Neutral Citation: [2015] IEHC 566

THE HIGH COURT

[2014 No. 188MCA]

IN THE MATTER OF A STATUTORY APPEAL PURSUANT TO SECTION 140 OF THE PENSIONS ACT, 1990, AS AMENDED, AND

IN THE MATTER OF AN APPEAL FROM A FINDING OF THE PENSIONS OMBUDSMAN

BETWEEN/

MICHAEL DURKIN

APPELLANT

AND

THE PENSIONS OMBUDSMAN

AND

THE TRUSTEES OF THE SIAC CONSTRUCTION LIMITED NON-CONTRIBUTORY PENSION AND DEATH BENEFITS PLAN

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 9th day of September, 2015

The appellant seeks an order pursuant to s.140 of the Pensions Act 1990, as amended, annulling the determination of the Pensions Ombudsman of the 6th May, 2014 in respect of certain aspects of his pension entitlements.

BACKGROUND

Mr. Durkin was employed by SIAC Construction from November, 1990 to 20th January, 2012. He was made redundant on 20th January, 2012. Mr. Durkin was a member of the 'Non-Contributory Pension and Death Benefits Plan' known as the SIAC Construction Limited Non-Contributory Pension and Death Benefits Plan which was established by a document entitled 'Second Definitive Deed and Rules', dated 29th April, 1999.

The issues in this case arise from a 'Deed of Amendment', dated 31st March, 2008, whereby SIAC sought to limit its exposure to pension liabilities by capping the salary level at which pensions were to be assessed. The document states that:–

> *"…the Employer may, upon notification in writing to the Trustees, and upon receipt by the Trustees of the prior written consent of the Member, impose a limit on the Member's annual rate of basic salary as at the renewal Date in any year and on the annual average amount of bonus received by the Member from the Employer over the preceding 3 calendar year period (i.e. ending on the 31st day of December in each such year) or over such shorter period as they have been received."*

On the 3rd December, 2008, the appellant received a memorandum from Mr. Hank Fogarty, then managing director of SIAC, regarding salaries for 2008. That letter set out the pensionable salary as being €105,000 per annum. The same letter also set out what was being provided as consideration for this concession, among which was a profit share/LTI (Long Term Incentive) scheme. A summary of the proposed new arrangement was circulated and received by the appellant on the same day. Discussions had been ongoing prior to that date about that arrangement, but the appellant avers that the proposals had not been fully developed.

Mr Durkin had two primary issues with the new pension arrangement. The first was when the accrual of pension benefits would begin, whether it was the first year of his employment or from the fifth year. The second issue was the nature of the LTI, the long term incentive scheme under which he was being offered a benefit in return for capping his pension.

On the 16th December, 2008, Mr. Durkin replied to Mr. Fogarty. Referring to previous correspondence of 3rd and 4th December, he stated that:–

> *"I confirm my acceptance of the offer contained within the two letters subject to the following as discussed:*
>
> *1. 'Pensionable Service' shall be defined as 'the full period from commencement of employment with SIAC Construction Ltd. to date of leaving service'.*
>
> *2. That the LTI Bonus Scheme is fully clarified and is in accordance with undertakings given to date."*

The appellant contends that this communication represents a conditional acceptance of the offer, which conditions have not been satisfied.

By further letter dated 25th February, 2009 and signed by Mr. Durkin on 2nd April, 2009, he states that:–

> *"I wish to confirm my agreement that, notwithstanding the statement to the contrary in the Rules attaching to the SIAC Pension Plan, any bonus or other payment over and above my normal salary entitlement either received by me or paid on my behalf during 2008 will be deemed to include a pension contribution and consequently will not be used in the calculation of either Final Salary, Pensionable Salary, or deferred Benefit or in the calculation of any other benefit under the Pension Plan."*

Having been made redundant in January, 2012, Mr. Durkin was provided with a document entitled 'Illustration of Options on Leaving

Service' which states that his 'Final Pensionable Salary' was €87,036.60. Correspondence ensued between the appellant's legal advisors and AON Hewitt, who issued the 'Illustration of Options on Leaving Service'. By letter to Ms. Carmel Higgins of AON Hewitt dated 4th May, 2012, the appellant's legal advisers state that the appellant's basic salary was €114,500 at the relevant time and, having regard to bonuses, his final pensionable salary was €161,242.60.

