Neutral Citation: [2014] IEHC 154

THE HIGH COURT

Record No [2012/464 MCA]

In the matter Section 7(4)(b) of the Payment of Wages Act 1991

BETWEEN

ALAN MORAN

Appellant

AND

THE EMPLOYMENT APPEALS TRIBUNAL

Respondent

AND

THE HEALTH SERVICE EXECUTIVE

Notice Party

JUDGMENT of Mr. Justice Keane delivered on the 25th March 2014

Introduction

1. This is an appeal under section 7(4)(b) of the Payment of Wages Act 1991 ("the 1991 Act"). That sub-section states:

> "A party to proceedings before the [Employment Appeals] Tribunal may appeal to the High Court from a determination of the Tribunal on a point of law and the determination of the High Court shall be final and conclusive."

2. The decision under appeal is a determination of the Employment Appeals Tribunal ("the Tribunal") made on the 14th November 2012. That determination was made on the present appellant's appeal against a first instance decision of a rights commissioner given on the 10th March 2011. That decision was given in respect of a complaint made by the appellant on the 17th May 2010.

3. In accordance with the obligation imposed on him under Order 84C, rule 2(3) of the Rules of the Superior Courts, as amended, in his Originating Notice of Motion dated the 17th of December 2012, the appellant identifies the point of law on which the appeal is made as whether "[the Tribunal] in its determination incorrectly applied section 6(4) of the Payment of Wages Act 1991 in respect of the time limits applicable to the bringing of [the appellant's] complaint under the Act to a Rights Commissioner, and incorrectly ruled that [the appellant's] complaint was time barred."

4. Three matters fall to be considered. The first is the nature and terms of the appellant's complaint to the rights commissioner (and of his appeal to the Tribunal). The second is the Tribunal's determination in respect of the appellant's appeal against the rejection of his complaint by the rights commissioner. The third is whether the Tribunal erred in law in its application of the provisions of section 6(4) of the 1991 Act to that complaint.

The Complaint

5. In his Notice of Complaint to the rights commissioner dated the 17th May 2010, the appellant identified his complaint as one of deduction (rather than non-payment) of wages. The appellant identified the date of deduction as "ongoing since 14/9/2007" and the amount of deduction as "€15,519 from 14.9.07 & ongoing."

6. The appellant and the notice party are largely in agreement concerning the facts that have given rise to the appellant's complaint. The appellant is, and was at all material times, employed by the notice party as a hospital network manager ("HNM"). At the time of his complaint he was in receipt of gross pay of €117,591 *per annum*.

7. On the 25th October 2007, the Government accepted the recommendations of Report No. 42 of the Review Body on Higher Remuneration in the Public Sector. The report recommended an increase of 19.6% for HNMs, with that increase to be implemented in 3 phases, commencing with an increase of 5% from the 14th September 2007. On the 8th July 2008, the Government announced that all of the pending increases recommended by that report would not be implemented. The Minister for Finance subsequently clarified, in a letter dated the 13th June 2007 to the Minister for Housing and Local Services, that the Government announcement did not affect payment of the first phase of the increase under the recommendation to employees of the notice party. However, because of an industrial relations issue that arose between the Department of Health and Children and the notice party regarding linkages between the relevant grades in the notice party and other grades covered by the Review Body, the relevant increase remained unimplemented up to the enactment of the Financial Emergency Measure in the Public Interest (No. 2) Act 2009 ("FEMPI 2"). FEMPI 2 effectively prohibits salary increases for public servants, subject to the power of the Minister for Finance to approve exemptions from that prohibition where the Minister is satisfied exceptional circumstances exist and there is, in those circumstances, a necessity for a distinction from other public servants or from other classes or groups of public servants, as the case may be, and it is just and equitable in all the circumstances to do so. In a letter to the Chief Executive Officer of the notice party, dated the 20th July 2010, the Department of Finance advised him that the Minister had reviewed the matter and had decided not to grant an exemption in respect of the appellant's grade.

