Neutral Citation Number: [2009] IEHC 124

THE HIGH COURT

2006 1478 JR

BETWEEN

EAGLE STAR LIFE ASSURANCE COMPANY OF IRELAND LIMITED

APPLICANT

AND

THE DIRECTOR OF THE EQUALITY TRIBUNAL and HUGH O'NEILL ACTING AS TEMPORARY EQUALITY OFFICER

RESPONDENTS

AND

BERNADETTE TREANOR

NOTICE PARTY

Judgment of Mr. Justice Hedigan, delivered on the 18th day of March, 2009

1. The applicant is a limited liability company and a registered provider of insurance services in Ireland.

2. The first named respondent is the senior official within the Equality Tribunal ('the Tribunal'), the body charged with investigation of complaints made under the Equal Status Acts 2000-2004.

3. The second named respondent is the Registrar of the Labour Court and has been appointed as an independent party to investigate the notice party's allegation of discrimination against the applicant.

4. The notice party is an Equality Officer, employed as part of the staff of the Tribunal.

5. The applicant seeks the following relief by way of judicial review:

> (a) An order of *certiorari* quashing the decision of the first named respondent to the effect that the first named respondent had no jurisdiction under section 38 of the Equal Status Act 2000 ('the 2000 Act') to dismiss the complaint made by the notice party against the applicant;
>
> (b) A declaration that the first named respondent's decision is invalid and/or *ultra vires* and/or wrong in law;
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> (c) An order of *certiorari* quashing the decision of the second named respondent to refuse to exercise his power under section 38 of the 2000 Act to dismiss the complaint made by the notice party against the applicant;
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> (d) A declaration that the second named respondent's decision is invalid and/or *ultra vires* and/or wrong in law;
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> (e) A declaration that the first and second named respondent had no jurisdiction to make any decision in the matter having regard to the fact that the complaint form sent to the first named respondent did not disclose any disability within the meaning of the 2000 Act;
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> (f) A declaration that the definition of disability contained in the 2000 Act does not include any condition from which the notice party has ever suffered and/or any condition imputed to her and/or any condition which existed in the past but ceased to exist;
>
> (g) A declaration that the notice party does not come within the protection of the 2000 Act on grounds of disability or otherwise and in those circumstances the first and second named respondents do not have and never had jurisdiction under that Act to adjudicate upon any claim made by the notice party against the applicant; and
>
> (h) An order of prohibition preventing the second named respondent from adjudicating on the complaint made by the notice party against the applicant.

I. Factual and Procedural Background

6. The notice party took up her current position as an Equality Officer in September 2001. As a result of this, she was required to make a submission to the applicant in order to ensure that her income continuance cover would continue. She ultimately made this submission by means of a group scheme operated by her trade union. However, because more than six months had passed since her promotion, she was required to undergo a new medical examination.

7. The notice party underwent a medical examination with a doctor other than her regular general practitioner. The doctor advised her that he was recommending that the applicant should offer her cover under the normal terms. The notice party also submitted documentation to the applicant relating to a previous visit which she had made to a heart specialist. During that consultation, the notice party had been informed that the complaint was not serious and the problem in question ultimately resolved itself within one month.

8. By letter dated that 13th of August 2002, the notice party was informed by the applicant that she had been accepted to the income continuance plan but only subject to a loading of 100% on the normal premium. No reason was advanced for the loading but, in light of the examining doctor's comments, the notice party presumed that this had been applied on the basis of her visit to the heart specialist. Specifically, the notice party surmised that the applicant had incorrectly imputed a significant heart condition to her.

9. The notice party then attempted to contact the applicant's chief medical officer, in order to obtain an explanation for the loading on her premium. When she failed to receive a satisfactory response, the notice party issued notifications and complaints of discrimination under section 21 of the 2000 Act, on the 1st of October 2002. Again the notice party did not receive a response from the applicant.

10. The notice party subsequently visited her own general practitioner in February 2003, who presented her with a letter dated the 28th of August 2002 which he had received from the applicant on the 15th of October 2002. The letter indicated that the reason for the application of the loading to the notice party's premium was the fact that she was clinically obese and was therefore at a greater risk of being absent from work.