Subsequently, on 26th April, 2012, Mr. Durkin issued a double-faceted complaint pursuant to the 'Internal Dispute Resolution Procedure' ('IDRP') to the Trustees of the SIAC Construction Ltd. Non-Contributory Pension and Death Benefits Plan ('the Trustees'). The first aspect of Mr. Durkin's complaint is that he believes the 'Illustration of Options on Leaving Service' document to be incorrect. He states that 'pensionable salary' is defined in the Deed of Amendment of 31st March, 2008 and requires the consent of a member to any reduction in pensionable salary and this consent must be provided in writing to the Trustees. He states that his pensionable salary has not been calculated in accordance with the scheme rules and should be calculated in the basis of the applicable preceding three calendar years, namely, 2009, 2010, and 2011.

The second aspect of the complaint is that even if consent was provided, the preservation requirements of the Pensions Act, 1990 (as amended), set out under Part III of the Act and in the Second Schedule to the Act, require that any reduction in a members preserved pension entitlements can only accrue uniformly from the effective date of change over the member's future working lifetime. Therefore, any benefit reduction does not take effect immediately unless there has been a benefit change under s.50 of the Pensions Act 1990, which it is submitted is not the case.

The Trustees dismissed Mr. Durkin's complaint in a determination issued on 25th July, 2013. It was found that Mr. Durkin had consented to the salary cap on two occasions, namely in the 16th December, 2008 memorandum to Mr. Fogarty, and also in a letter dated 2nd April, 2009.

In relation to Mr. Durkin's contention that the effect of the new agreement should be 'phased-in', the trustees, having regard to legal advice received, held that *"a cap on pensionable salary implemented in this manner is not a reduction in long service benefit taking account of the provisions of this Scheme. In these circumstances 'phasing in' does not apply to this cap on pensionable salary."*

Subsequently, on 16th September, 2013 the appellant issued a complaint to the Pensions Ombudsman based on the same two complaints as raised in the IDRP.

DETERMINATION OF THE PENSIONS OMBUDSMAN
The impugned determination of the Pensions Ombudsman dismissing the complaint of Mr. Durkin issued on the 6th May, 2014. The Pensions Ombudsman was satisfied on the basis of the information and documentation available to him, which he found to be sufficient, that:-

- it was clear that the company wished to limit its liabilities under the Pension Plan and proposed that basic salary would be capped, and that bonuses would no longer be pensionable. This was done by the Deed of Amendment of 31st March, 2008;

- this plan was part of a range of measures, and was discussed between the Company and senior staff as one of several changes to employment and remuneration terms;

- bonuses were not specifically excluded in the Deed of Amendment but allowed the Company discretion to limit the amount of basic salary and bonuses to be used in determining Pensionable Salary at a later date, subject to notifying the trustees and obtaining the written consent of the members;

- the company, and not the Trustee, sought Mr. Durkin's written consent, and that consent was sought for a range of employment/remuneration terms, and not only pension related matters;

- the qualifications in Mr. Durkin's letter of the 16th December, 2008, did not render it an invalid consent:

o The request that his pensionable service be defined as service with the Company, which was in accordance with the plan rules and was the basis applied to him under the plan;

o The second was a request for clarification of the proposed responsibility of the proposed LTI scheme, which was outside the scope of the pension plan and the responsibility of the trustee.

