

12

182/86



Fair Employment Agency

Andras House
60 Gt. Victoria Street
Belfast BT2 7BB
Telephone 240020

Chairman: Bob Cooper

3852W 4/6/87.

Mr. Reg Wilson,
Assistant Secretary,
Dept. of Economic Development,
The Arches Centre,
13, Bloomfield Avenue,
Belfast, BT4 3NR.

Your ref:

Our ref:

Date: 1/6/1987.

Dear *Reg*,

I enclose a copy of Anthony Lester's Opinion which the Agency received in connection with flags and emblems in the workplace. You will see in the course of the Opinion reference to other possible discriminatory acts against Mr. Johnston, referring to his period in the 'pool' and his lack of machine work. The Agency, however, found that Mackie's did not discriminate against him in respect of any other aspect than the display of flags, emblems, etc.

Yours sincerely,

Bob

R. C. COOPER
Chairman

RGC/NM

Ph 4/6.
the memo
To note a copy to
Mr. Wolstenhulme.
At file. Copied 5/6 JMS
h 4/6

THE FAIR EMPLOYMENT (NORTHERN IRELAND) ACT 1976

AND

THE DISPLAY OF FLAGS, EMBLEMS AND SYMBOLS AT THE WORKPLACE

OPINION

1. I have been instructed by the Fair Employment Agency for Northern Ireland to advise whether it is unlawful under Part III of the Fair Employment (Northern Ireland) Act 1976 to display flags, emblems and symbols at the workplace in the circumstances described in relation to Mr. Johnston's complaint. For the reasons summarised below, in my view :

(i) the display of flags, emblems and symbols at the workplace is capable in appropriate circumstances of constituting "less favourable treatment" on religious or political grounds, under Section 16, and a "detriment" under Section 17(b)(iv), of the Act;

(ii) the fact that Mr. Johnston was the only Catholic to complain about the display is relevant only to the question of reasonableness;

(iii) the information before me strongly indicates that there may well have been unlawful discrimination, but further information should, if possible, be obtained before the Agency determines whether James Mackie and Sons Limited have in fact discriminated against Mr. Johnston contrary to Section 16 read with the other relevant provisions of the Act.

THE STATUTORY PROVISIONS

2. Section 16(1) defines "discrimination" to mean -

(a) discrimination on the ground of religious belief or political opinion; or

(b) discrimination by way of victimisation;

and "discriminate" shall be construed accordingly. Section 16(2) provides that for the purposes of the Act a person discriminates against another person on the ground of religious belief or political opinion if, on either of those grounds, he treats that other person less favourably in any circumstances than he treats or would treat any other person in those circumstances. Section 17 makes it unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland, where that person is employed by him, (inter alia) by subjecting him to any detriment. By virtue of Section 35(1), anything done by a person in the course of his employment is treated as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval. These provisions are

similar to the equivalent provisions in the Sex Discrimination Act 1975 and the Race Relations Act 1976, so that judicial decisions interpreting those provisions are relevant when interpreting the provisions of the Act. The Act also contains some special provisions which are not contained in the Sex Discrimination and Race Relations Acts. For example, by virtue of Section 57(2), any reference in the Act to a person's religious belief or political opinion includes references to his supposed religious belief or political opinion and to the absence or supposed absence of any, or any particular, religious belief or political opinion. Although there is no express provision to this effect in the British statutes, in my view, it is included in the Act purely for the avoidance of doubt. Section 57(3) of the Act is obviously tailored to the context of Northern Ireland. It provides that any reference in the Act to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with Northern Irish affairs (including the use of violence for the purpose of putting the public or any section of the public in fear). The Act contains no equivalent to Section 1(1)(b) of the British statutes, so as to include "indirect discrimination" (or in United States parlance "disparate impact") within the definition of unlawful discrimination. And Section 57(4) contains a special provision in relation to the concept of "equality of opportunity", as defined by Section 3(1) of the Act, whereby any reference to failure to afford equality of opportunity

includes a reference to unintentional failure. These differences between the Act and the British statutes make it theoretically possible to argue that the definition of discrimination in Section 16(1) should be interpreted in a different and narrower way than the definition of "direct discrimination" ("disparate treatment" in United States parlance) in Section 1(1)(a) of the British statutes. However, in my view, Section 16(1)(a) of the Act should be interpreted in the same way as the similarly worded Section 1(1)(a) of the British statutes. Nor, in my view, should any significance be given to the absence in the Act of a provision similar to Section 3(4) of the Race Relations Act and Section 5(3) of the Sex Discrimination Act, which provide, for the avoidance of doubt, that a comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. Accordingly, I consider that judicial decisions interpreting the meaning of less favourable treatment and detriment in the context of the British statutes are relevant and useful in construing these concepts in the context of the Act.

