an office or post referred to in paragraph (8)(b).

(5) Paragraphs (1) and (3) do not apply to any act in relation to an office or post where, if the office or post constituted employment, that act would be lawful by virtue of Article 70 and paragraph (2) does not apply to any act in relation to an office or post where, if the office or post constituted employment, it would be lawful by virtue of Article 70 to refuse to offer the person such employment.

(6) Paragraph (3) does not apply to benefits of any description if the relevant person is concerned with the provision (for payment or not) of benefits of that

description to the public, or a section of the public to which the person appointed belongs, unless—

(a) that provision differs in a material respect from the provision of the benefits by the relevant person to persons appointed to offices or posts which are the same as, or not materially different from, that which the person appointed holds; or

(b) the provision of the benefits to the person appointed is regulated by the terms and conditions of his appointment; or

(c) the benefits relate to training.

(7) In paragraph (3)(c) the reference to the termination of the appointment includes a reference—

(a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and

(b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(8) This Article applies to—

(a) any office or post to which persons are appointed to discharge functions personally under the direction of another person, and in respect of which they are entitled to remuneration; and

(b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department,

but not a political office or a case where Article 19, 20, 21, 26 or 32 applies, or would apply but for the operation of any other provision of this Order.

(9) For the purposes of paragraph (8)(a) the holder of an office or post—

(a) is to be regarded as discharging his functions under the direction of another person if that other person is entitled to direct him as to when and where he discharges those functions;

(b) is not to be regarded as entitled to remuneration merely because he is entitled to payments—

(i) in respect of expenses incurred by him in carrying out the functions of the office or post, or

(ii) by way of compensation for the loss of income or benefits he would or might have received from any person had he not been carrying out the functions of the office or post.

(10) In this Article—

(a) appointment to an office or post does not include election to an office or post;

(b) "political office" means—

(i) any office of the House of Commons held by a member of it,

(ii) a life peerage within the meaning of the Life Peerages Act 1958, or any office of the House of Lords held by a member of it,

(iii) any office of the Assembly held by a member of it,

(iv) any office of a district council held by a member of it, or

(v) any office of a political party.

(c) "relevant person", in relation to an office or post, means—

(i) any person with power to make or terminate appointments to the office or post, or to determine the terms of appointment,

(ii) any person with power to determine the working conditions of a person appointed to the office or post in relation to opportunities for promotion, a transfer, training or for receiving any other benefit; and

(iii) any person or body referred to in paragraph (8)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;

(d) references to making a recommendation include references to making a negative recommendation; and

(e) references to refusal include references to deliberate omission.]…

***Article 37(1)***

… 37.—(1) Except as provided by this Order or regulations thereunder, no proceedings whether civil or criminal shall be brought against any person in respect of a contravention of any provision of this Order or of such regulations...

***Article 38(1)***

38.—(1) A complaint by any person ( "the complainant") that another person ( "the respondent")—

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of any provision of Part III; or

(b) by virtue of Article 35 or 36 is to be treated as having committed such an act of discrimination[F1 or harassment] against the complainant,

may be presented to the Tribunal. …"

[16] The second relevant statutory measure is The Employment Equality (Age) Regulations (NI) 2006 (the "*2006 Regulations*"). The material provisions of this instrument are the following:

> ***"Regulation 13***
>
> 13.—(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this regulation applies, to discriminate against a person—
>
> (a) in the arrangements which he makes for the purposes of determining to whom the appointment should be offered;
>
> (b) in the terms on which he offers him the appointment; or
>
> (c) by refusing to offer him the appointment.
>
> (2) It is unlawful, in relation to an appointment to an office or post to which this regulation applies and which is an office or post referred to in paragraph (8)(b), for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made, to discriminate against a person—
>
> (a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or
>
> (b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.
>
> (3) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this regulation applies, to discriminate against him—
>
> (a) in the terms of the appointment;
>
> (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any

other benefit, or by refusing to afford him any such opportunity;

(c) by terminating the appointment; or

(d) by subjecting him to any other detriment in relation to the appointment.

