Neutral Citation Number: [2008] IEHC 40

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 767 J.R.]

BETWEEN

PATRICK McKERNAN

APPLICANT

AND
THE EMPLOYMENT APPEALS TRIBUNAL

RESPONDENT

AND
CORK CITY COUNCIL

NOTICE PARTY

Judgment of Mr. Justice Kevin Feeney delivered the 5th day of February, 2008

1.1 From the 18th May, 1979 the applicant held the permanent office of rent collector to Cork City Council. He was appointed and held his office under Article 32(2) of the Local Government (Officers) Regulations 1943 made under Part 2 of the Local Government Act 1941. It was a permanent position and under the legislation the applicant held his post until he should die, resign or be removed from office. Part 2 of the 1941 Act was repealed by the Local Government Act 2001. Section 158(b) of that Act permitted a local authority, such as the notice party herein, to alter the terms and conditions of employment of employees such as the applicant.

1.2 Following the said statutory change Cork City Council sought to introduce changes in the terms and conditions of employment of the rent collectors employed by the Council and in particular sought to end door to door rent collection. All the active rent collectors, other than the claimant in this case, were members of the IMPACT trade union. That trade union represented the rent collectors in discussions with the City Council resulting in a memorandum of understanding being agreed as of February, 2002. The applicant became aware that the City Council proposal to abolish the position of rent collector and entered into correspondence with the City Council. In July of 2002 the claimant's solicitor wrote to Cork City Council expressing the view that the applicant's terms of employment were covered by the 1943 regulations. On the 22nd August, 2002 Cork City Council responded indicating that it was not its intention to remove the claimant from office nor was any such proposal being made but the letter went on to point out that the 1943 regulations had been replaced by the terms of the 2001 Act and that the City Council would not deal with the claimant individually as negotiations had taken place with the trade union. The claimant was not a member of the trade union and was not part of the negotiation process. The claimant was informed by the City Council that door to door rent collections were to cease as and from the 1st October, 2002. At the end of September, 2002 the claimant was asked to return the sum of money which he had available to him as a "float" and was informed that he should report to the senior officer in Housing on the 2nd October, 2002 for his new assignment. A dispute arose as to the proposed redeployment of the applicant by the notice party and in December, 2002 the applicant claimed that he was forced to accept an early retirement package on a without prejudice basis.

1.3 The applicant commenced a claim for unfair dismissal before the Employment Appeals Tribunal, it being the claimant's case that himself and two other rent collectors, who were in dispute with Cork City Council, "were effectively victimised".

He claimed that he was left with no alternative but to accept on a without prejudice basis a retirement package at the relatively early age of fifty seven as a result of which the applicant had suffered and continued to suffer ongoing loss.

1.4 The applicant brought his claim to the Employment Appeals Tribunal under the Minimum Notice and Terms of Employment Acts 1973 to 2001 and under the Redundancy Payments Acts of 1967 to 2003 and under the Unfair Dismissal Acts 1977 to 2001. The applicant contended that he was unfairly dismissed from his position with the City Council. The claim was heard on oral evidence over a period of five days, from the 25th April, 2005 to the 13th October, 2005. Both the parties were represented by solicitor and counsel and detailed written submissions were placed before the three member division of the Tribunal. On the 26th May, 2006 the Employment Appeals Tribunal issued its decision wherein it determined that the Tribunal was satisfied that on the evidence that the claimant terminated his own employment and consequently such termination could not be construed as an unfair dismissal and that therefore the Tribunal had no alternative but to dismiss the claimant's appeal under the Unfair Dismissal Acts 1977 to 2001. The Tribunal also concluded that the claimant's claim in respect of redundancy and minimum notice failed in view of the financial package which the applicant had already received from the City Council. The decision of the Employment Appeals Tribunal was a detailed eight page written decision signed by the chairman and dated the 26th May, 2006.