11. On the 6th of February 2003, the notice party issued a fresh notification and complaint of discrimination against the applicant. She also issued a notification and complaint of victimisation on the 25th of July 2003, pursuant to section 3(2)(j)(4) of the 2000 Act. The notice party issued the latter complaint on the basis of the decision of the applicant's chief medical officer to directly contact her general practitioner. This is something which she contends is prohibited by the code of practice on life assurance of the Irish Insurance Federation, save in cases where a potentially serious illness has been diagnosed by the examining doctor. The notice party suggests that this conduct of the applicant amounted to an attempt to remove the complaint from the jurisdiction of the Tribunal. This is not something which it is necessary for me to consider for the purposes of the present application, nor is there sufficient evidence before the Court to reach even the most tentative of conclusions as to the probity or otherwise of the applicant's motives.

12. Following the issue of the complaint in February 2003, a considerable volume of correspondence was exchanged between the parties. For example, on the 24th of February 2003, the first named respondent wrote to the applicant and indicated that owing to the employee status of the notice party, the case would need to be heard by an independent, temporary equality officer. The applicant replied by letter dated the 24th of March 2003, emphasising the importance, for the sake of all parties, that the complaint be dealt with in an entirely impartial forum.

13. By letter dated the 20th of October 2003, the applicant's solicitor contacted the first named respondent requesting a preliminary investigation into the issue of the jurisdiction of the Tribunal to consider the notice party's complaint in light of the definition of disability prescribed by the 2000 Act. The applicant's solicitor wrote once again to the first named respondent on the 24th of November 2003 requesting clarification of certain matters which had arisen during the correspondence. Neither of these letters received a response from the first named respondent and a considerable period of time proceeded to elapse before any further *inter partes* contact occurred.

14. It was not until the end of May 2006 that the first named respondent received clearance to appoint a temporary equality officer to hear and determine the claim. Following this, on the 23rd of June 2006, the first named respondent wrote to the notice party to ensure that she remained interested in pursuing her claim against the applicant. When no reply was received, the first named respondent again wrote to the notice party on the 15th of August 2006 again requesting confirmation of the notice party's intentions and also imposing a deadline for reply of the 15th of September 2006. The notice party ultimately responded on the 11th of September 2006, confirming her interest in pursuing the issue.

15. The first named respondent then wrote to the applicant on the 20th of September 2006, confirming the appointment of the second named respondent and explaining that the delay in processing the claim had been caused by the extensive backlog of cases. The applicant was requested to file its written submissions in respect of the complaint.

16. The applicant contacted the first named respondent on the 9th of October 2006, requesting that she should exercise her power under section 38 of the 2000 Act to dismiss the complaint. Without prejudice to this request, an extension of time was sought in respect of the filing of submissions. The first named respondent replied on the 11th of October 2006, informing the applicant that she would not be exercising her power under section 38 and that she had received confirmation from the notice party that the claim was to be pursued. The applicant, in turn, responded on the 3rd of November 2006 requesting that, owing to the unusual circumstances of the case, the powers under section 38 should be delegated to the second named respondent. The first named respondent confirmed on the 5th of November 2006 that the assignment of the case to the second named respondent incorporated the power to dismiss under that section.

17. The second named respondent considered the application to dismiss and concluded that section 38 was not applicable on the basis that there was no indication that the notice party had ever decided not to pursue her case. This decision was communicated to the applicant on the 21st of November 2006. The applicant expressed its dissatisfaction with the determination by letter dated the 12th of December 2006 and on the 18th of December 2006, an application for leave to apply by way of judicial review was made to the High Court. Leave was granted by Peart J. and on the basis of his order the present proceedings come before this Court.

