Neutral Citation Number: [2014] IEHC 331

THE HIGH COURT

[2013 No. 334 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO

SECTION 7(4)(B) OF THE PAYMENT OF WAGES ACT 1991

BETWEEN/

HEALTH SERVICE EXECUTIVE

APPELLANT

AND

JOHN McDERMOTT

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 19th June, 2014

1. The respondent, Mr. McDermott, is a medical consultant attached to Connolly Hospital, Blanchardstown, Dublin. He is employed pursuant to the 2008 Consultant Contract, on a Type B contract. Clause 23 of the Contract provided for a particular salary scale, with certain additional payments due on particular dates from 2007 onwards. It is not in dispute but that the salary increases due from 1st June, 2009, onwards were not paid by his employer, the Health Service Executive.

2. The reasons why these payments were not sanctioned or paid are fairly clear. By June, 2009 it was plain that the State was facing a very significant financial crisis which, among many other painful things, called for an immediate reduction in the public sector pay bill.

3. By notice of complaint dated 16th June, 2011, the respondent referred a claim to the Rights Commissioner under the Payment of Wages Act 1991 ("the 1991 Act"). In that complaint the respondent maintained that his pay had been unlawfully deducted between 1st January, 2011, and 30th June, 2011. At a hearing before the Rights Commissioner the HSE argued that the complaint was time-barred because it contended that the cause of action emanated from a decision of the then Minister for Health and Children (Deputy M. Harney T.D.) in either June, 2009 or (at the very latest) August, 2009 not to sanction the increase which had been otherwise scheduled under the contract. Section 22(4) of the Health Act 2004 requires that terms of conditions of remuneration of all employees working in the health service must be approved by the Minister and, indeed, the consent of the Minister for Finance. Absent such ministerial consent the HSE could not, as a matter of public law, lawfully make the payment. Whether this failure gives an employee such as Mr. McDermott other remedies – whether a claim under the 1991 Act or an action for damages for breach of contract – is not a matter which I need presently consider.

4. The time-barring argument was rejected by the Rights Commissioner in a decision dated 7th January, 2012, who decided that he had jurisdiction to hear the complaint in respect of alleged contraventions falling within the six months period commencing 30th December, 2010, and ending on 29th June, 2011. The Commissioner then proceeded to consider the substance of the complaint and in that respect found against Mr. McDermott.

5. Mr. McDermott then appealed to the Employment Appeal Tribunal ("EAT") where the time point arose as a preliminary issue. The EAT rejected the argument that the complainant must lodge the complaint within six months from the date of the first deduction or non-payment. It rather took the view that a cause of action arises with each and every contravention and that an employee has six months from every such contravention to make a claim against the employer.

6. The HSE now appeals to this Court on a point of law pursuant to s. 7(4)(b) of the 1991 Act against the correctness of that decision.

Background to the 1991 Act

7. The 1991 Act was a modernising item of legislation designed to replace and repeal the former Truck Acts, 1831 to 1896. The Truck Acts were themselves designed to address the social problem whereby in the 18th and 19th centuries many employers sought to pay their employees by means of benefits in kind, rather than coin or cash. These benefits in kind often took the form of credits to be exchanged for consumer staples – such as clothing and food – in the shops and premises often run by the employer. The object of the Truck Acts was to prevent this particular form of exploitation of employees, by limiting the type of deductions which might be made by employers but also by requiring certain types of employees to be paid by coin or cash.

8. The 1991 Act sought to modernise that old law and, in particular, sought to facilitate the payment of wages otherwise than in cash. Yet, in some respects at least, the spirit of the Truck Acts lives on in that s. 5 of the 1991 Act seeks to limit the type of deductions which can be made at source in respect of an employee's wages. Thus, for example, subject to some specific exceptions, s. 5(2)(b) of the 1991 Act prohibits an employer from making a deduction from the wages of an employee in respect of "goods or services supplied to or provided by the employee the supply or provision of which is necessary to the employment."

9. Section 6 of the 1991 Act creates a new mechanism whereby these rights can be enforced. Accordingly, complaints under the 1991 Act can be submitted to the Rights Commissioner at first instance, although the claim can also be pursued before the courts as an alternative: see s. 6(3)(a) and s. 6(3)(b). Section 6(4) introduces a time limit for claims before the Rights Commissioner:

> "A Rights Commissioner shall not entertain a complaint under this section unless it is presented to him within the period of 6 months beginning on the date of the contravention to which the complaint relates or (in a case where the Rights Commissioner

is satisfied that exceptional circumstances prevented the presentation of the complaint within the period aforesaid) such further period not exceeding 6 months as the Rights Commissioner considers reasonable."