2.1 The applicant commenced judicial review proceedings by order of this Court on the 3rd July, 2006, and was granted leave to issue a notice of motion seeking judicial relief. The principal relief sought is an order of *certiorari* quashing the decision of the Employment Appeals Tribunal dated the 26th May, 2006, together with a consequential order pursuant to order 84, Rule 26(4) remitting the matter back to a different division of the Employment Appeals Tribunal with a direction to consider the applicant's claim in accordance with law and in accordance with the findings of this Honourable Court. The grounds upon which the reliefs are sought are set forth in paragraph E of the statement of grounds dated the 27th June, 2006 (incorrectly referred to as dated the 29th June, 2006 in the order of the High Court of the 3rd July, 2006) signed by the solicitor for the applicant. The grounds are therein set out in three numbered paragraphs.

2.2 The first ground can be summarised in that it is claimed that the decision of the Tribunal was bad on its face, in that it made no attempt to outline the evidence presented by four witnesses called by Cork City Council in defence of the applicant's claim. It is contended that as a result of such omission that the applicant was precluded from effectively considering what evidence the Tribunal had relied upon in arriving at its determination and further that the applicant is unable to determine what findings of fact had been relied upon by the Tribunal in making its determination and that the determination reached by the Tribunal was not supported by the summary of evidence outlined in its written decision. The second ground relied on is that the decision of the Tribunal was in breach of natural justice, in that one of the principal reasons supporting the determination is reliance on the doctrine of frustration and neither of the parties to the hearing before the Tribunal were asked to consider that issue by way of oral or legal submissions. The third ground, which is inter-related to ground two, was that it was claimed that the Tribunal took into account irrelevant or extraneous matters and misdirected itself in law and fact and that its decision was perverse in arriving at its determination, based upon the mistaken assumption that the notice party, that is Cork City Council, was under a legal obligation to phase out rent collection as a result of the introduction of the Local Government Act 2001, when in fact the provisions of that Act merely allowed and permitted a local authority to alter the terms and conditions of employment of employees, such as the applicant, without the safeguards that had been provided for under the 1943 regulations.

3.1 It is necessary to consider the written decision of the Tribunal to put in context each of the three grounds. The first ground relies on a quotation from the paragraph headed determination, wherein it is stated:

> "The evidence … presented to this Tribunal has been fairly set out above".

and goes on to further state:

> "The facts surrounding the issues and disputes between the parties and an account of the evidences of the various witnesses are set out above in great detail and need not be repeated here".

The applicant herein complains that whilst the written decision sets out in some detail the evidence presented by the applicant and other witnesses called by him, that there was no attempt within the written decision to outline the evidence presented by the four witnesses called by Cork City Council. It is that fact which gives rise to the claim made by the applicant that the decision is bad on its face. The complaint is also made that, as a result of such failure, that the applicant was precluded from making a proper consideration of what evidence had been relied on and further that the applicant was unable to determine what findings of fact had been made by the Tribunal in arriving at its decision. Prior to the Tribunal arriving at its decision, it had received and considered detailed written submissions from both sides. Those submissions commented in some considerable detail on the evidence adduced before the Tribunal and highlighted certain aspects of the evidence. An overall reading of the written decision of the Tribunal makes it clear that there were a number of clear findings identified by the Tribunal in its decision. Whilst the Tribunal expressly refers to particular items of evidence given by individuals, it also provides clear statements as to the determinations made by it. The Tribunal selected particular items of evidence from particular witnesses to include in its report but also made a number of express findings, namely:

> (a) "The claimant's position of 'rent collector' was abolished and thus the actual job itself disappeared but such a situation had been signalled for quite some time and it did not come as a surprise to him (the applicant) or others.
>
> (b) In the instant case the claimant was offered a generic grade 5 position which he was not satisfied with. Having heard the evidence the Tribunal is satisfied that having taken this position there would not have been an appreciable diminution in earnings nor terms and conditions. It was clear from the evidence that the claimant wished to choose his own type of work. What is also clear from the evidence is that the claimant wanted to "tailor make" or "self design" his own position with the Corporation. Moreover, the claimant indicated to the respondent (Cork City Council) that he would accept the financial 'package' he was entitled to if he could be sweetened by 'six months' wages.
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> (c) In the instant case it is clear that the new position being offered was the best available and was one which the respondent (Cork City Council) was satisfied that the claimant could perform with some on the job training.
>
> (d) The claimant in the instant matter unreasonably refused the offer of the new position. At worst the claimant had no option but to accept the offer as the former position had become outmoded and was no longer a function in the employment of the respondent's Council. The claimant could have continued to work in the new position 'under protest' and issued proceedings for breach of contract if he felt that the employer was not doing all he could to facilitate him. The Tribunal went on to state on its final page, as follows:
>
> (e) ..Although the claimant's position with the respondent (Cork City Council) as 'rent collector' had come to an end, his contract of employment continued and as the respondent was obliged to do, pursuant to s. 15 of the Redundancy Act, 1967, a new position was offered which was declined by the claimant. The claimant in the instant case clearly and unequivalently informed the respondent that he did not wish to resume his duties in the manner as offered and proposed and in the terms of the actual contract of employment as intended by the respondent. It was the claimant who brought his own contract of employment 'to an end'."