(4) It is unlawful for a relevant person, in relation to an office or post to which this regulation applies, to subject to harassment a person—

(a) who has been appointed to the office or post;

(b) who is seeking or being considered for appointment to the office or post; or

(c) who is seeking or being considered for a recommendation or approval in relation to an appointment to an office or post referred to in paragraph (8)(b).

(5) Paragraphs (1) and (3) do not apply to any act in relation to an office or post where, if the office or post constituted employment, that act would be lawful by virtue of regulation 9 (exception for genuine occupational requirement etc); and paragraph (2) does not apply to any act in relation to an office or post where, if the office or post constituted employment, it would be lawful by virtue of regulation 9 to refuse to offer the person such employment.

(6) Paragraph (3) does not apply to benefits of any description if the relevant person is concerned with the provision (for payment or not) of benefits of that description to the public, or a section of the public to which the person appointed belongs, unless—

(a) that provision differs in a material respect from the provision of the benefits by the relevant person to persons appointed to offices or posts which are the same as, or not materially different from, that which the person appointed holds; or

(b) the provision of the benefits to the person appointed is regulated by the terms and conditions of his appointment; or

(c) the benefits relate to training.

(7) In paragraph (3)(c), the reference to the termination of the appointment includes a reference—

(a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and

(b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(8) This regulation applies to—

(a) any office or post to which persons are appointed to discharge functions personally under the direction of another person, and in respect of which they are entitled to remuneration; and

(b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department,

but not to a political office or a case where regulation 7 (applicants and employees), regulation 8 (discrimination by persons with statutory powers to select employees for others), regulation 10 (contract workers), regulation 17 (barristers), or regulation 18 (partnerships) applies, or would apply but for the operation of any other provision of these Regulations.

(9) For the purposes of paragraph (8)(a), the holder of an office or post—

(a) is to be regarded as discharging his functions under the direction of another person if that other person

is entitled to direct him as to when and where he discharges those functions;

(b) is not to be regarded as entitled to remuneration merely because he is entitled to payments—

(i) in respect of expenses incurred by him in carrying out the functions of the office or post; or

(ii) by way of compensation for the loss of income or benefits he would or might have received from any person had he not been carrying out the functions of the office or post.

(10) In this regulation—

(a) appointment to an office or post does not include election to an office or post;

(b) "political office" means—

(i) any office of the House of Commons held by a member of it,

(ii) a life peerage within the meaning of the Life Peerages Act 1958(1), or any office of the House of Lords held by a member of it,

(iii) any office of the Assembly held by a member of it,

(iv) any office of a district council held by a member of it,

(v) any office of a political party;

(c) "relevant person", in relation to an office or post, means—

(i) any person with power to make or terminate appointments to the office or post, or to determine the terms of appointment,

(ii) any person with power to determine the working conditions of a person appointed to the office or post in relation to opportunities for promotion, a transfer, training or for receiving any other benefit, and

(iii) any person or body referred to in paragraph (8)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;

(d) references to making a recommendation include references to making a negative recommendation; and

(e) references to refusal include references to deliberate omission.

…

***Regulation 40***

40.—(1) Except as provided by these Regulations, no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of these Regulations.

(2) Paragraph (1) does not prevent the making of an application for judicial review or the investigation or determination of any matter in accordance with Part X (investigations: the Pensions Ombudsman) of the Pension Schemes (Northern Ireland) Act 1993(1) by the Pensions Ombudsman. …"

***The Appeal***

[17] The appellant, with the benefit of certain amendments of his Notice of Appeal which this court has determined to permit, refined his grounds of appeal to the following:

(i) Unlawful refusal to adjourn.

(ii) Apparent bias.

(iii) Breach of EU law.

We shall address each ground in turn.

***Unlawful Refusal to Adjourn***

[18] The relevant factual matrix is both uncomplicated and uncontentious. In brief compass:

(a) The appellant's reconsideration application was made on 7 February 2022.

(b) On 16 February 2022 the Tribunal made certain procedural directions.