10. As we shall presently see, it is the construction of these provisions – and, specifically, the meaning of the words "on the date of the contravention to which the complaint relates" - which is at issue in the present appeal.

11. Section 7 makes provision for an appeal from decisions of the Rights Commissioner to the EAT and s. 7(2) provides that such appeals must be brought within a six week period from the date it was communicated to the parties. It is accepted that such an appeal was lodged within the six week period. The EAT, however, decided the preliminary time point in a manner adverse to the HSE and it is from that decision that the present appeal is taken.

The construction of s. 6(4) of the 1991 Act

12. It is at this point that we can return to the construction of the relevant language of s. 6(4), namely, "within the period of 6 months beginning on the date of the contravention to which the complaint relates". The first thing to note is that no special meaning has been ascribed to the word "contravention" by the 1991 Act, so that it must be given its ordinary, natural meaning.

13. We may next observe that the actual language of the sub-section is clear, because it is the words "contravention to which the complaint relates" which are critical. It may be accepted that every distinct and separate breach of the 1991 Act amounts to a "contravention" of that Act. If, for example, an employee is paid monthly and the employer makes unlawful deduction X in respect of salary for every month in a two year period it might be said in the abstract that there have been 24 separate "contraventions" of the 1991 Act during that period.

14. Yet the relevant statutory language takes us somewhat further, because the key question is the "date of the contravention to which the complaint relates." In other words, time runs for the purposes of the Act not from the date of any particular contravention or even the date of the first contravention, but rather from the date of the contravention "to which the complaint relates." As the EAT pointed out in its ruling on the matter, had the Oireachtas intended that time was to run from the date of the first contravention, it could easily have so provided.

15. For the purposes of this limitation period, everything turns, accordingly, on the manner in which the complaint is framed by the employee. If, for example, the employer has been unlawfully making deductions for a three year period, then provided that the complaint which has been presented relates to a period of six months beginning "on the date of the contravention to which the complaint relates", the complaint will nonetheless be in time.

16. It follows, therefore, that if an employer has been making deduction X from the monthly salary of the employee since January 2010, a complaint which relates to deductions made from January, 2014 onwards and which is presented to the Rights Commissioner in June, 2014 will still be in time for the purposes of s. 6(4). If, on the other hand, the complaint were to have been framed in a different manner, such that it related to the period from January, 2010 onwards, it would then have been out of time.

17. It may be that when enacting s. 6(4) the Oireachtas did not fully appreciate that everything might turn for the purposes of time on the actual manner in which the particular complaint was actually framed by the employee, but the language of the sub-section really admits of no other conclusion. Nor can it be said that such a conclusion is absurd in any way.

18. In these circumstances the Supreme Court has indicated that it is not necessary or even appropriate for a court to go further on questions of statutory interpretation. As Denham J. said in *Board of St. Malóga National School v. Minister for Education* [2010] IESC 57, [2011] 1 I.R. 363:

> "As the words of s.29 [of the Education Act 1998] are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."

19. Counsel for the HSE, Mr. McDonald SC, urged a different approach, contending that this construction of the Act would lead to an absurd situation where there was, in effect, no time limit, depriving s. 6(4) of all meaning. For my part, I fail to see how such a construction would lead to a state of affairs which was either absurd or which would produce the results which Mr. McDonald SC feared. Depending, of course, on the manner in which the complaint is framed, only complaints which "relate" to the last six months (or, if the Rights Commissioner is satisfied that there are "exceptional circumstances" which prevented the bringing of the complaint, twelve months) prior to the presentation of the complaint to the Rights Commissioner will not be time-barred.

20. This state of affairs – with a rolling time limit - is by no means unusual in the law. If, for example, a commercial tenant is obliged to pay a monthly rent of €5,000, but has actually only paid €4,500 per month for the last eight years, then having regard to the provisions of the Statute of Limitations, in a breach of contract action the landlord will be able to claim only in respect of the underpayments for the last six years. No one would suggest in that situation that the entire action was statute-barred on the basis that the cause of action first arose eight years ago with the first underpayment, because each separate underpayment would be regarded as a separate cause of action. A very similar analysis applies by analogy to the claim in the present case.

21. If, moreover, any different interpretation were to be adopted it itself could quickly lead to some anomalous and even absurd results, as the following series of examples show.