The above findings led the Tribunal to conclude that it was satisfied on the evidence that the claimant terminated his own employment and consequently such termination could not be construed as an unfair dismissal. Having considered the written decision of the Tribunal as a whole, it is manifest that the Tribunal made clear and concise findings of fact based upon its interpretation of the evidence. A failure to expressly refer to the evidence of particular witnesses in no way diminishes from those findings. The written decision identifies the factual determinations made by the Tribunal. This Court is satisfied that there is no obligation on the Tribunal to make express reference to which particular portion of the evidence was relied upon in coming to such determinations. The presence of clear and concise determinations allowed and permitted the applicant to be aware of the factual grounds and findings which underpinned the Tribunal's decision. Those provided a clear basis for the determination of the Tribunal and provided sufficient basis to enable the applicant to consider whether or not to exercise his right to pursue his right to a full appeal in the Circuit Court.

In arriving at its decision, the Tribunal had also confirmed that it had received and considered the detailed written submissions on behalf of the parties, which it identified as being very helpful and of assistance, and that the Tribunal had read and considered all that material.

3.2 The applicant relies on one authority in support of its claim relating to the failure to recite the evidence from Cork City Council witnesses. That is a judgment of the Supreme Court in *Dempsey v. Tobin* (Unreported Judgment of the 28th January, 2005). On page 3 of that judgment McGuinness J. stated:

> "It is clear from decisions of this Court and from the law in general that a trial Judge, when deciding between two witnesses, should set out his reasons for making a choice between the evidence of the two witnesses. He should set out the evidence he has heard and his reasons for preferring the evidence of one witness to another."

That quotation relates to a situation in a trial where there is conflicting evidence. In particular it relates to conflicting expert medical evidence and identifies the desirability of a trial Judge, when deciding between the evidence of two such witnesses, that the judgment should set out the reasons for making a choice between the evidence of the two witnesses. That authority is not relevant to the facts of this case as the applicant has failed to identify any finding which resulted from the Tribunal deciding between conflicting evidence from two witnesses. The applicant has failed to identify any instance where it is suggested that the Tribunal chose between the evidence of two witnesses. Indeed it is to be noted that in the written submissions put in to this Court on behalf of the applicant, that it was acknowledged at paragraph 35 thereof that if the only complaint was a complaint relating to the failure to recite the evidence of the Cork City Council witnesses that an application for *certiorari* would not lie. That acknowledgement recognises the reality of the factual position in that there was clear and concise findings of fact which were more than sufficient to enable the applicant to consider whether or not to appeal to the Circuit Court. Insofar as it is contended that the decision of the

Tribunal is perverse or is not supported by the summary of evidence, outlined in its decision, the Court is satisfied that it cannot be said that the Tribunal's decision was perverse in the sense of being unreasonable. At the very high point from the applicant's point of view, even if there was a want of evidence or if the Tribunal drew wrong conclusions from the facts, or took into account extraneous matters, it erred within jurisdiction and its decision should not be quashed. See *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 462 and *Memorex World Trade Corporation v. The Employment Appeals Tribunal* [1990] 2 I.R. 184. This Court is satisfied that on the first of the three grounds in respect of which relief is sought that the decision made by the Tribunal is not bad on its face.