(c) On 9 March 2022 the appellant responded.

(d) A hearing was scheduled to take place on 12 May 2022.

(e) The Tribunal responded favourably to the appellant's request to adjourn this hearing.

(f) The hearing was rescheduled for 6 October 2022.

[19] The appellant attended the hearing. According to the ensuing decision, this was an *ex parte* hearing at which the Alliance Party was not represented. Based on the evidence before this court, the appellant formally requested an adjournment of the hearing on the eve thereof on the grounds that (a) he was unrepresented, (b) highly complex EU law issues were involved and (c) he had recently applied to the Equality Commission for Northern Ireland ("ECNI") for assistance. The decision of the Tribunal records that the latter event occurred on the eve of the hearing.

[20] The Tribunal's reasons for refusing the adjournment application are rehearsed in paras [11]–[13] of its decision:

> "11. I asked Mr Wilson when he had contacted the Equality Commission to seek advice on this matter. He stated that he had contacted the Commission on 4 October this year (two days before the hearing). That was some ten months after he had first sought conciliation in relation to this matter with the Labour Relations Agency and therefore at least ten months after he knew of the basis of his claim. Throughout those ten months, the claimant had repeatedly asserted his legal expertise and experience.
>
> 12. The tribunal has a statutory duty to deal with claims in accordance with the overriding objective. That includes the requirement of "avoiding delay."
>
> 13. The claimant is not unused to legal matters and did not put forward any reason for the significant delay on his

part in seeking further advice in relation to this matter."

[21] The refusal by a first instance court or tribunal to grant an adjournment to a litigant may in some circumstances give rise to a determination by an appellate court or a court of review that the ensuing substantive determination is unsustainable in law. In the case of tribunal proceedings this issue was addressed *in extenso* in the recent decision of this court in *Galo v Bombardier Aerospace UK* [2023] NICA 50, at paras [61] – [67]. It suffices in this contest to reproduce para [64]:

> "The principle enunciated by this court is that in any review or appellate challenge to a first instance decision to refuse an adjournment application advanced on whatever grounds, the test to be applied is whether this has had the effect of unfairly depriving the litigant of a fair hearing. It is no answer, no objection in principle, to say, particularly in cases of asserted ill health, that this must almost invariably require the first instance court or tribunal to adjourn the hearing. There are three main reasons for this. First, a litigant's fundamental right of access to a court, which is constitutional in nature and its related common law right to a fair decision-making process, does not entitle the litigant to dictate how this process is to be undertaken. Second, every court and tribunal will be jealous in guarding against any possible misuse of its process. Third, the terms of the test (above) are not absolute."

Thus the test to be applied is whether the adjournment refusal has unfairly deprived the litigant concerned of their right to a fair hearing.

[22] We consider that this test is not satisfied for the following reasons. First, there are the three factors rehearsed in paras [11]–[13] of the Tribunal's decision, each of them entirely legitimate. Second, the appellant wilfully refused to participate in the hearing before the Tribunal, having attended initially and then electing to leave. Third, for the reasons which we shall explain in our determination of the third ground of appeal, this court, having had the benefit of the legal arguments which the appellant declined to place before the Tribunal, is of the opinion that they are devoid of merit. On this ground alone the appellant lost nothing of substance. It follows that the first ground of appeal must fail.

***The Bias Ground***

[23] The governing principles were rehearsed in *Re Hawthorne and White's Application* [2018] NIQB 5, at paras [147]–[155]. It suffices to reproduce an extract from para [148]:

> " … there will always be a risk in every litigation context that some recusal applications are made on flimsy , though superficially attractive, grounds and are granted without rigorous scrutiny by an overly sensitive and defensive tribunal…
>
> It is trite that where an application of this kind is made, an asserted risk to the fairness of the trial which is flimsy or fanciful will not suffice …
>
> In every context, the test for apparent bias requires consideration of a possibility, applying the information known to and attributes of the hypothetical observer. Some reflection on the attributes of this spectator is appropriate. It is well established that the hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unduly sensitive and is of a sensible and realistic disposition."