- the "process left a lot to be desired", but the memorandum from Mr. Durkin of 16th December, 2008 did constitute consent under Clause 31 of the Pension Plan;

- there was no obligation under the plan rules to obtain member consent at each renewal date after 2008;

- there was discussion and explanation of the proposed revision of Mr. Durkin's remuneration package from 2008 which included an amendment to his pension provision, and that he understood and consented to this;

- while the processes of obtaining consent was not handled in accordance with best practice, that was due to insufficient or unclear communication from the company to AON and the Trustee rather than any negligence or fraudulent intent;

- in agreement with the legal advice given to the trustees, and the position taken by AON, the introduction of the 2008 amendment under the pension plan did not contravene the preservation requirements under the Pension Act 1990, and therefore did not need to be phased in.

The Pensions Ombudsman held, in accordance with the view of the trustees, that the LTI issue was an employment issue and not a pension related one, and therefore it was out of his jurisdiction to consider.

The Pensions Ombudsman held the following documents to be evidence of consent:-

- memorandum of 16th December, 2008 seeking clarification of LTI Bonus scheme and the definition "pensionable service"

- Benefit statements reflecting new arrangements issued, to which there was no objection.

- A letter dated 2nd April, 2009 which did not refer to Mr. Durkin' previous consent and contained no reference to any conditions to

which his consent was subject.

- Accepting the validity of the revised arrangement when making his case to the Rights Commissioner.

Mr. Durkin then exercised his right of appeal to the High Court pursuant to s.140 of the Pensions Act 1990.

SUBMISSIONS OF THE APPELLANT
Counsel for the appellants submits that the jurisdiction of the High Court in appeals against determinations of the Pensions Ombudsman was recently set out by this Court in *Willis v The Pensions Ombudsman* [2013] IEHC 352 where it was held that:–

> *"A high threshold must be crossed by any appellant from a decision of a financial/pensions ombudsman. The Court has no difficulty in accepting that the relevant test for a statutory appeal against a decision of the Pensions Ombudsman should be the same as that provided for in respect of the Financial Services Ombudsman as laid down by Finnegan P. in Ulster Bank v. Financial Services Ombudsman [2006] I.E.H.C. 323 where it was stated at p. 9:-*
>
> *'To succeed on this appeal the plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the court will have regard to the degree of expertise and specialist knowledge of the defendant. The deferential standard is that applied by Keane C.J. in Orange v. The Director of Telecommunications Regulation & Anor. and not that in The State (Keegan) v. Stardust Compensation Tribunal.'*
>
> *The appeal is a limited one and not a full de novo hearing."*

The Court went on to state:–

> *"I accept, as I must, that in this context the Pensions Ombudsman could not, regardless of the merits of the case, legitimately make a decision which the law did not permit. But subject only to that consideration he enjoys a significant discretion to allow and achieve a fair outcome in relation to a complaint."*

In *Manor Castle Ltd. v Commission for Aviation Regulation* [2008] IEHC 386 Charleton J. held that in a statutory appeal an appellant was required to establish, as a matter of probability, that the decision reached was vitiated by a serious and significant error or a series of such errors which required an assessment of whether the decision was unreasonable. Charleton J. went on to state:–

> *"It seems to me, therefore, that before a decision can be overturned on appeal, the relevant statutory provision must be considered in the context of the Act as a whole, following which a number of considerations must be addressed:*
>
> *(1) The court must examine the nature of the jurisdiction; is the court exercising power in relation to an issue with which it has experience, for example the concept of planning permission and exempted development, or is it dealing with an arcane discipline which is devolved solely to an administrative tribunal which has expertise in that regard?*
>
> *(2) If the court is empowered to impose conditions, for example because a successful appeal will automatically cause a licence to issue, it will be necessary for the court to consider what conditions, if any, ought to be imposed.*
>
> *(3) If the body whose decision is being appealed is a specialist body, with expertise in policy or a discipline such as accountancy, this must be taken into account.*
>
> *(4) The court must establish the intention of the legislature in creating the appeals mechanism, in particular the intended relevance of the original decision to the appeal proceedings; should the original decision be considered in detail or should the process operate akin to a de novo appeal from the Circuit Court to the High Court.*
>
> *(5) The court must consider any powers which it has to gather information or, just as important, the absence of any power to gather information as this indicates that the original decision making body is what is being reviewed, not that the High Court is entering the process itself…"*

In relation to the first aspect of the appellant's complaint, namely the issue as to whether or not valid consent was provided, it is submitted that the Deed of Amendment of 2008 makes clear that such consent had to be received in writing by the Trustees. It is submitted that the finding of the Pensions Ombudsman that the requisite consent was present in circumstances where it was not received in writing by the Trustees is an error in fact and law.