THE FACTS

2. According to the helpful background note by the Chairman of the Agency which accompanies my Instructions, it has long been the tradition in industrial establishments with mainly Protestant labour forces for the workshops to be decorated by the workers with flags and emblems, particularly around the

celebration of the Battle of the Boyne, on 12th July, as well as on other special occasions. The decorations which take the form of flags and emblems are doubtless designed to symbolise the Unionist cause and the "Protestant Ascendancy" - Union Jacks, many varieties of Ulster flags, red, white and blue bunting, pictures of the Royal family, or of King William of Orange, and other Orange emblems. It is normal for there to be at least one Orange Arch over a corridor in each workshop, made of painted cardboard and decorated with Orange emblems. It is also fairly normal for flags to be put out on all machines, whether or not the machines are occupied by Catholic workers.

3. Obviously, the display of these flags and emblems is provocative to many Catholic workers in Northern Ireland. I am instructed that most new companies which have started in Northern Ireland during the last 20 years have, on advice from local management and employers' organisations, included as part of their rules a strict prohibition on all flags and emblems and political symbols at the workplace. Although the reason usually given in the rule book is that for reasons of safety such a display constitutes a fire hazard, the real reason is plainly to avoid causing provocation and distress to Catholics and to promote harmonious relations at the workplace, irrespective of religious belief or political opinion. However, in many long-established companies, the practice of having these displays continues, and few employers dare to challenge the practice against the wishes

of a predominantly Protestant workforce. There have been a number of recent incidents in labour forces with regard to such displays.

4. In the past, Catholic workers, when in a very small minority, have been prepared to put up with such displays, even though they are very deeply resented. However, the Chairman's view is that this tolerance is coming to an end. Because of the changed political climate, Catholics are likely to take more and more exception to such displays, which they view, with considerable justification, as an assertion of territoriality, triumphalism, or "Croppies Lie Down". The more that firms with predominantly Protestant labour forces come to employ Catholic workers, the more likely it is that there will be conflict surrounding these political/religious displays.

5. It is important to describe this background, because it makes no sense to attempt to answer the difficult and important legal questions raised by my Instructions in the abstract. What matters is the context in which displays of this nature take place. The display of the Union Jack at a workplace in England might be an innocent and unusual manifestation of patriotism, or it might be an emblem of the National Front, and a hostile symbol to black or Jewish workers. In Northern Ireland, the display of the Union Jack, especially in combination with Orange insignia, conveys a clear message to the workers of both communities, no doubt

deeply resented by many Catholics. The fact that the Guide to Manpower Policy and Practice recommends management and trade unions to discourage the display of flags and emblems likely to give offence or cause apprehension amongst employees illustrates the practical importance of the problem and the adverse consequences of permitting such displays.

6. James Mackie & Sons is a long established family firm in the textile industry. It employs about 1,000 workers. The firm is situated inside, but close to the edge of, Catholic West Belfast. Its labour force has traditionally been overwhelmingly Protestant, with few Catholics, particularly at skilled and Staff levels. The "Troubles" have meant that its situation is more overwhelmingly Catholic than ever before. The proportion of Catholics in its labour force have increased slightly, but it would seem reasonable to infer from the firm's history, the composition of its labour force, and its geographical location, that the recruitment of Catholics is not viewed with enthusiasm by some and perhaps most Protestant workers there.

7. On 1st July 1985, Mr. Timothy Johnston complained to the Agency about what had happened that day. He had worked in Mackies for six months. He was one of only two Catholics working in the Spindle Shop where he reckoned that between 30 and 40 Protestants were employed. Those are the figures in the report of the meeting with him, but according to his statement in the Case Report he was one of four (not two)

0 9 8

Catholics and there were between 20 and 30 (not 30 and 40) Protestants. He claimed that he had suffered minor harassments during his six months' employment - some men refusing to speak to him and others making snide remarks - but nothing he had not expected or had not been able to deal with. The fact that he had not complained about these minor harassments (assuming that they occurred) is in his favour, because it indicates that he is a reasonable person, not hypersensitive or ready to manufacture incidents. However, it would be desirable to obtain chapter and verse about these incidents. They are relevant not only to his reasonableness but also to the context of his working conditions.

8. Mr. Johnston started work at Mackies as a Machinist, and on his first day he was introduced to the Foreman who asked him his address. I assume that the reason for this question was because the Foreman wanted to find out or confirm whether Mr. Johnston was a Catholic. Again, this is a point which should be pursued, if possible, even at this late stage, because it is relevant to the context of his working conditions. At first he was put on bench work which is very hard work and, after two months, he had not seen a machine. It may well be that this was because he is a Catholic. It is once more part of the factual background. Even though he did not complain at the time of religious discrimination in this respect, it is a matter which should, if possible, be pursued. It was not included specifically in the statement which was sent to Mackie, but it is a relevant matter.

