

THE HIGH COURT

[2013 No. 3499S]

BETWEEN

DAVID GUNNING

PLAINTIFF

AND

COILLTE TEORANTA

DEFENDANT

JUDGMENT of Kearns P. delivered on the 6th day of February, 2015

The plaintiff's claim in these proceedings is for the sum of €299,001, together with interest, in respect of performance related bonus payments to which he had been deemed entitled by the Remuneration Committee of the defendant by whom he was employed as Chief Executive Officer until the 19th March, 2013.

The plaintiff claims he is entitled to this sum pursuant to the terms of his contract with the defendant made on the 1st February, 2006, and in particular clause 5.12 thereof. However, it is pleaded in the defence that the defendant was precluded from making the payment by virtue of a purported directive contained in a letter dated the 8th April, 2013 sent to the defendant by the Minister of Agriculture, Food and the Marine pursuant to the provisions of s.36 of the Forestry Act 1988. Given that the plaintiff's contract with the defendant had by that time expired, this directive, if effective, would amount to a forfeiture of accrued performance bonuses to which the plaintiff had been deemed entitled by the Remuneration Committee of the defendant at a meeting held on the 5th March, 2013.

Accordingly, it may be seen that a very net issue arises for consideration in this case, namely, whether the so-called directive contained in the letter of the 8th April, 2013 was one which could have the effects contended for by the Minister in this case.

THE FORESTRY ACT 1988

The Forestry Act 1988 (hereinafter "the Act") is an Act designed "... to make provision for the development of forestry and to provide for the establishment of a company for that purpose and for the assignment to the company of functions heretofore exercised by the Minister for Energy ...".

Section 35 of the Act provides that there shall be a Chief Executive of the company and in relation to such Chief Executive it is provided as follows at s.35(6):-

"The Chief Executive shall hold office on and subject to such terms and conditions (including terms and conditions relating to remuneration, allowances and superannuation) as may be determined by the Minister with the consent of the Minister for Finance."

Section 36 of the Act provides in relation to the "staff of company" that:-

"... the company, in determining the remuneration or allowances for expenses to be paid to its officers or servants or the terms or conditions subject to which such officers or servants hold or are to hold their employment, shall have regard to Government or nationally agreed guidelines which are for the time being extant, or to Government policy concerning remuneration and conditions of employment which is so extant, and in addition to the foregoing, the company shall comply with any directives with regard to such remuneration, allowances, terms or conditions which the Minister may give from time to time to the company with the consent of the Minister for Finance."

It is to be noted that no provision is outlined in either section for the retrospective forfeiture of remuneration earned by either the Chief Executive or any member of staff of the company. Equally, it is clear that on a running basis the company may be obliged to comply with directives which the Minister may give from time to time with regard to remuneration.

FACTS

The plaintiff entered his service agreement with the defendant on the 1st February, 2006 on foot of which he was appointed as Chief Executive of the company for a fixed term of seven years.

His responsibilities were to act a Chief Executive of the company and to carry on, manage and control the administration of the company subject to the lawful directions of the Board.

It is clear from the documentation before the Court that the plaintiff was conspicuously successful in the performance of his duties under the contract. In addition to his basic pay, he earned significant performance related bonuses during the currency of his contract.

When the economic downturn took place, an issue arose as to whether Mr. Gunning's remuneration should be reduced by the non-payment of bonus payments. This "appeal" was not unlike appeals made to other public service employees who had contractual arrangements which fell outside the scope of the FEMPI legislation. On the 23rd June, 2009, the then Minister for Agriculture wrote to the Chairman of the defendant in relation to the non-payment of bonuses to Mr. Gunning, stating:-

"As I am sure you are aware, there is no legal basis provided, for me as Minister, to request or insist that the bonus payment be withheld per se, but I am somewhat surprised that you are dealing with this issue in a formal legal manner, when a pragmatic, patriotic approach is what is required on the part of your board and indeed Mr. Gunning."

I do not wish to enter into what are private contractual matters between you and the Chief Executive Officer, indeed it would be very wrong of me to do so. It would however be remiss of me, as the Government Minister to whom the Board reports annually, not to highlight the very negative impact such a large bonus payment would have for both Coillte, which is a State body and, I suggest, your Chief Executive Officer.

While there may be no specific legal reason why this bonus of some 20.5% of Mr. Gunning's annual salary, which is currently fixed at a figure of some €294,027, should not be paid, I take the view that both the Board and Mr. Gunning should strongly consider the current economic position that the country finds itself in and the best interests of Coillte, Mr. Gunning and the overarching wider public interest, in deciding to cancel the proposed bonus for 2008.