Counsel refers the Court to the second edition of Irish Pensions Law and Practice wherein the authors state:–

> *"…there are special rules which apply to insurance policies. One of the most important is the obligation of uberrimae fides or utmost good faith. The trustees of a pension scheme are under the same duty of uberrimae fides with regard to proposing for insurance cover as any other person seeking insurance…*
>
> *…must disclose…all information (generally referred to as 'material facts') which a…[member]… would consider relevant in assessing…*
>
> *Failure to disclose material facts makes the policy voidable…"*

Counsel submits the only two documents which might be termed a 'consent' are the 18th December, 2008 memorandum and the letter of 2nd April, 2009. However, it is submitted that the 18th December memo cannot be viewed in a vacuum as it refers to previous correspondence with Mr. Fogarty. In any event, the 'consent' offered is subject to two conditions and it is denied that either of these is merely a 'request for clarification' found by the Ombudsman. The letter of 2nd April clearly relates to the year 2008 only and was sent in circumstances where an email had been received from Mr. Fogarty on the same date with regard to the promise of an LTI scheme which never came to fruition.

It is submitted that insofar as the Pensions Ombudsman avers that the 2008 'consent' raised a query in relation the LTI Bonus Scheme and that this did not relate to pension entitlements so therefore did not affect the consent, the appellant submits that this is an error in law.

The appellant denies that there was acquiescence as contended for by the respondent. The consents provided were referable back to other documents and the 2009 consent related to the year 2008 only. Furthermore, Mr. Durkin had no legal advice at the time the documents were created and proffered to him by the employer as agent for the Trustees.

In relation to the 'phasing-in' requirement, the second aspect of the appellant's complaint, it is submitted that the Pensions Ombudsman avers that he relied upon the logic as enunciated in the determination of the Trustees that what happened with Mr. Durkin and his 'pensionable salary' did not trigger the legal requirement under the 1990 Act (as amended) to phase in any alteration or reduction in 'long service benefit'.

The appellant submits that it is difficult to understand the respondent's finding that the salary cap which was introduced did not trigger the phasing in requirement. The purpose of the legislation is to protect an individual's accrued pension from unjust attack by the employer or the pension. It is submitted that the Act makes clear that pension entitlement with regard to accrued pension cannot be reduced immediately without a formal section 50 process and cannot be reduced with immediate effect.

The appellant contends that neither the internal dispute resolution determination nor the final determination of the respondent explain how a reduction in 'long service benefit' does not trigger phasing in. The Pensions Ombudsman states that AON corresponded with him and stated as follows with regard to the alleged requirement for phasing in:–

> *"Phasing in is only triggered where there is a change in the obligation under a scheme. The obligation under the Plan Rules was not altered as a result of the Deed of Amendment of 2008. The Pensionable Salary Cap is dependent on the consent of a member and therefore cannot represent an alteration of the obligation under the Plan to pay benefits to the member."*

The final determination of the Ombudsman states that:–

> *"…the introduction of the 2008 amendment under the pension plan did not contravene the preservation requirements under the Pensions Act 1990."*

The appellant submits that while there is no issue with the fact that the pension deeds or rules were changed to allow for the changing of pensionable salary once consent was obtained, any such alteration in which pensionable salary is defined and is unrelated to actual salary and remuneration to include bonus is clearly an attack on the accrued benefit and must therefore be phased in to protect the member.