Apparently he complained to the management that he was a Machinist without a machine, and there was some improvement in that he was given spasms of machine work. However, he had not operated a machine during the five weeks before 1st July. Once more there seems reason to suspect that this may have been associated with the fact that he is a Catholic, and the failure to provide him with work at a machine would seem to merit some investigation.

9. According to the report of his meeting with the Agency, which is fuller than the version which was sent to Mackie as his statement, on 1st July Mr. Johnston went home at lunch time and, on his return to work, found the entire workshop covered with bunting, Union Jacks, and the Red Hand of Ulster flags. He felt all eyes on him as he entered, and one man on a ladder stopped dead to look at him. He felt very frightened and intimidated and went to the foreman to complain. The foreman said "This is out of my hands. I'll have to contact Personnel." According to my Instructions, Mr. Johnston has stated that Union Jacks were placed upon his machine and that an Orange Arch was erected in the corridor. This statement is not contained in the report of his initial meeting with the Agency, nor in the complaint which was sent to Mackie. If it is accurate it is obviously important in showing that one of his fellow workers placed flags on his machine in his absence.

10. According to the letter of 11th September 1985 sent to the Agency on Mackie's behalf, although bunting, Ulster flags, and small Union Jacks belonging to employees were erected in the workshop on 1st July, it is a gross exaggeration to state that the "entire Workshop was covered". It is admitted that Mr. Johnston expressed his apprehension to the Personnel Manager (but not to the Foreman. The work upon which he had been engaged was completed after lunchtime on 1st July, and this meant his automatic transfer from the department to the "Pool". "The Pool" is the term applied to a group of employees who have no work in their department and who are sent as required to other departments where there is a labour shortage. This raises a question as to whether Mr. Johnston was placed in the Pool for reasons connected with his religion (further evidence of possible religious discrimination) or with his having made a complaint to the Foreman and Personnel Manager (evidence of victimisation). Since this does not seem to have been pursued, I will not comment further upon it except to observe that on the face of it there appears to be cause for further inquiry. Another aspect of the facts which is unclear to me is the significance of the Foreman's statement that he had not allowed the men to put anything up until the horn went at stopping time. I assume that this means that he made them wait until the lunch-break. However, the fact that their conduct was controlled by the Foreman (whether during working time or the lunch-break) is helpful in showing that the men

and the Foreman were acting in the course of their employment.

11. Mackie have stated that they fail to comprehend how the Agency can classify the erection of the Union flag or the Ulster flag as "sectarian" when those flags are the recognised emblems of the United Kingdom and the Province of Ulster respectively. At the meeting with the Conciliation Officer, Mr. Stewart of the Engineering Employers' Federation disagreed that the flying of the Ulster Flag or the Union Jack could be described as sectarian. Given the background and context to which I have referred, this seems to be a fanciful view. Moreover, it is inconsistent with the fact that, according to Mr. Stewart, if the Personnel Manager or the Foreman had instructed the men to remove the flags and bunting this would, in his view, "certainly have heightened feelings within the workforce." Mr. Stewart also pointed out the difficulties in dealing with a situation in a Company with such a long history as Mackies (presumably a reference to a long history of employing a predominantly Protestant workforce with traditional hostile attitudes towards the employment of Catholics) and he stated that in the case of a new Company being set up, the Federation would recommend the inclusion of a clause in the rule book to cover such matters (presumably tacit recognition that the practice is undesirable or requires special handling).

IS MACKIES' CONDUCT CAPABLE OF CONSTITUTING LESS FAVOURABLE TREATMENT ?

12. I have already observed that the men's conduct in putting out the flags and bunting with the Foreman's consent was done in the course of their employment by Mackies. Furthermore, Mackies clearly condoned the conduct by not requiring the display to be removed after Mr. Johnston had complained. Accordingly, if what was done constituted unlawful discrimination, Section 35(1) applies and Mackies are liable vicariously as well as directly for discriminating against an employee contrary to Section 17(b) read with the other relevant provisions of the Act. The first important legal question which then arises is whether such conduct constitutes less favourable treatment on the ground of religious belief or political opinion, within the meaning of Section 16(1)(a) and (2). I note that Mr. Johnston claims that he received this treatment because of his religious beliefs as a Catholic. However, in view of the difficulty in distinguishing between religious belief and political opinion in the context of the display of sectarian flags and emblems, and bearing in mind the fact that Section 57(2) expressly includes supposed religious beliefs or political opinions, it would be preferable to treat the complaint as covering both grounds. Section 16(2) requires that the alleged discriminator should treat the victim less favourably in any circumstances than he treats or would treat any other person in those circumstances. I do not see any difficulty about