[24] The contours of this ground of appeal were a little opaque on paper. The desired clarification which this court sought of the appellant at the hearing did not materialise in the clearest of terms. The particulars of this ground, discernible from both the amended Notice of Appeal and the appellant's skeleton argument, together with this court's assessment, are the following:

(a) In May 1999 when the President '… was a solely practicing solicitor operating out of Bradbury Place in Belfast' the appellant retained his services and then withdrew his instructions. Having considered all the evidence adduced, this assertion must be rejected for want of evidential foundation.

(b) The President was 'persistently hostile to the appellant when representing various parties before the Tribunal', giving rise to an earlier letter. This assertion must be rejected for the same reason.

(c) The appellant's complaint of judicial misconduct against the President was upheld by the OITFET complaints officer. The correspondence underpinning this discrete assertion confounds it. It is clear from the relevant letters that there was indeed a complaint of this nature. However, they establish nothing other than that the preliminary hurdles were overcome to an extent that an investigation would ensue. Some three years later, what this investigation has entailed and whether it has had an outcome are a matter of mystery. This, however, has no bearing on this court's assessment that this discrete assertion is based upon a fundamental misinterpretation of the correspondence.

(d) "By refusing to recuse himself from the 05/10/22 reconsideration hearing and also calling the appellant's integrity into question by denying – in email

correspondence – that paragraph (a) above had not actually occurred." This discrete complaint has no merit, for two fundamental reasons. First, the threshold of apparent bias which must be overcome is manifestly not satisfied. Second, we have already determined that the assertion imbedded in subparagraph (a) – above – has no merit.

For the reasons given this ground of appeal must be dismissed.

***The EU Law Ground of Appeal***

[25] The centrepiece of this ground of appeal is Article 2 of the Northern Ireland Protocol (incorrectly described by the appellant as Article 2 of the Windsor Framework). This provides:

> "**Rights of Individuals**
>
> 1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
>
> 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

The presentation of the appellant's supporting argument was based exclusively on The Law and Practice of the Northern Ireland Protocol (ed. McCrudden), p 151, where one finds the following exposition of Article 2:

> "**12.2.4 Anti-discrimination Clause**
>
> The second element in Article 2, the anti-discrimination clause, needs separate treatment. It provides that there shall be 'no diminution of ... equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity ..., including in the

> area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol ...' The directives included are restricted to what EU law considers the key 'antidiscrimination' directives. The description of the directives listed as constituting 'Union law' has considerable significance. This is because Article 4(3) WA stipulates that the provisions of the Agreement referring to 'Union law or to concepts or provisions thereof' shall be 'interpreted and applied in accordance with the methods and general principles of Union law.' This means, for example, that the interpretation of what the directives require must be undertaken taking into account all of the interpretative elements that the Court of Justice of the European Union (CJEU) would apply, including the general principles of EU law and, where relevant, the CFR, since the CJEU may draw upon the CFR if required to rule upon the meaning of the directives. Article 13(2) of the Protocol places no temporal limitations on this obligation. Northern Ireland courts would, therefore, also be required to follow post-transition CJEU case law by reason of that provision."

[26] The interlocking elements of the appellant's argument, with a degree of infilling by the court, are the following: the 1998 Agreement enshrines protections against discrimination; Article 2 of the Protocol gives expression to this protection by reference to the provisions of EU law specified in Annex 1; within Annex 1 one finds Council Directive 2000/78; and the appellant is entitled to invoke the protection of Article 3 of the latter.

[27] The purpose of Council Directive 2000/78 is stated in Article 1:

> "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

The scope of the Directive is specified in Article 3:

> "1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
>
> (a) conditions for access to employment, to self-employment or to occupation, including selection

criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces."