It is submitted that the respondent makes a distinction between a situation where the Plan Rules specifically altered Mr. Durkin's pensionable salary, which he found did not happen in this case, and a situation where the alteration was facilitated by way of an agreement so phasing-in is not triggered. However, the appellant contends that this is an error as the Plan Rules were changed by the 2008 Deed of Amendment without which the reduction would have been impossible. The Ombudsman states at paragraph 2.5 of his determination that:–

> *"I have not found that Mr. Durkin was entitled to have this benefit calculated in accordance with the pre 2008 definition of Pensionable Salary."*

The appellant submits that the Ombudsman made a fundamental error of fact and law in relation to this aspect of the appellant's complaint as there has been a change in the definition of pensionable salary by way of the Deed of Amendment of 31st March, 2008 and therefore it is clear that there is a change in the definition of long service benefit.

In it submitted that, in light of the foregoing, the determination of the respondent was vitiated by serious and significant errors of fact and law.

SUBMISSIONS OF THE RESPONDENT

Counsel on behalf of the Ombudsman submits that the legal test applicable in this case is set out in the oft cited dictum of Hamilton CJ. in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34:–

> *"…the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

The test the Court should adopt when deciding a statutory appeal from a determination of the Financial Services Ombudsman or the Pensions Ombudsman is set out by Finnegan P. in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* [2006] IEHC 323:-

> *"To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant."*

It is submitted that this test has been considered and applied in a large number of cases. In *Hayes v the Financial Services Ombudsman* [2008] 11 MCA McMenamin J. cited the Ulster Bank test and described it as "the threshold principle applied when other statutory appeals from the respondent have come before the Court" and as "a well established and accepted test." He stated that the test comprised the following elements – (i) the burden of proof is on the appellant, (ii) the onus of proof is the civil standard, (iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole, (iv) the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or series of such errors, (v) in applying the test the court may adopt what is known as a deferential stance and may have regard to the degree of expertise and specialist knowledge of the respondent.

In *Willis v The Pensions Ombudsman* [2013] IEHC 352 this Court held that:–

> *"A high threshold must be crossed by any appellant from a decision of a financial/pensions ombudsman. The Court has no difficulty in accepting that the relevant test for a statutory appeal against a decision of the Pensions Ombudsman*

should be the same as that provided for in respect of the Financial Services Ombudsman as laid down by Finnegan P in Ulster Bank… The appeal is a limited one and not a full de novo hearing."

In *Governey v Financial Services Ombudsman* [2013] IEHC 403 Hedigan J. reiterated this finding as follows:–

> *"The appeal is thus not a de novo one. Whilst it is not a judicial review, it does bear many of its characteristics and on a scale between de novo and judicial review is far closer to judicial review. A notable characteristic that this type of appeal has in common with judicial review is the deference that this Court must accord to the FSO as a specialist expert Tribunal working within its own area of professional expertise. Thus, there may be a permissible error if it is within jurisdiction insofar as it falls short of being one which is serious and significant. In determining factual matters, I can only quash the FSO's decision if I am persuaded that he could not have reasonably come to his decision based on the facts he had before him."*

It is submitted that the Pensions Ombudsman considered both aspects of the complaint carefully and the adjudicative process adopted was entirely appropriate. The appellant seeks to challenge the determination on its merits and, in doing so, falls into error vis-à-vis the test this Court must apply. It is submitted that unless the appellant can persuade the Court that the adjudicative process taken as a whole was vitiated by a serious and significant error or series of errors, the appeal cannot succeed.

It is submitted that the two so-called qualifications to the appellant's consent in the memo of 16th December, 2008 were not such to render the consent invalid. One of these was a request to do something that had in fact been effected (i.e. that the appellant's pensionable service be defined as service with the company), while the other amounted to a request for clarification of a matter outside the scope of the pension plan and outside the responsibility of the trustees.