II. The Submissions of the Parties

(a) Failure to Pursue Complaint

18. The applicant submits that the respondents were guilty of a manifest error of law in failing to exercise their powers under section 38 of the 2000 Act. Specifically, it argues that the effect of that section is to impose a continuous obligation on the decision-maker to actively monitor the status of a complaint from the expiry of one year after its issue. The applicant suggests that the imposition of such an obligation under section 38 is consistent with section 25 of the 2000 Act, as amended by section 59 of the 2004 Act, which imposes a positive obligation on the first named respondent to fully investigate the cases brought before her.

19. On the basis of this construction of the legislation, the applicant contends that the respondents plainly failed to ask themselves the correct question in the present case. It is argued that had the appropriate significance been ascribed to section 38 of the 2000 Act, the respondents could not reasonably have concluded that the claim ought to be allowed to proceed, in light of the years throughout which the notice party remained silent.

20. Further and in the alternative, the applicant suggests that the decision of the respondents not to dismiss the case under section 38 of the 2000 Act was so fundamentally at variance with reason and common sense as to amount to an unlawful exercise of administrative power. It is submitted that there was no evidence before the respondents based on which they could reach the conclusion that the notice party had in fact pursued her complaint.

21. The respondents and the notice party argue that there can be no question of a failure to adequately encourage the pursuit of the claim by any or all of the parties involved. In this regard, the notice party explains that she, owing to her position of employment, was fully aware of the internal backlog within the Tribunal. She emphasises that she knew at all times that she would receive notification from the first named respondent whenever her complaint was nearing consideration. Beyond this, she argues that there was nothing

more that she could have done to expedite the process as the responsibility of the administrative scheduling of her case lay with the respondents alone.

22. The respondents, meanwhile, contend that had the notice party been afforded preferential treatment in the processing of her case, it would have amounted to a serious and unacceptable abuse of privilege. The respondents and notice party collectively argue, therefore, that the hyperactive level of pursuit of the claim which the applicant has advocated would have neither been permissible nor effective.

(b) Fair Procedures
23. The applicant also argues that, quite apart from the substance of the ultimate determination under section 38 of the 2000 Act, the failure of the respondents to keep the applicant involved in the decision-making process amounts to a serious violation of natural and constitutional justice. In the applicant's submission, it ought to have been made aware of the fact that the notice party had received multiple reminder letters questioning whether or not she wished to continue with her case. The applicant also suggests that it ought to have been permitted to make formal representations to the respondents in respect of the issue of delay before the ultimate decision on that point was made.

24. The respondents reject the arguments of the applicant on this point, submitting that the question of the prosecution of the complaint under section 38 of the 2000 Act is focussed exclusively on the conduct of the notice party. They contend that any submissions which might putatively have been made by the applicant on the issue of delay would not have influenced their decision since they are not relevant to the central question under section 38 i.e. the intentions of the notice party.

(c) Jurisdiction
25. It is submitted by the applicant that the notice party has failed to provide any basis to suggest that she has been discriminated against on the basis of a disability, within the meaning of that term as prescribed by section 2 of the 2000 Act. As such, the applicant contends that the second named respondent has no jurisdiction to consider the notice party's claim as it is untenable under the legislative regime. The applicant asserts that the sole premise on which the 100% loading was applied to the notice party's premium was that of her body mass index ratio. Bodyweight is something which the applicant submits cannot conceivably fall within the definition of a disability under the 2000 Act. On this basis, it argues that the notice party's complaint is inherently unsustainable and that this Court ought to intervene to restrain the second named respondent from addressing an issue which he has no jurisdiction to consider.

26. The respondents argue that the clear intention of the Oireachtas in enacting the 2000 Act was to create an independent legal regime for the consideration of complaints of discrimination. They suggest that the functions of the courts in the context of this regime are distinctly delimited by the provisions of the 2000 Act. Under section 28 of that Act, a decision of the Tribunal may be appealed to the Circuit Court, from which in turn an appeal may be taken on a point of law to the High Court. Aside from this, the respondents contend that the High Court is confined to its regular supervisory jurisdiction over the exercise of administrative power In this regard, they suggest that the effect of the present application, if successful, would be to usurp the function of the Tribunal by pre-determining matters which lie primarily and pre-eminently within its province.