If the bonus is paid out, and that is for Coillte to decide, I have to make it clear that it will be for Coillte to publicly defend its decision in this regard and I will, if asked, indicate that I strongly request to the Board, notwithstanding the obvious legal and contractual obligations, not to make the bonus payment for 2008.

As I say this is a matter for the Board, but it is a decision that is closely related to the quality of its governance of Coillte and while there may be clear legal reasons why the bonus should be paid, these reasons could by a simple voluntary agreement be easily be put to one side, resulting in a positive and realistic decision in tune with the financial times Ireland finds itself in and one which shows strong fiscal corporate governance on the part of Coillte and its CEO."

It is most important at this juncture to highlight that Mr. Gunning, on an entirely voluntary basis, agreed to the deferral of his 2008 performance bonus and altogether waived his entitlement to bonus for the years 2009 and 2010 in response to this appeal. I stress this fact, lest any impression be given that Mr. Gunning was impervious to the financial difficulties which were being felt across all sectors of Irish society during this particular period.

In a further letter to the Chairman of the defendants dated the 26th January, 2011, the previous Minister restated the position:-

"As we are both aware, there is no basis legally for me, as Minister, to insist that this bonus would not be paid but I am astonished that the Remuneration Committee and the Board of Coillte could consider such a payment is appropriate in the current economic climate."

By mid-August 2012 the question of reappointing the plaintiff for a second term was under consideration. It became clear that the terms of any such appointment would only be satisfactory from the Minister's point of view if Mr. Gunning were to agree to revised terms of remuneration and to forego any entitlement to performance related pay arising under his current contract over and above that which had already been paid to him.

Mr. Gunning elected not to seek the renewal of his contract on the terms offered which prompted the letter from the present Minister dated the 8th April, 2013 wherein he recorded that he and his department were strongly opposed to the payment of any performance related bonuses to CEOs of State companies. In that letter, the Minister went on to state:-

"I understand that clause 5.13 of the CEO contracts specifically allows the Company to make changes to the bonus arrangements and it has therefore been open to the Company to alter or to cancel them. In view of this express power of the Board to cancel the performance arrangements and the duties of the Board to comply with section 36 of the Forestry Act 1988, as well as the general obligations to implement Government pay policy under the Code of Practice, referred to above, I have been advised that the Board would be in defiance of Government policy on remuneration, as outlined above, if it intends to proceed to award a performance payment to Mr. Gunning."

This is the instrument or mechanism relied upon by the defendant to support the contention that the plaintiff's entitlement to sums claimed by way of performance related pay up to the 8th April, 2013 no longer subsisted. It is noteworthy that the defendant's reliance on the Minister's letter of the 8th April, 2013 and on s.36 of the Act first emerged in a letter from Messrs. Arthur Cox, solicitors, dated the 22nd April, 2013 addressed to the plaintiff's solicitors. The Arthur Cox letter does not in its terms refer at all to any "directive", but reads as follows in relevant part:-

"The payments claimed by your client in your letter of the 21st of March relate to performance-related pay. Our client's Board considered this matter at its meeting on the 15th April last. Our clients Board, mindful as it is of our clients legal obligations, and noting in particular a letter from the Minister for Agriculture, Food and Marine of the 8th April calling on our client not to make the payments concerned and the Minister's reference therein to our client's duty to comply with section 36 of the Forestry Act 1988, has decided not to make the payments concerned."

DISCUSSION

At the outset it strikes the Court as extraordinary that a letter with such far reaching consequences from Mr. Gunning's point of view (given that it purported to forfeit and confiscate accrued entitlements) stopped short of describing the Minister's letter as a "directive" as required by s.36 of the Act itself. Nor has there been any evidence to show that this decision or directive was arrived at or issued with the consent and agreement of the Minister for Finance as required by the terms of the section.

A number of cases were cited in support of the arguments advanced on behalf of Mr. Gunning. Reference was made to the decision of the High Court in *Clancy & Anor. v. Ireland* [1988] I.R. 326 which found that the Offences Against the State (Amendment) Act 1985, while it amounted to a permissible delimitation of property rights in the interests of the common good, could not amount to a confiscation of property or deprive a claimant of the entitlement to a fair hearing in respect of monies over which he asserted a claim.