4.1 The second ground relied upon by the applicant is that there was a breach of natural justice in that one of the principal reasons supporting the determination of the Tribunal was the Tribunal's reliance on the doctrine of frustration and it is claimed that neither the applicant nor Cork City Council were asked to consider such issue. The portion of the written decision relied upon in support of this ground is to be found in the fifth page of the written decision of the 26th May, 2006. Therein it is stated as follows:

> "In the instant case the doctrine of supervening legal impossibility has rendered the position (the applicant's job as rent collector) nugatory by virtue of the legislative enactment in consequence whereof the Corporation no longer has such a position of rent collector within its organisation. For the avoidance of doubt it was 'position' and not the contract of employment which was frustrated by statute. This doctrine is distinctly different from the commonly accepted term 'frustration' which results from a certain incapacity, for example illness, custodial sentences and such like."

The applicant's case is that it is apparent from the above statement that the Tribunal proceeded on a mistaken assumption that Cork City Council was obliged as a result of the provisions of the 2001 Act to phase out rent collecting. The correct factual position is that the effect of the provisions of the Local Government Act 2001 was that Cork City Council was able to proceed with its implementation of the phasing out of rent collecting without its rent collectors being able to rely upon the safeguards provided for in the Local Government Regulations 1943. After the passing of the 2001 Act, rent collectors who had previously been office holders became employees and under the provisions of s. 158 of the 2001 Act, the local authority was empowered to determine the remuneration and conditions of employment of its employees and was given the entitlement from time to time to alter the remuneration and conditions of employment of such employees. There was no obligation on Cork City Council, as a result of the provisions of the 2001 Act to phase out door to door rent collecting. In the light of the true Statutory position the statement that the position of rent collector was frustrated by statute is incorrect. It was argued on behalf of the applicant that it is manifest from the written decision of the Tribunal that it had proceeded on a mistaken assumption that the notice party was under a legal obligation under the 2001 Act to phase out rent collecting. It is therefore claimed by the applicant that the Tribunal failed to consider a crucial aspect of the applicant's claim, namely that the notice party, Cork City Council, unilaterally changed the phasing out of rent collecting without proper notice being given and without adequate consultation with the relevant parties.

4.2 That error is the basis for grounds 2 and 3 of the applicant's claim for judicial review. Not only is it claimed that the decision was in breach of natural justice in that one of the principal reasons supporting the determination was reliance on the doctrine of frustration which neither the applicant nor the notice party had addressed but also that the Tribunal took into account irrelevant or extraneous matters and misdirected itself in law in proceeding on the mistaken assumption that Cork City Council was under a legal obligation to phase out rent collection as a result of the 2001 Act.

4.3 The notice party does not dispute that there is the factual error identified above. The respondent does not formally make that concession. However what is submitted on behalf of the notice party is that any factual error is immaterial. That submission is based upon the contention that it was accepted by all parties at the hearing before the Tribunal that the position of rent collector was to be abolished and that the only issue between the parties was the time table for the phasing out of the position and more significantly the alternative positions available to the applicant. It was contended that whether or not the abolition of the position of door to door rent collector gave rise to the contract between the parties being frustrated, or whether the position was abolished by virtue of the doctrine of supervening legal impossibility was immaterial in view of the fact that the real issue between the parties was whether the applicant had been offered suitable alternative positions and whether his refusal to engage with Cork City Council in relation to alternative positions or reassignment was reasonable. The claim of immateriality or irrelevance was claimed by the notice party to be supported by the fact that at no stage during the course of the five day hearing was it contended by the applicant that the position of door to door rent collector could continue to exist. It was therefore claimed that whether the position was abolished by virtue of legislation (which it was not) or by virtue of the doctrine of frustration or otherwise was irrelevant. A careful reading of the written submissions submitted on behalf of the applicant to the Tribunal makes it clear that all parties were proceeding on the basis that there was to be a change over to a new system. Indeed it was expressly stated in paragraph 11 of the written submissions of the applicant to the Tribunal as follows:

> "It should be noted that the evidence of the claimant (the applicant herein) is that he was resigned to the new system coming into place but at the very least he expected that he would be redeployed to an appropriate position with adequate training and adequate consultation."