Counsel contends that while the appellant is entitled to disagree with the final determination, he is not entitled to succeed on appeal merely by putting forward a credible alternative view – he must persuade the Court that the Ombudsman could not reasonably have come to his conclusions based on the facts before him.

In relation to the second aspect of the complaint, namely the phasing-in entitlement in the event that the appellant did provide valid consent, the respondent submits that this is a mixed question of fact and law which involves the application of a specific, technical aspect of the Act to the specific circumstances. The Trustees sought and obtained legal advice when considering this matter and came to the view that the change in the appellant's earnings ceiling for pension purposes did not trigger a requirement to phase in the impact of this change under the 'preservation of benefit' provisions of the Act.

While the Ombudsman considered this advice, it is averred that he formed his own view and was satisfied that the relevant provisions of the Act are triggered by a "change in the basis of calculation" of long service benefit. Counsel submits that the view of the Ombudsman, clearly informed by his specialist expertise, is that the placing of a limit on pensionable salary, with the consent of an employee, does not of itself alter the definition of pensionable salary and does not amount to a change in the basis of calculation of long service benefit. The respondent submits that this is a view reasonably open to the Ombudsman and that the Court should extend an appropriate degree of deference to the Ombudsman's determination.

In any event, counsel for the respondent submits that no serious or significant error can be identified in the final determination and that the relevant test has therefore not been met by the appellant.

DISCUSSION

The legal test applicable in appeals of this kind is well established and is set out clearly in the decision of Hamilton CJ. in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and Finnegan P. in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* [2006] IEHC 323 as set out above.

This Court should be slow to interfere with decisions of expert administrative bodies such as the office of the respondent. The relevant jurisprudence makes clear that the appellant is required to establish that the decision reached by the Pensions Ombudsman was vitiated by a serious and significant error or a series of such errors. In this regard, the appellant submits that the determination of the respondent contains serious errors of law and fact in relation to both aspects of his complaint, namely, the finding that valid consent to the revised pension arrangements was provided by the appellant and that there was no requirement under the Pensions Act (as amended) to 'phase-in' the effect of the new arrangements.

I have carefully considered the decision of the respondent in the context of the chronology of events and all of the relevant documentation and am satisfied that the appellant has failed to establish that there has been a serious or significant error or series of such errors on the part of the respondent.

In relation to the issue as to whether or not the appellant provided adequate consent, the respondent has provided a reasoned decision as to why the so-called qualifications or conditions in the memorandum of 16th December, 2008 do not render the consent invalid and I am satisfied, having regard to the expertise of the respondent as the Court is entitled to do, that the respondent did not err in arriving at this conclusion. It is clear that the respondent had regard to the complaints raised by the appellant in relation to consent being provided to the Trustees. Indeed, the respondent found that *"the process left a lot to be desired"* and that *"the process of obtaining the requisite member consent under the pension plan was not handled in accordance with best practice".* Nevertheless, the respondent concluded that the consent requirements were satisfied and has set out his reasons for so doing.

In relation to the second aspect of the complaint, namely, the 'phasing-in' requirement, the Court is satisfied that the respondent has adequately set out his reasons for finding that the introduction of the 2008 Amendment under the pension plan did not contravene the preservation requirements under the Pensions Act 1990. In his affidavit in these proceedings the respondent further explains his reasoning as follows:–

> *"The amendment introduced under the plan by the deed of 2008, did not alter the definition of pensionable salary – it merely allowed the employer, subject to employee consent, to impose a limit on the salary and bonus figure to be pensioned. In doing so it did not move away from a salary related obligation basis or remove the link to final salary in the calculation of plan benefits. I concluded therefore that the 2008 amendment under the plan did not give rise to a change in the basis for calculating the long service benefit or impose an obligation on the preservation requirements of Part III of the Pensions Act, 1990, as amended, to phase in any such change."*

The Court accepts this position as advanced by the respondent and is satisfied that the appellant has failed to establish any serious or significant error in this aspect of the final determination.

For the reasons set out above, the appeal is dismissed.