[28] The appellant contends that his case falls within the embrace of Article 3. He basis this contention on the decision of the Court of Justice of the European Union ("*CJEU*") in ***A v Dammark*** [Case C-587/20]. In that case the applicant complained about the termination of her employment on age discrimination grounds. She had been employed in various positions in an "organisation of workers." Latterly her position was that of "politically elected sector convenor." The ingredients of the issues raised are discernible from para [13] of the judgment:

"**15.** In addition, the referring court states that, as elected sector convenor, A was not employed but held an office based on trust, responsible to the sector congress of HK/Privat, which had elected her. However, her role as sector convenor included certain elements characteristic of ordinary workers."

The duties of the post are addressed in the next succeeding paragraph:

> "**13.** That court notes in this regard that the duties performed by A as sector convenor of HK/Privat consisted in having responsibility for its overall management, laying down policy in its professional field, concluding and renewing collective agreements and ensuring that these were respected. In addition, she had to implement decisions adopted by the congress and the sector board and those of HK/Danmark's management board, of which she was also a member."

The applicant worked full time for the organisation, received a monthly salary corresponding to a particular State pay grade and was subject to the Law on holidays. The question referred, in substance, was whether Article 3(1)(a) of the 2000 Directive applied to her. The question referred described the applicant as a "political elected sector convenor of a trade union."

[29] The CJEU employed the familiar reasoning that the Directive must be given an autonomous interpretation of uniform application throughout the EU territory: para [25]. The phraseology "conditions for access to employment, to self-employment or to occupation" had to be interpreted "by reference to their usual meaning in everyday language": para [26]. Article 3(1)(a) covered "conditions for access to any occupational activity, whatever the nature and characteristics of such activity" and its terms "must be construed broadly": para [27]. The language of Article 3(1) indicated that the scope of the Directive extended beyond "workers" within the meaning of Article 45 TFEU: para [29].

[30] The argument against the applicant, recorded in para [36] was that the Directive did not apply since the post of sector convenor of the organisation of workers concerned was "a political post the holder of which is elected by the members of that organisation." The CJEU rejected this argument briskly, at para [37]:

> "However, that line of argument cannot be accepted."

The first reason given, in para [38], is that the method of recruitment to the post was irrelevant. The court's reasoning continues, at para [39]:

> "Second, it does not follow from Directive 2000/78 that political posts are excluded from its scope. On the contrary, under Article 3(1)(a) thereof, that directive applies to both the private and the public sectors and 'whatever the branch of activity.' In addition, where that directive authorises the Member States not to apply the scheme which it lays down for certain professional activities, it specifies the activities

> in question. Accordingly, Article 3(4) of Directive 2000/78 provides that it may be provided that that directive is not to apply to the armed forces in so far as it relates to discrimination on the grounds of disability and age."

At para [40] the court expressly accepted the observation of the Advocate General that:

> "… the objective pursued by Directive 2000/78 … would not be achieved if the protection that it guarantees against discrimination in the field of employment and occupation were to depend on the nature of the functions performed in a particular employment."

At para [43] one finds the language of "… the freedom of trade unions to elect their representatives." The CJEU formulated its ruling in these terms:

> "Article 3(1)(a) and (b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that Directive."

[31] Our analysis of this decision is the following. Three particular features of para [43] are striking. First, it is couched in notably circumscribed terms. Second, it employs the language of "employment and occupation", replicating that of the Directive. Third, it does not include the terminology of "political posts."

[32] Secondly, the terms "political office" and "political post" do not derive from the Directive. Nor is there any indication that they derive from the domestic laws of the state of the referring court. Their origins would appear to lie in the vocabulary which was adopted in the underlying national proceedings. In the absence of definition or elaboration – neither of which can be found in the judgement of the CJEU – these are relatively meaningless terms. They are shorthand terms with no clear connotation. Furthermore, the CJEU does not expressly state whether it accepted or rejected the organisation's characterisation of the applicant's post as "political." Having regard to the Advocate General's Opinion (para 41 especially), which the court endorsed, it seems more likely that the court considered this irrelevant. More fundamentally, we consider it abundantly that the appellant cannot satisfy the "employment/occupation" requirement.

