Neutral Citation [2015] IEHC 351

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 314 JR]

BETWEEN

CHANELLE MULLALLY, ALAN POWER, NOEL BURNS, RICHARD DOYLE AND THE PSCHIATRIC NURSES ASSOCIATION (IRISH FIRE AND EMERGENCY SERVICES ASSOCATION)

APPLICANTS

AND

THE LABOUR COURT

RESPONDENT

AND WATERFORD COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 9th day of June, 2015.

Introduction

1. In these proceedings, the applicants seek the following reliefs:

> 1. An order of *certiorari* of the decision of the respondent dated the 14th of March, 2014.
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> 2. A declaration by way of judicial review that the respondent failed to comply with the provisions of s. 20(1) of the Industrial Relations Act 1969 and s. 68 of the Industrial Relations Act 1946, by failing to properly or at all investigate the trade dispute and/or comply with its obligations thereunder.
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> 3. An order remitting the complaint made by the applicants to be determined by a different division of the respondent.
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> 4. A declaration that the manner in which the respondent purported to investigate the applicants' complaints and conducted the oral hearing failed to comply with constitutional rights to fair procedures and/or under the European Convention on Human Rights, and in particular Articles 6 and 11 thereof (and as a consequence if necessary a declaration that the respondent failed to comply with its obligations under the ECHR Act, 2003.)
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> 5. A declaration by way of judicial review that the respondent's decision of the 14th of March, 2014 was *ultra vires*, invalid and/or void.

Background

2. The first four applicants are retained fire fighters employed by the notice party ("the Council"). The Council has some 530 employees of which 76 are retained fire fighters. Of that 76, 61, or 80%, are members of the fourth applicant ("the PNA") and of its branch, the Irish Fire and Emergency Service Association ("IFESA"). The Council currently recognises five different unions representing its employees for negotiation purposes but does not recognise the PNA or IFESA. The PNA is a registered trade union with a negotiation licence, but is not a member of the Irish Congress of Trade Unions.

3. On the 22nd of May, 2013, the general secretary of the PNA wrote to the county manager of the Council requesting recognition of IFESA for negotiation purposes. The Council responded by letter of the 11th of June, 2013 stating that as IFESA is not recognised nationally for negotiation purposes, the Council could not give recognition.

4. On the 27th of September, 2013, the applicants formally requested the respondent ("the Labour Court") to investigate the trade dispute pursuant to its powers under s. 20(1) of the Industrial Relations Act 1969.

Relevant Legislation

5. Section 20 (1) of the Industrial Relations Act 1969 provides as follows:

> "20.—(1) Where the workers concerned in a trade dispute or their trade union or trade unions request or requests [the Labour Court] to investigate the dispute and undertake or undertakes before the investigation to accept the recommendation of the Court under section 68 of the [Industrial Relations Act 1946] in relation thereto then, notwithstanding anything contained in the Principal Act or in this Act, the Court shall investigate the dispute and shall make a recommendation under the said section 68 in relation thereto."

6. Section 68 (1) of the Industrial Relations Act 1946, as substituted by s. 19 of the Industrial Relations Act 1969, provides as follows:

> "68.—(1) The Court, having investigated a trade dispute, may make a recommendation setting forth its opinion on the merits of the dispute and the terms on which it should be settled."

The Hearing Before the Labour Court

7. The hearing took place on the 4th of March, 2014. The applicants were represented by solicitors and senior counsel. The Council

was represented by Mr. Don Culliton, acting Assistant Chief Executive of the Local Government Management Agency. Both sides made oral and written submissions.

8. In its written submission, the Council referred to the judgment of the High Court in *Abbot and Whelan v. ITGWU* (Unreported, High Court, 2nd December, 1980) to the effect that there is no constitutional right to be represented by a union in the conduct of negotiations with an employer who has no duty to negotiate with any particular citizen or body of citizens. In the grounding affidavit of John Hughes, board member and treasurer of the PNA, Mr. Hughes avers that he attended at the hearing and the Labour Court's Chairman indicated at the outset that this case was irrelevant to the issues before the respondent. He further avers that the Council in its oral submissions suggested that recognition should not be recommended because the other five unions already recognised by the Council would take industrial action if the PNA was recognised.

