

SUMMARY

## **2013/25 How the Kelly case ended in an anti-climax (IR)**

***&lt;p&gt;The Irish High Court dismissed Patrick Kelly&rsquo;s demand to be provided with information on the successful (female) candidates for the vocational training course he was denied. The court held that the right of the course applicants to confidentiality outweighed Kelly&rsquo;s right to disclosure.&lt;/p&gt;***

### **Summary**

The Irish High Court dismissed Patrick Kelly's demand to be provided with information on the successful (female) candidates for the vocational training course he was denied. The court held that the right of the course applicants to confidentiality outweighed Kelly's right to disclosure.

### **Facts**

On 21 July 2011 the ECJ delivered its judgment in the Kelly case (C- 104/10, summarised in EELC 2011-3).

Readers may recall that Patrick Kelly was a teacher in Dublin. He applied to University College Dublin (UCD) for admission to a course for a Master's degree in social science. His application was unsuccessful. Several female applicants did get admitted to the course. Kelly brought proceedings before the Equality Tribunal against UCD. He claimed that he had been discriminated on the basis of his gender, arguing that he was better qualified than the least qualified female applicant to be offered a place on the course.

While he was proceeding before the Equality Tribunal, Kelly applied to the Circuit Court, seeking from UCD copies of the applications of the other candidates as well as their 'scoring

sheets'. UCD offered to provide Kelly with part but not all of the information he had requested.<sup>1</sup> Kelly's application eventually led to the Irish High Court asking the ECJ questions on the interpretation of Directives 76/207 (equal treatment of men and women in employment), 97/80 (burden of proof) and 2002/73 (amending Directive 76/207).

Briefly stated, the ECJ replied that said directives do not entitle an applicant for vocational training, who believes his application was unsuccessful for discriminatory reasons, to information held by the course provider on the qualifications of the other applicants. The ECJ added two things:

a) "Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing [facts from which it may be presumed that there has been discrimination], could risk compromising the achievement of the objective pursued by [Directive 97/80] and thus depriving Article 4(1) thereof in particular of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings."

b) "Where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality".

## **Judgment**

Following the ECJ's ruling, the Irish High Court was called on to apply that ruling to the facts of the case. It did so in a judgment dated 9 May 2012, of which the most relevant part is paragraph 9, which reads:

"It is quite clear that each finding of the European Court of Justice is unfavourable to the applicant's case. The one exception is the Court's finding that it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing facts (from which it may be presumed that there has been direct or indirect discrimination) could risk compromising the achievement of the objective pursued by Article 4(1) of Council Directive 97/80 of its effectiveness. However, it is for the national court to determine this matter in accordance with national law. The answer to the first question states that in assessing this, the national court must take into account the rules governing confidentiality. The High Court judge, McKechnie J, made a provisional finding that, pursuant to national law, UCD did not have to disclose the documents in question in unredacted form. In deciding this he took into consideration the right of confidentiality of the other candidates. This provisional finding was subject to the ruling of the European Court of Justice. I am satisfied that there is nothing in the ruling of the European Court of Justice that could give grounds for changing the provisional decision of

McKechnie J. His decision is exactly in accordance with it. The right of the course applicants to confidentiality outweighs the plaintiff's right to disclosure of the documents in unredacted form. I do not therefore propose to interfere with the provisional decision of McKechnie J. It is thus no longer provisional but has become his final decision in this matter."

### **Commentary**

It is clear from Directive 97/80 that it is for the person who considers him or herself to have been wronged because the principle of equal treatment has not been applied to him or her, who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.

The judgment of the Court of Justice clearly outlines that it is a matter for the national court to determine whether refusal of disclosure may frustrate the objective of the Directive. However, in considering whether disclosure should be made, the national court must take into account principles of confidentiality and the protection of personal data.

So in effect, this case confirms that in situations where an unsuccessful applicant for a course claims that he or she has been the victim of discrimination, there is no express right under European law to disclosure of unredacted information relating to successful applicants.

### **Footnote**

1. The judgment reported here suggests that Kelly was offered information on the other candidates "in redacted form".

**Subject:** Gender discrimination

**Parties:** Patrick Kelly – v – National University of Ireland

**Court:** High Court of Ireland (Hedigan J.)

**Date:** 9 May 2012

**Case number:** 2012 [IEHC] 169

**Publication:** [www.bailii.org/ie/cases/IEHC/2012/H169.html](http://www.bailii.org/ie/cases/IEHC/2012/H169.html)

**Creator:** The High Court

**Verdict at:** 2012-05-09

**Case number:** 2012 [IEHC] 169