27. The notice party disputes the applicant's suggestion that the 100% loading on her premium was applied on the basis of obesity alone; she maintains that the allegedly imputed heart condition must undoubtedly have been a factor in the applicant's reasoning. Further and in the alternative, she argues that even if the loading was predicated exclusively on her weight, she is still capable of maintaining a claim for discrimination on grounds of disability. To this end, she relies on a number of recent authorities from other jurisdictions to the effect that in some circumstances, obesity can fall within a logical construction of that term. On the basis of all of this, the notice party submits that the second named respondent patently does have jurisdiction to consider her claim.

III. The Decision of the Court

(a) Failure to Pursue Complaint
28. Section 38 of the 2000 Act creates a mechanism for the dismissal of complaints under the 2000 Act in circumstances where the complainant has not pursued or has ceased to pursue their claim. It provides as follows:-

> "(1) Where a case is referred to the Director and, at any time after the expiry of one year from the date of the reference, it appears to the Director that the complainant has not pursued, or has ceased to pursue the reference, the Director may dismiss the reference.
>
> (2) As soon as practicable after dismissing a reference, the Director shall give notice in writing of that fact to the complainant and the respondent.
>
> (3) Where a reference is dismissed under this section, no further proceedings may be taken in relation to that reference, but nothing in this section prevents a person from making a further reference in relation to the same matter (subject to any applicable time limit)."

29. It seems to me that the function of section 38 of the 2000 Act is to create a procedure for the removal from the Tribunal's lengthy list of claims which have become moribund, for whatever reason. In this regard, I share the view of the respondents and the notice party that, to a large extent, section 38 may be classified as a house-keeping section, devised by the Oireachtas for the purposes of administrative efficiency within the Tribunal. I cannot accept that the effect of the section, in the absence of express provision to such extent, is to impose a requirement on individuals such as the notice party to continuously inquire as to the status of their complaint and thereby impose pressure on the Tribunal to accelerate the adjudicative process.

30. The operation of section 38 might undoubtedly come into effect in a situation where a complainant fell out of contact for extended periods or failed to furnish the Tribunal with important information at its request. I do not think, however, that such culpably ambivalent conduct can be ascribed to the notice party in the present case, on any construction of the facts. While there was undoubtedly some degree of delay in responding to the confirmation requests in June and August 2006, I cannot accept that this amounted to a failure to co-operate with the Tribunal or adequately pursue the claim at hand. Throughout the currency of the proceedings, the notice party has complied with all time limits imposed on her, statutory or otherwise, and has in general furnished any information required by the Tribunal in a prompt and efficient manner. I do not think that more can be expected of her than this.

31. Moreover, the fundamental cause of the delay which has arisen in the present case is the backlog of cases for hearing by the Tribunal as well as the administrative impediments to securing the temporary appointment of the second named respondent. These are things which are unquestionably unfortunate from the perspective of all parties concerned. However, the responsibility for such

shortcomings in the processing of claims by the Tribunal cannot be attributed to the notice party in her personal capacity.

(b) Fair Procedures

32. The respondents, like all administrative decision-makers, bear an extremely important responsibility of adhering to the requirements of natural and constitutional justice. In this regard, they must adhere to the primary maxim of *audi alteram partem*; they must hear both sides. It is well-established, however, that the obligations which arise under this tenet of public law are not without limits. The respondents are not obliged to afford a right of representation to every party who could conceivably be affected by an action taken on their part, nor are they enjoined to provide reasons for all the steps which they take in performing their statutory function. Were the requirements of the doctrine of fair procedures extended to such reaches, it would be impossible for the public bodies to function effectively; they would be stultified by boundless bureaucracy.

33. The limits of the right to be heard have been considered in a number of circumstances which are broadly analogous to those in the present case. In *Lewis v. Heffer* [1978] 1 WLR 1061, the Court of Appeal held that decisions made solely as a matter of good administration, and without any direct civil or penal consequences, did not require compliance with the rules of natural justice. Specifically, Lane L.J. stated at page 1078:-

> "In most types of investigation there is in the early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at *that* stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially, and the greater the importance of observing the maxim *audi alteram partem* ."