9. In his replying affidavit, Mr. Culliton avers that he has attended well in excess of 150 Labour Court cases and the hearing in this matter was not unusual and was fairly conducted. He disputes the suggestion by Mr. Hughes that the Court's Chairman said the submissions of the applicants in relation to the *Abbot* case were irrelevant. He says that the *Abbot* case was discussed before the respondent and therefore was relevant. He avers that the Court did indicate its familiarity with the case law but disputes the suggestion that the parties were told that they should not open case law.

10. Mr. Culliton says that he submitted to the Court that if recognition was awarded, it would likely result in an unstable industrial relations environment due to the competing nature and number of unions who would have recognition rights. He avers that it is correct to say that a major part of the Council's submission was that recognition of the PNA is not desirable having regard to the solid and effective industrial relations mechanisms already in place in the public sector.

The Recommendation
11. The Labour Court issued its recommendation on the 14th of March, 2014 in a formal three page document. This document summarises the background and the party's respective arguments in concise form. The respondent's recommendation was as follows:

> "RECOMMENDATION:
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> Unlike all other cases in which the Court has recommended that a trade union be recognised for industrial relations purposes, the employer in this case has in place well established arrangements for the conduct of collective bargaining with authorised trade unions. The applicants in this case are, in effect, a breakaway group who are seeking to establish negotiating rights with the employer through the convenience of another trade union that has no recognised involvement in negotiations with local authorities.
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> While the applicants have an acknowledged right to be members of whatever organisation they choose, the exercise of that right cannot, in the circumstances of the present case, imply a concomitant obligation on the employer to negotiate with their chosen organisation. In the Court's opinion, recognition of this group would have a highly undesirable destabilising effect on the established negotiating arrangements currently in place. It would also greatly impair the orderly conduct of industrial relations within the local authority sector. On that account, it would be irresponsible for the City (*sic*) Council to accede to the applicants' request for recognition.
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> For these reasons the Court does not recommend concession of the worker's claim."

The Applicants' Case
12. Mr. McGarry SC on behalf of the applicants submitted that the conclusions arrived at by the Labour Court were unsupported by any evidence but rather appeared to derive from submissions made by the Council. The Court's conclusion was flawed in that it took irrelevant matters into account and failed to take relevant matters into account. The Court further failed to give any, or adequate, reasons for its decision and insofar as reasons were given, these were irrational and/or unreasonable in themselves.

13. He contended that the Court had not complied with its duty under s. 68(1) to have regard to the respective merits of each side. It appeared that the Court had only considered the effect of recognition on the Council and given no consideration to the merits of the applicants' case at all. The *Abbot* case appears to have found its way into the decision despite the fact that the Court had said at the outset it was not relevant. The decision appears to have been based on taking account of the threat of industrial action by other unions, which was wholly unsupported by evidence but rather based purely on the Council's submissions. The conclusion that it would be irresponsible for the Council to recognise the PNA was clearly *ultra vires*.

14. With regard to the issue of justiciability, he submitted that because the applicants had agreed to accept the Court's recommendation, it had a legal consequence for them. He referred to *Byrne v. Commissioner of An Garda Siochana* [1993] I.L.R.M. 1 and *Ryanair v. Flynn* [2000] 3 I.R. 240. On the issue of taking irrelevant matters into account, he referred to *R. v. Liverpool University, ex parte Caesar-Gordon* [1991] 1 Q.B. 124, *State (Cussen) v. Brennan* [1981] I.R. 181, *McCormack v. Garda Siochana Complaints Board* [1997] 2 I.R. 489, *P. & F. Sharpe Ltd v. Dublin City and County Manager* [1989] I.R. 701 and *Listowel UDC v. McDonagh* [1968] I.R. 312.

15. Further, on the issue of having regard to immaterial and unsupported allegations, the applicants relied on *The State (O'Reilly) v. Windell* (Unreported, High Court, 4th February, 1986), *The State (Hussey) v. Irish Land Commission* [1983] I.L.R.M. 407 and *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642. In reply, on the issue of justiciability, he referred to *Grange v. Commission for Public Service Appointments* [2014] IEHC 303 and *Dellway Investments Ltd v. NAMA* [2011] 4 I.R. 1.