Similarly in *Cox v. Ireland* [1992] 2 I.R. 503, the plaintiff complained that having been convicted in the Special Criminal Court, the effect of s.34 of the Offences Against the State Act 1939 was that he immediately forfeited his employment as a community school teacher and was disqualified from holding any like office or employment for a period of seven years. Barr J. found that the section caused the loss of pension rights already earned prior to conviction. In the Supreme Court it was found that the unilateral variation and suspension of contractual rights, including rights which may involve the entitlement to a pension to which a contribution over a period has been made, constituted a major invasion of those particular property rights. The Supreme Court found that it was established that notwithstanding the fundamental interest of the State which the section sought to protect, the provisions of s.34 of the Act of 1939 failed insofar as practicable to protect the constitutional rights of the citizen and were, accordingly, impermissibly wide and indiscriminate.

Given that s.36 does not provide in any way for the forfeiture of vested property rights, and given further that in construing s.36 the

Court must apply the presumption of constitutionality and in this regard must apply the double construction rule, the construction contended for by the defendant would offend Article 40.3.2 of the Constitution which requires the State to vindicate the property rights of every citizen.

DECISION

It is plain beyond doubt that at no stage prior to the 8th April, 2013 did either the present Minister or his predecessor purport to issue a directive under s.36 of the Act to interfere with or vary the then subsisting and ongoing terms of the plaintiff's contract. On the contrary, every letter emanating from the Minister's predecessor contained an express acknowledgment that the Minister had no legal right to require non-payment of bonus entitlements already accrued.

Quite why events took the course they did may perhaps be gleaned from the Minutes of the Remuneration Committee meeting held on Tuesday, the 5th March, 2013, a meeting which was attended by Mr. Kevin Smyth, Assistant General Secretary from the Department of Agriculture. The minutes record that Mr. Smyth, in his contribution to the meeting, said that:-

"Ministers Coveney, Howlin met on the 1st March with Minister Rabbitte also in attendance. The Ministers reaffirmed Government policy that PRP should not be paid to the Chief Executive of any commercial State company. The Ministers are clearly of the view that Government policy supersedes the Board's contractual obligations and that, should the Board proceed, this decision would risk putting the Board in conflict with Government. He also said that Mr. Gunning has the right to legal redress should the Board decide not to award the outstanding PRP."

Be that as it may, the plain facts of the matter are that the Remuneration Committee did approve payment to Mr. Gunning of all his accrued entitlements and the validity of that decision had not been queried in the present proceedings.

The defendants have been unable to cite a single authority which would support the confiscation sought in this case. The submissions filed on the Minister's behalf are stated to represent the culmination of a four year long "battle" between the Minister and his department on the one hand and the Chairman and Board of Coillte on the other in relation to the question of whether the plaintiff should be awarded and paid bonus payments for that period.

It is submitted on behalf of the defendants that as the Act contemplates performance related bonuses not being awarded or paid in light of a change of Government policy, the Court should not enforce the plaintiff's claim herein.

An interesting point arose during discussion at the hearing in this case as to whether the Minister was precluded or estopped from arguing the case contended for by reference to the letters sent by his predecessor which clearly acknowledged the absence of any legal basis for non-payment of bonuses provided for by the contract. In ease of the defendants, I do not propose to determine the case on this basis, satisfied as I am that on any proper construction of s.36, it cannot be applied retrospectively so as to deprive a citizen of already accrued remuneration entitlements.

It would have been a different story altogether if a directive, such as that contemplated by s.36, had been given during the currency of the plaintiff's contract of employment, with regard to as yet unearned and unpaid bonuses. There could be no complaint about a prospective measure of this sort and there clearly is a statutory basis for such an intervention.

However, for the reasons already indicated, such an intervention could never be justified as a retrospective exercise in forfeiture.

Even if I am mistaken in so holding, it is quite clear that the purported confiscation did not comply with the requirements of s.36 of the Act. Having regard to the penal nature of the measure sought to be imposed upon the plaintiff, the letter would have to have been expressed as a directive and would further require to be accompanied by some evidence that the same had been issued with the consent of the Minister for Finance. No such evidence was forthcoming in this case.

For all these reasons I am satisfied that the plaintiff is entitled to recoup and to be paid the sums which he earned during the period of his employment with the defendants or, to put it another way, I find that the defendants are not entitled to deprive him of these accrued entitlements which had been earned prior to the letter of the 8th April, 2013.

At the conclusion of the hearing I invited brief submissions from both sides on the question of interest on the monies due to the plaintiff, which had been claimed on his behalf at the 8% rate of Court interest. Having regard to the true rate of interest payable over the last two years, the Court will, in the exercise of its discretion, award the sum of 2% interest on the sum due and owing to the plaintiff