34. Similarly, in *Wiseman v. Borneman* [1971] A.C. 297 the House of Lords considered the fairness of the process for considering whether there was a *prima facie* case for instituting proceedings against a defaulting taxpayer. This is an assessment which I feel draws broad comparison with the assessment of the respondents in the present case. Lord Morris stated the following at page 309:-

> "It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

The above passages from *Lewis* and *Wiseman* were both recently approved of by the Supreme Court in this jurisdiction in the case of *Ó Ceallaigh v. An Bord Altranais* [2000] 4 IR 54.

35. The issue which the Court must determine in the present case, therefore, is whether or not justice requires that the decision making process under section 38 of the 2000 Act should attract the full requirements of the doctrine of fair procedures *viz.* the applicant. As already noted, section 38 is a statutory provision which seems to be wholly focussed on the subjective intention of the complainant, in this case the notice party. It does not create a general, discretionary power to dismiss a claim based on the circumstances of the case. It simply generates a clearing mechanism whereby complaints in which interest has been lost may be swept from the list. In such circumstances, I cannot accept that the applicant had any right to make submissions as to the appropriate exercise of the section 38 jurisdiction, nor that it was entitled to a reasoned decision as to why that power was not ultimately invoked. The issue for consideration under the section was the position of the notice party alone, nothing which the applicant might have said could have had any bearing on this.

(c) Jurisdiction

36. Section 2 of the 2000 Act defines the concept of disability. It provides as follows:-

> "(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
>
> (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
>
> (c) the malfunction, malformation or disfigurement of a part of a person's body,
>
> (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
>
> (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour."

37. There can be no doubt but that it is questionable whether a particularly high body mass index falls within any of the categories listed in this section. That, however, does not seem to me to be the question which befalls the Court in the present case. It is trite law that the function of the High Court on judicial review is not to engage in a substantive review of the merits or otherwise of a particular course of administrative action, whether proposed or already taken. The Court's responsibility is instead to guard against the unlawful exercise of executive power.

38. In *State (Cork County Council) v. Fawsitt* (Unreported, High Court, 13th March 1981), McMahon J. concluded that a court or tribunal exceeds its jurisdiction if it addresses itself to the wrong question, takes irrelevant considerations into account or makes an order without deciding the issues which it is required to decide before an order can validly be made. It seems to me that neither of the respondents has been guilty of any such conduct in the present case. The question of whether obesity is capable of constituting a disability, against which discrimination is prohibited under the 2000 Act, will inevitably be the primary enquiry in which the second named respondent will engage. The primary responsibility for the interpretation of the provisions of the 2000 Act rests with him and recourse may ultimately lie to the High Court by way of an appeal on a point of law if necessary. In *Doherty v. South Dublin County Council* [2007] 2 IR 696, Charleton J. affirmed the importance of judicial restraint in such matters, to ensure that the High Court does not prematurely trespass into the special jurisdiction assigned to the Tribunal by the 2000 Act.

39. In view of this, I do not propose to consider in detail the foreign authorities which were presented to the Court on the issue of whether obesity can constitute a disability, in particular in light of the esoteric distinctions which pertain between the various legislative provisions at issue. In *Cook v. Rhode Island Department of Mental Health* 10 F.3d 17 (1993) for example, the United States

First Circuit Court of Appeals was considering a concept of "perceived disability", the definition of which bore little resemblance to that of disability *simpliciter* prescribed in section 2 of the 2000 Act.

40. It is also not necessary for me to consider the specific factors which were taken into account by the applicant in fixing the insurance premium of the notice party. This is something which will no doubt be subjected to minute scrutiny by the second named respondent when he comes to consider the matter.

IV. Conclusion

41. In light of the foregoing, I am satisfied that the decision of the respondents not to exercise their power under section 38 was not made in error of law or in breach of the well-established principles of natural justice. I am further satisfied that the second named respondent does have jurisdiction to entertain and consider the notice party's complaint. I will therefore refuse the relief sought.