The Council's Case
16. As commonly occurs in applications of this nature, the Labour Court did not participate in the proceedings with the application being opposed by the Council. Mr. Ward SC on behalf of the Council submitted that in essence, the recommendation of the Labour Court was not justiciable as it did not constitute a determination of any rights or obligations and accordingly judicial review did not lie at the suit of the applicants. The Court possesses two statutory jurisdictions, one of which involves determination of rights and the other which does not. He contended that the Court, in references under s. 20(1) of the Industrial Relations Act 1969, was providing an industrial forum for the mediation of disputes which had no legal consequences. In that regard, he placed particular reliance upon *The State (Stephen's Green Club) v. Labour Court* [1961] I.R. 85. In support of the same argument, he also relied on *McElroy v. Mortished* (Unreported, High Court, 17th June, 1949) and *MacDonncha v. Minister for Education and Skills* [2013] IEHC 266. On the same issue, reliance was also placed upon *Ryanair, Flood v. An Garda Siochana Complaints Board* [1997] 3 I.R. 321 and *The State (Gleeson) v. Minister for Defence* [1976] I.R. 280. The respondents also referred to *Abbot and Whelan, Dublin Colleges ASA v. City of*

Dublin VEC (Unreported, High Court, Hamilton J., 31st July, 1981), *Ryanair v. The Labour Court* [2007] 4 I.R. 199 and *Demir and Baykara v. Turkey* (2008) ECHR 1345.

17. The Council further submitted that the respondent is an expert body and as such, the court should be slow to interfere with decisions taken within its own area of expertise, which should be afforded curial deference. Reliance in that regard was placed on *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, *Henry Denny and Sons (Ireland) Ltd v. The Minister for Social Welfare* [1998] 1 I.R. 34, *Faulkner v. The Minister for Industry and Commerce* [1997] E.L.R. 107 and *ACT Shipping (PTE) Ltd. v. Minister for the Marine* [1995] 3 I.R. 406.

18. The Council also argued that apart from the foregoing, the applicants had a full and fair hearing before the Labour Court where they were fully represented, had the opportunity to adduce evidence, and make whatever submissions they wished and these were considered in a reserved and written recommendation of the Court. In that regard, there was nothing irrational about the Court's recommendation and no breach of fair procedures had occurred.

Discussion

19. The nature of the jurisdiction of the Labour Court to issue a recommendation when consulted regarding a trade dispute was considered by Hogan J. in *MacDonncha*. The two applicants were Chief Executive Officers of Vocational Educational Committees and as such were in receipt of allowances known as transport liaison officers allowance ("TLOA"). These allowances were paid to CEOs for administering the operation of the school transport system. The Government decided in 2010 to transfer the administration of the school transport system to the transport providers and abolish the TLOA. This constituted a significant pay reduction for CEOs and gave rise to a trade dispute between the CEOs and the Government which was referred to the Labour Relations Commission and ultimately to the Labour Court pursuant to s. 26(1) of the Industrial Relations Act 1990, which gave the Court a jurisdiction to investigate the trade dispute similar to that contained in s. 20(1) of the Industrial Relations Act 1969.

20. Further to this referral, the Labour Court issued a recommendation in which it stated that the elimination of the TLOA was justified in the circumstances and further recommended that the offer of the Department of Education to compensate the CEOs be accepted. One of the issues considered by the High Court was whether this recommendation created a *res judicata* precluding the applicants from applying to the Court for relief in relation to the withdrawal of the TLOA.