The submissions went on to state in paragraph 21, as follows:

> "It is respectfully submitted that even if the Tribunal were to find that the alternative positions offered to the claimant were suitable they cannot leave the matter at that but must consider the reasonableness of the claimant's refusal to accept same."

It is also apparent from the summary contained in the submissions that whilst complaints were made in relation to a lack of information and the changing of the phasing out of the rent collecting without proper notice or consultation, that at all times it was common case that the position of door to door rent collector was to be abolished. It is expressly conceded on behalf of Cork City Council that the 2001 Act did not in any way lead to the abolition of the position of door to door rent collector. However what was put in issue by the notice party is that the error in relation to the basis for the abolition of the position of door to door rent collector did not materially impact upon any of the findings of fact made by the Tribunal or on its conclusions.

4.4 The Chairman of the Tribunal in his affidavit deals with this matter in his replying affidavit. He acknowledges therein that neither party was asked to consider the issue of the doctrine of frustration nor the doctrine of supervening legal impossibility by way of either oral or legal submissions. In paragraph 10 of the affidavit the Chairman of the Tribunal submits that whether the Tribunal was correct in law in relation to the consequences of the Local Government Act of 2001 or not is of no relevance in that it was accepted by both parties that the claimants role as rent collector had ceased and this deponent goes on to aver that if the Tribunal was incorrect in determining the basis for such termination, it is of no relevance as the central issue in the proceedings before the Tribunal was the adequacy or otherwise of the alternative position which had been offered to the applicant by the notice party. The deponent also relies on the fact that the applicant's submission to the Tribunal acknowledged that he was resigned to the new system coming into

place as stated in paragraph 11 of the written submissions.

4.5 This Court must consider the issue as to whether the error of law identified above and contained within the decision of the Tribunal is such as would result in the decision of the Tribunal being quashed by order of *certiorari*. In this instance the record of the Tribunal is its decision of the 26th May, 2006. In particular the Court has regard to the approach identified by Keane J. in *Farrell v. The Attorney General* [1998] 1 I.L.R.M. 364 where he stated (at page 377):

> "Even where there is no error as to jurisdiction, no fraud on the part of the coroner and no error on the face of the record, there may have been some frailty in the course of the proceedings, such as an error in law or a want of natural justice and fair procedures, which would entitle the High Court to set aside the verdict in whole or in part."

That statement of the legal entitlement of the High Court is applied to a coroner but would be equally applicable to the Employment Appeals Tribunal. This Court must consider whether the error in law, identified above, is such as would entitle the Court to set aside the Tribunal's decision.

4.6 Assistance as to the circumstances which would give rise to such entitlement were identified by Clarke J. in the decision of *Cork County Council v. Shackleton* (Unreported, High Court, 19th July, 2007). That case was heard together with another case and both had, at their heart, difficult questions concerning the interpretation of the social and affordable housing requirements imposed by s. 96 of the Planning and Development Act, 2000. Clarke J. identified that in both sets of proceedings the proper interpretation of s. 96 was crucial and ultimately concluded that the interpretation, under review in the *Shackleton* case made by the arbitrator was wrong and was based upon an incorrect interpretation of the crucial legislative section. Clarke J. went on to consider whether in those circumstances the decision of the arbitrator required to be quashed. Ultimately Clarke J. concluded at paragraph 9.7 on page 49 of the judgment, as follows:

> "It seems to me to follow that, where there has been a significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong in law, any such decision should, *prima facie*, be quashed."

The approach identified by Clarke J. is of assistance to this Court in that it highlights the necessity to have regard to whether or not the error identified is significant relating to a material matter leading to the decision. That approach followed and applied the earlier decision of the Supreme Court in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 which identified that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. The Supreme Court identified that if a decision did, then the decision maker should be held to have acted *ultra vires*. It would follow that if the exercise of a statutory discretion is grounded on an erroneous view of the law it should not normally be allowed to stand. If it was so grounded it would fail the test of being reasonable and rational.