this requirement in the present case. The comparison is between Mr. Johnston as a Catholic (and, as I would argue, with supposed Republican political opinions) and a Protestant worker with Loyalist political opinions. It would presumably not be disputed by Mackie (though there is no admission to this effect) that Protestant workers in this workshop are not subjected to displays of Catholic/Republican flags and emblems and to the other harassment of which Mr. Johnston has complained. If it were argued that there is no Protestant analogue in that his treatment included a significant element of a religious or political character to which a Protestant would not be vulnerable, then I agree with my Instructions that the recent decision by the Court of Session in Strathclyde Regional Council v Porcelli (1986) IRLR 134 answers this objection. In that case it was held that Section 1(1)(a) of the Sex Discrimination Act 1975 is concerned with the "treatment" and not with the motive or objective of the person responsible for it. If the form of the unfavourable treatment or any material part of it which is meted out includes a significant element of a sexual character to which a man would not be vulnerable, the treatment is on the grounds of the woman's sex within the meaning of Section 1(1)(a). In the Porcelli case, the treatment of the respondent which was of the nature of sexual harassment was adopted because she was a woman. The weapon used was based upon the sex of the victim. Since this form of treatment would not have been used against an equally disliked man, the treatment of the respondent was different in a material

respect from that which would have been inflicted upon a male colleague. However, the respondent had been treated less favourably on the ground of her sex than a comparable man. In my view, this principle applies to the interpretation of Section 16(2) of the Act.

13. It follows that Mackies' alleged conduct (by themselves, and by the Foreman and fellow workers) is capable of constituting less favourable treatment. However, I emphasise that it would be prudent to include as part of the discriminatory conduct not only the display of flags and emblems but also the surrounding circumstances to which I have referred, both in general in Northern Ireland and in particular at Mackies, which evidence the adverse nature of such a display and the less favourable working conditions of Mr. Johnston in comparison with his Protestant fellow workers.

IS MACKIE'S TREATMENT OF MR. JOHNSTON CAPABLE OF CONSTITUTING DETRIMENT ?

14. It is necessary to establish not only less favourable treatment, within Section 16(2), but also detriment, within Section 17(b)(iv). In De Souza v the Automobile Association (1986) IRLR 103, the Court of Appeal held that the appellant had not been subjected to a "detriment" by her employers, within the meaning of Section 4(2)(c) of the Race Relations Act 1976, as a result of overhearing a manager say to another

manager, in relation to her, to get his typing done by "the wog". A racial insult is not enough, by itself, to be a "detriment", even if the insult causes the employee distress. Before an employee can be said to have been subjected to a "detriment", it must be found that by reason of the acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. The appellant failed because she could not properly be said to have been "treated" less favourably by the manager whose racial insult she had overheard. It would have been decided differently if she had been insulted by him to her face. The case is useful as approving the approach of Brightman LJ in Ministry of Defence v Jeremiah (1980) ICR 13 (CA), where he stated (at page 30) that

"in deciding whether or not there is a detriment to the who complains, the court must in my opinion take all the circumstances into account.... The question before the tribunal in my view would be whether a reasonable male worker would or might take the view that there was detriment. I say "would or might", because tastes differ."

Brandon LJ stated (at page 26) that he did not regard the expression "subjecting ... to any other detriment" as meaning anything more than "putting under a disadvantage".

15. In my view, the treatment of Mr. Johnston by Mackie is plainly capable of constituting such a "detriment". One must, as Brightman LJ observed take all the circumstances into account. If the circumstances are as I have described, then it seems clear that a reasonable Catholic worker in his position would or might take the view that there was a detriment. Mr. Johnston was put under a real disadvantage by reason of the distress and apprehension which he felt, especially in the context of the series of minor acts of harassment to which he claims to have been subjected before 1st July 1985. The fact that another Catholic worker (and perhaps more than one) did not complain is relevant but it is not conclusive. As Brightman LJ again observed "tastes differ". Furthermore, the absence of complaint by other Catholics may well be explained by factors other than the absence of any feeling of detriment (notably fear of the consequences of complaining). It would be sensible to interview other Catholic workers to obtain their evidence about detriment, but, as I have stated, even were they to regard the display in the workshop as inoffensive and not detrimental, that would not be conclusive.

16. I should add for completeness that if Mr. Johnston has also been discriminated against by being placed or kept in the Pool, without being allocated work at a machine, then that aspect of his case falls to be considered under Section 17(b)(ii) rather than Section 17(b)(iv).