21. In considering this issue, Hogan J. said (at p. 13):

> "35. Here it may also be noted that the Labour Court assumed jurisdiction under s. 26(1) of the Industrial Relations Act 1990 (albeit in the context of the dispute resolution procedures envisaged by the [Croke Park Agreement]) and that it merely issued a recommendation. The whole purpose of the Labour Court's functions in matters of this nature is to advance a solution to industrial relations disputes. Although the Court's functions are sometimes clothed in the language of law (e.g., the very use of the term "Court") and while it employs legal principles when adjudicating on matters relating to legal rights (such as, for example, cases involving the rights of part-time workers or employees on fixed term contracts), in the present context it is really acting as a form of industrial relations mediator. When adjudicating on matters relating to the CPA, therefore, the Labour Court is accordingly not deciding legal rights or employing exclusively legal concepts to resolve such disputes. On the contrary, when issuing recommendations in this context the Court will often – perfectly properly – adopt a purely pragmatic and practical approach to such questions. Its role in such cases is to resolve disputes and to maintain industrial peace and the criteria which underpin its recommendations are not strictly legal ones.
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> 36. In summary, therefore, the recommendation of the Labour Court at most amounts to a binding resolution of any such dispute for industrial relations purposes. While the decision to terminate the TLOA was one which was (probably) taken outside of the strict confines of the CPA, it cannot be said that the use of the CPA dispute resolution procedures (such as, in this instance, the reference to the Labour Court) rendered the outcome binding or final for legal purposes. This is not only because the Court's jurisdiction under s. 26(1) of the Industrial Relations Act 1990 is not invested with that quality of legal finality, but also because for all the reasons set out in *Holland* the CPA itself does not create – and was not intended to create – legally justiciable rights.
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> 37. It follows, therefore, that the Labour Court recommendation does not create *res judicata* nor does it preclude the applicants from applying to this Court for declarations as to the legality of the withdrawal of the TLOA allowance…"

22. It seems to me that Hogan J.'s characterisation of the legal qualities of a recommendation of the respondent issued pursuant to the investigation of a trade dispute is entirely consistent with the views expressed over half a century earlier by Walsh J. in *Stephen's Green Club*. The applicant was a private members' club which sought an order of prohibition against the Labour Court prohibiting it from investigating an alleged trade dispute concerning pay and conditions at the Club. Section 67 of the 1946 Act, since amended by s. 18 of the 1969 Act, empowered the Labour Court to investigate a trade dispute. Following such investigation, the court was empowered by s. 68, as here, to issue a recommendation. The Irish Transport and General Workers Union, on behalf of employees of the Club, had requested the Labour Court to investigate the trade dispute arising. The Club contended that it did not carry on any trade or industry and therefore no trade dispute could be deemed to exist. Accordingly, the Club sought prohibition on the ground that the Labour Court had no jurisdiction to investigate the matter. The Labour Court submitted, *inter alia*, that prohibition did not lie against it when discharging its duties under s. 67 although such an order might lie where the Labour Court's jurisdiction under ss. 71 and 72 of the 1946 Act were an issue, the distinction being that in the latter case, the Labour Court had power to make binding awards.

23. Walsh J., in dismissing the application, held that this submission was well founded in the following terms (at p. 94):

> "The next question to consider is whether the remedy of prohibition lies in respect of the powers exercisable by the Labour Court by virtue of s. 67 of the Act. Sect. 68 provides that the Court, having investigated a trade dispute, shall make a recommendation setting forth its opinion on the merits of the dispute and the terms on which, in the public interest, and with a view to promoting industrial peace, it should be settled, due regard being had to the fairness of the said terms to the parties concerned, and the prospects of the said terms being acceptable to them. The Act does not provide any machinery for enforcing the recommendation or of translating the recommendation into findings binding upon the parties and it does not provide for the taking of any consequential action by a superior authority. It is submitted on behalf of the Labour Court that prohibition does not lie in this case although it is conceded that it would lie in respect of cases which come within the provisions of s. 71 of the Industrial Relations Act, 1946, in that, under s. 71, the Court when dealing with trade disputes has power to make an award which shall be in force for a period of three months commencing on the date of the award, and an employer who, otherwise than with the consent of the Court, employs or agrees to

employ during that period a worker on conditions inconsistent with those of the award shall be guilty of an offence under the section and be liable on summary conviction to a fine not exceeding £100.