[33] For the assorted reasons adumbrated in paras [31]–[32], and having considered the further written submissions of the parties, we are not persuaded that the decision in *HK* lends support to the appellant's fundamental contention, namely that Directive

2000/78 applied to the decision of the Alliance Party declining to nominate him as a party candidate in a forthcoming public election.

[34] The foregoing analysis and conclusion, however, are not dispositive of this issue as they do not preclude the view that, disregarding the decision in *HK*, decisions made by a political party on election candidate nominations fall within the embrace of (in the language of the Directive) "access to employment, to self-employment or to occupation", which must be accorded a broad and purposive interpretation. The appellant did not formulate his case in this way. Rather, as appears particularly from para [12] of his written submissions, the twin pillars of his case are (a) the "political posts" mention in para [39] of HK and (b) the "vocational organisation" and "vocational training" provisions in Article 23 of the 1998 Order and Regulation 21 of the 2006 Regulations respectively. Disregarding our assessment that does not assist the appellant in any way, his argument can prosper only if the Alliance Party is a "vocational organisation" within the meaning of Article 23 or a vocational training provider within the meaning of Regulation 21.

[35] At an early stage of these appeal proceedings the Constitution and Rules of the Alliance Party of Northern Ireland (a single instrument) was provided further to the direction of the court. This contains the following noteworthy provisions:

> "The objectives of the Party shall be to heal the bitter divisions in our community and to promote the policies of the party as determined by the Council …
>
> Membership of the Party shall be open to all those who support the objectives of the Party …
>
> Ultimate authority for granting membership of the Party to any person shall belong to the Executive Committee …"

[Para 9.4]:

> "Any member who wishes his or her name to be placed on the Party's central list of Approved candidates for a stated election may apply in writing to the General Secretary of the Party and must complete a candidate approval form …
>
> Such member shall then be considered by the Candidate's Sub-committee of the Executive Committee within three months after such application and may be called for interview by the Sub-committee. Where the candidature of a member has the provisional support of an Association and the Association so requests, such member's application must be considered within 14 days. Notice of acceptance or rejection as the case must be given to the applicant

> immediately after a decision has been taken. Rejection shall not bar any member from making subsequent application. The Candidate's Sub-committee shall have the right to determine suitability of the candidate using a range of criteria and information available."

This instrument also contains provisions relating to Party Officers, the Executive Committee, the Council, election of the Party Leader and Deputy Party Leader, the annual conference, the Party's Regional Associations and discipline.

[36] This court finds it impossible to identify anything in the Constitution and Rules of the Alliance Party of Northern Ireland warranting the assessment that this political entity is either a vocational organisation within the meaning of Article 23 or a provider of vocational training within the meaning of Regulation 21. Furthermore, there is no identifiable ingredient of vocational provision or training in the non-selection decision which the appellant has sought to impugn in these proceedings. It follows that a fundamental element of the appellant's case cannot be sustained.

[37] It is correct that neither of the aforementioned statutory provisions was considered by the President in the impugned decision of the Tribunal. Given our analysis and dismissal of the appellant's arguments based thereon, this is of no moment.

[38] Summarising, Article 2 of the NI Protocol does not avail the appellant since, for the reasons explained, pre-EU withdrawal neither of the identified provisions of the 1998 Order or the 2006 Regulations conferred on him a right to challenge the impugned decision of the Alliance Party in proceedings in the OITFET, with the logical consequence that he has suffered no diminution of any discernible right as a result of EU withdrawal.

[39] We would add two observations. First, it is not the function of this court in adversarial proceedings to excavate and unearth potentially relevant measures of domestic law in an endeavour to determine whether some other statutory provision not canvassed before this court, or the Tribunal might confer on the appellant the right which he seeks to assert. Second, this court has received no argument on whether there has been any failure of transposition of Directive 2000/78.

***Conclusion***

[40] Generously, and in an attempt to at least promote finality in the interests of all concerned, the court permits the appellant to amend his grounds of appeal in each of the respects requested. This judgment has addressed all of the amended grounds in full and finds none of them meritorious. The appeal is dismissed accordingly.