First example

22. Suppose, for example, an employer made deduction X from his employees monthly salary from January 2010, but no complaint was made by the employees. Possibly emboldened by their passivity, the employer then commences to make deduction Y in March, 2014. An employee thereafter presents a complaint to the Rights Commissioner in June, 2014 to the effect that unlawful deductions X and Y have been made from his salary from March 2014 onwards. Is to be said that the Rights Commissioner cannot entertain any claim in relation to deduction X from March, 2014 because the evidence is that these deductions commenced in January, 2010?

Second example

23. Suppose, for example, an employer hires a young employee with little English and who perhaps has little familiarity with Irish labour rights legislation. The employer makes a series of unlawful deductions from the employee's wages and this state of affairs continues

for many years due to the employee's vulnerability and lack of awareness of his statutory entitlements. Is to be said that in those circumstances the employer should be permitted to continue to make these unlawful deductions every month, more or less in perpetuity, even though this result would be precisely the logical consequence of the argument now advanced by the HSE?

The decision in *Moran v. Employment Appeals Tribunal*
24. It remains only to consider the decision of Keane J. in *Moran v. Employment Appeals Tribunal* [2014] IEHC 154. In that case the parties also canvassed many of the arguments which featured in the present appeal, but in the event Keane J. did not find it necessary to rule on those arguments. This was because the complaint *as formulated by the claimant in that case* related to a time period of alleged contraventions which was plainly time-barred.

25. This point was clearly explained by Keane J. in the following terms:

> "I do not believe that it is necessary or appropriate for the Court to address, much less resolve, the issue of statutory construction presented by the appellant in order to dispose of this appeal. The uncontroverted evidence presented to the rights commissioner, the Tribunal and to the Court establishes that the appellant did not, as a matter of fact, present a complaint to the rights commissioner relating to a contravention of the 1991 Act alleged to have occurred on any specific date or dates within 6 months of the 17th May 2010. The appellant himself identified the contravention to which his complaint relates as an "application ... for payment of a 5% wage increase awarded by Government to [HSNs] in the [HSE] with effect from 14 September 2007."
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> The issue of how this Court should construe the provisions of section 6(4) of the 1991 Act for the purpose of applying it to a complaint that there has been an impermissible deduction from the wages of the appellant in each of the 6 months immediately prior to the presentation by him of that complaint (specifically, a deduction in the form of a refusal to include in that payment an increase to which the complainant claims to have become entitled some years previously) is a hypothetical issue as far as the complaint actually presented by the appellant in this case is concerned.
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> As Carroll J. confirmed in the case of *Mhic Mhathuna v. Ireland* [1989]1 I.R. 504 (at 510), the Court cannot take into account arguments based on assumptions or hypotheses outside the facts and circumstances of the action or, in this instance, the appeal - before the Court.
>
> If the appellant is correct in his contention concerning the proper construction of section 6(4) of the 1991 Act, then it is open to him to present a complaint to a rights commissioner relating to any alleged deduction in the wages paid to him on any specified date (or dates) within the period of 6 months beginning on the date of the first such payment. If he is incorrect in that contention, any such complaint will fail. But it would be wrong for the Court to seek to anticipate the outcome of such a complaint before the rights commissioner or the Tribunal for the purpose of the present appeal, just as it would be wrong for this Court to conduct this appeal as though the applicant had actually presented such a complaint to the rights commissioner or to the Tribunal in this case."

26. It is accordingly clear that, just as in the present case, the decision in *Moran* turned entirely on the manner in which the complaint had been formulated in that case. The claim was accordingly held to be time-barred precisely because the complaint "related" to a time period well beyond the six months statutory period. Indeed, in that final paragraph which I have just quoted, Keane J. clearly hinted that he would have arrived at a different conclusion had the complaint been formulated differently, so that it "related" to a different time period which was not statute-barred.

Conclusions
27. It follows, accordingly, that for the reasons which I have just stated, the EAT was correct in concluding that the claim in the present case was not time-barred by reason of the operation of s. 6(4) of the 1991 Act. Critically, the complaint in the present case related to a period of time (January, 2011 to June, 2011) which was presented to the Rights Commissioner on 16th June, 2011, within the six months time limit in respect of this particular complaint.

28. Accordingly, therefore, I propose to dismiss the appeal by the HSE on the preliminary time issue and to return the matter to the Tribunal so that it can now proceed to consider the merits of the complaint.