There is a considerable body of case law on the question of to what bodies prohibition may issue. It is well established in this country that prohibition may issue to any body which has the duty to act judicially and which on consideration of facts and circumstances has power by its determination within its jurisdiction to impose liability or to affect rights. By this is meant that liability is imposed, or the right affected, by the determination only, and not by the fact determined, so that the liability will exist or the right will be affected although the determination be wrong in law or in fact: see Palles C.B. in *Reg. (Wexford Co. Council) v. Local Government Board* [1902] 2 I. R. 349, at p. 373. It may be that, in the appropriate case prohibition would also be awarded against a tribunal which though having the duty to act judicially has no power to make a binding determination but whose recommendation or report forms part of a statutory scheme in which explicit provision is made for the findings to acquire finality upon the taking of consequential action by a superior authority: see *Rex v. Electricity Commissioners* [1924] 1 K. B. 171. The last point, however, does not arise in the present case because the Industrial Relations Act, 1946, contains no provision to enable any superior authority to translate a recommendation of the Labour Court made under s. 67 of the Act into an award binding on the parties or to permit of any sanction in the event of non-acceptance of the recommendation by any of the parties. In its investigation of disputes under s. 67 of the Act, the Labour Court has many of the general characteristics and powers of a Court of law. For example, it may summon witnesses to attend before it and examine them on oath and may require any such witness to produce to the Court any document in his power or control. The Act provides that it is an offence, punishable on summary conviction by a fine not exceeding £10, for any person who has been summoned as a witness to make default in attending or, having attended, to refuse to take the oath or to produce a document or to answer questions which the Court may require him to answer. In these matters the Labour Court closely resembles a Court of law, yet these powers in themselves are not sufficient to erect it, while exercising the jurisdiction conferred by s. 67, into a tribunal against which prohibition may be awarded, because within this jurisdiction the Labour Court, though having the duty to act judicially, cannot by its recommendation impose liabilities or affect rights. That does not mean, however, that a citizen has no redress in the event of the Labour Court attempting to exceed its statutory powers by invoking s. 67 of the Act to investigate disputes which are outside its jurisdiction. In that event the appropriate remedy would be an injunction to restrain such investigation or any purported exercise of the power to summon witnesses to give evidence or to produce documents as part of such investigation. This remedy is not open to the prosecutor in the present matter because I have already held that the investigation complained of is not *ultra vires* the Labour Court…

In the result the cause shown will be allowed and the conditional order discharged."

24. The applicants argued that the law has moved on since *Stephen's Green Club* was decided and indeed since the decision in *Ryanair*. The court should now have regard not so much to whether strictly legal rights are affected by the decision in issue but whether one could say that the decision had no effect and no benefit could be derived from it. It was argued that as a minimum, the jurisdiction of the Labour Court to issue a recommendation potentially creates a benefit in favour of the successful party even if only a moral impetus. I accept that recent jurisprudence indicates that whether legal rights and obligations are affected by the impugned decision is not necessarily decisive. Thus, in *Maguire v. Ardagh* [2002] 1 I.R. 385, Hardiman J. was unconvinced by the argument that an Oireachtais committee enquiry into a fatal shooting by members of An Garda Siochana was "legally sterile" and therefore immune from judicial review. He described the phrase as being extremely unattractive. A finding by a parliamentary committee that a named person had unlawfully killed another might have no legal consequences but could hardly be said to have no effect. Similar views were expressed by Quirke J. in *De Róiste v. Judge Advocate General* [2005] 3 I.R. 494 and Hedigan J. in *De Burca v. Wicklow County Manager* [2009] IEHC 54. Those cases, however, concerned decisions or determinations that had a significant impact on the applicant's constitutionally protected right to his or her good name. Similar considerations do not arise in this case.

Conclusion

25. It seems to me that no distinction in principle can be drawn between the investigation undertaken and subsequent recommendation issued by the respondent in this case and that undertaken in *Stephen's Green Club*. Accordingly in my view, I am bound to follow it. I do not think it could be said that any of the subsequent decisions referred to by the applicants either expressly or by implication have overruled the judgment of Walsh J. or suggested that it was wrongly decided.

26. In exercising its jurisdiction under s. 20 (1), it is clear that the Labour Court is not finally determining any issues of law or fact. This is amply illustrated by the fact that if the recommendation in this case had in fact been that the PNA be recognised by the Council, that would not bind the Council. Indeed, the applicants are only bound because they undertook in advance of the investigation to accept the recommendation as a prerequisite to the Labour Court embarking on an investigation under the section. Such an investigation is not an adjudicative process and creates no *res judicata*. Rather, it is in the nature of an industrial relations forum which is designed to facilitate the mediation of trade disputes and offer an opinion as to how such a dispute may be resolved. Its recommendation has no strictly legal effect but rather relies upon the moral authority of the expert statutory body from which it emanates. It does not give rise to justiciable rights such as would permit the applicants to seek judicial review.

27. Accordingly, I will dismiss this application.