4.7 This Court must therefore give consideration as to whether or not the decision of the Tribunal contained a significant error of a material matter leading to the decision. The Court must consider whether or not the decision of the Tribunal was grounded on an erroneous view of the law and whether the decision turned on an incorrect and wrong determination of a legal issue.

4.8 The necessity of a link between the incorrect understanding of the law and a decision, thereby making it clearly relevant, is further illustrated in the case of *Murphy v. Minister for Social Welfare* (1987) I.R. 259 which was a judicial review case seeking an order of *certiorari* quashing the decisions of a deciding officer and an appeals officer respectively under the Social Welfare (Consolidation) Act of 1981 and in addition claiming a declaration that the applicant's employment was insurable under the Act. In dealing with the applicant's claim that his employment was insurable under the Act Blayney J. held (at page 301):

> "But it is clear that the Appeals officer did not do this. His decision was based on a single ground, namely that the applicant was not employed under a contract of service. In the result it seems to me that the Appeals officer did not understand correctly the law which he had to consider in coming to his decision, and it follows that his decision is vulnerable on the ground of illegality as understood in the sense explained by Lord Diplock in his judgment in Council of *Civil Service Unions v. Minister for the Civil Service* (1985) A.C. 374 at 410. That approach clearly identifies the willingness of the High Court to quash decisions where there was an incorrect interpretation of the law which had to be considered and indeed in that case underpinned the single ground of the decision of the Appeals Officer.".

4.9 A careful reading of the decision of the Tribunal, in its entirety, leads this Court to the conclusion that the determination of the Tribunal could not be said to be grounded on an erroneous view of the law nor could it be said that the decision turned on an incorrect determination of a legal issue. Nor was the incorrect statement of the law made in relation to a matter that had to be considered. The error, which has been identified, does not on the facts of this case relate to a material matter and cannot be said to have led to the decision. It follows that the issue raised in relation to natural justice does not on the facts of this case arise. Natural justice clearly requires that a party be given an opportunity to be heard as to facts in issue, remedies and to relevant law. A reading of the decision of the Tribunal confirms that whilst there was an error as to the basis upon which there was no longer the position of door to door rent collector within Cork City Council, the common position of the parties was that the applicant accepted that the position was being abolished. The dispute between the parties was in relation to the time period over which the rent collection was to be phased out and what alternative positions or alternative retirement package would be available. In those circumstances the consequences of the Local Government Act 2001 were not directly relevant. It was common case that the claimant's functions and duties were being abolished and that was not the fact in issue nor was the legal basis for such abolishment a relevant or material matter. It did not have to be considered. The decision of the Tribunal recognised that the applicant's contract of employment continued and a decision to find against the applicant was based upon the fact that the applicant declined the new position offered.

4.10 This Court is satisfied that the error in relation to legal interpretation identified in the decision of the Tribunal is not a significant error insofar as it did not relate to a material matter and could not be said to have led to the decision. The decision was grounded upon the common case that the applicant's position was to be abolished and in those circumstances the legal framework of such abolition could not be said to have grounded the Tribunal's decision nor was the error in interpretation of a material statutory provision leading to the decision.

5.1 This Court is therefore satisfied that the impugned decision of the Tribunal is not in breach of natural justice. In this case it was contended in the second ground upon which judicial review was sought that one of the principal reasons supporting the determination was the error identified in the application. This Court is satisfied that a true analysis of the decision does not lead to the conclusion that the error could be identified as a principal reason supporting the determination. The error can not be identified as significant in that it did not relate to a material matter and could not be said to have led to the decision.

The Court is therefore satisfied that the decision cannot be categorised as perverse nor could it be said that there was a failure of natural justice.

5.2 In the light of the determination by this Court that the applicants have failed to establish any grounds to establish entitlement to the reliefs sought, the Court will allow the cause shown and refuse the relief sought.

5.3 In the light of the above determination the issues raised in relation to discretionary factors and alternative remedy do not arise. This Court expresses no view in relation to the issue as to whether or not any alternative remedy continues to exist but does note that the respondent, Cork City Council, has conceded that it will take no issue with an appeal being lodged out of time and the issue as to whether or not an extension of time for pursuing such an appeal can be granted is a matter for another Court.