8. The appellant contends that this industrial relations issue is also a breach of his employment law rights in that the non-implementation of the 5% increase that had been due to him as a HNM with effect from the 14th September 2007 is an unlawful deduction from the wages properly payable to him with effect from that date, contrary to the provisions of section 5 of the 1991 Act.

The rights commissioner decision

9. In his decision given on the 10th March 2010, the rights commissioner noted that the notice party was seeking the determination,

as a preliminary issue, of the question whether the appellant's complaint, as submitted, complies with the time limits provided for in section 6(4) of the 1991 Act. However, the rights commissioner did not address that submission in the operative pmt of his decision, concluding instead on the merits of the complaint:

> "...I find that the non-application of a salary increase, albeit one that was previously sanctioned at a particular moment in time, is not a non-payment of the wages properly payable to the [appellant]."
>
> The rights commissioner thus concluded that the appellant's claim was not well founded as it falls outside the provisions of the 1991 Act.

The appeal to the the Tribunal

10. The appellant brought an appeal against the decision of the rights commissioner (in the prescribed "Form T1-B") to the Tribunal. That form is signed by the appellant and dated the 15'11 April 2011. In it, the appellant identified the remedy that he is seeking as " [a]n order for the payment of the wages claimed." Under the heading "Reasons for Appeal", the appellant states:

> "My application is for payment of a 5% wage increase awarded by Government to [HSNs] in the [HSE] with effect from 14 September 2007...."

11. The Tribunal heard the appeal at Carrick on Shannon on the 4th October 2012 and issued its determination on the 14th November 2012. That determination notes that the Tribunal had reservations about its jurisdiction to hear the matter by reference to the time limit set out in section 6(4) of the 1991 Act. The Tribunal invited the parties to make submissions on the point and even offered them an adjournment to facilitate the exchange of written submissions concerning it, should they so desire. However, the parties decided to proceed on the basis of oral submissions made, after a short recess, on the hearing date.

Section 6(4) of the 1991 Act

12. Section 6(4) of the 1991 Act states:

> "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."

The contravention to which the complaint relates

13. The contravention to which the complaint presented to the rights commissioner in this case relates was quite plainly stated by the appellant in that complaint to be a deduction from the wages properly payable to him from the 14th September 2007, totalling at the time of his complaint the sum of €15,519. Lest there be any doubt in that regard, the appellant re-iterated in his appeal to the Tribunal: "My application is for payment of a 5% wage increase awarded by Government to [HSNs] in the [HSE] with effect from 14 September 2007...". It is common case that the appellant did not present his complaint to the rights commissioner until the 17th May 2010, more than 32 months after that date.

14. When confronted with that evident difficulty at the hearing of his appeal before the Tribunal in Carrick on Shannon on 4th October 2012, the appellant sought, with considerable ingenuity, to complain of a different contravention (or series of contraventions) of the 1991 Act. In essence, it was suggested that the Tribunal should not consider the complaint actually presented to the rights commissioner by the appellant but should instead consider a complaint (or complaints) of the alleged deduction from the appellant's monthly wages in each of the six months immediately prior to the 17th May 2010 of a sum representing the 5% pay increase to which the appellant claims he was entitled with effect from the 14th September 2007 despite the enactment of FEMPI 2.

15. The Tribunal addressed this aspect of the appellant's complaint in the following terms:

> "...[W]e must now look at the date the appellant lodged his application with the Rights Commissioner, which was 17 May 2010, to determine if this was the beginning of the contravention from which the period of six months would run.
>
> The appellant's claim is in relation to a pay increase awarded to [HSNs] pursuant to report Number 42 of the Review Body on Higher Remuneration in the Public Sector, which increase was to be implemented on 14 September 2007 in three phases. However, at that time, while other staff in the public service received the increase, the [HSNs] did not. This was due to the increase requiring sanction from the Department of Health and Children, and due to disagreement with IMPACT regarding such pay increases, this sanction was not forthcoming. Unfortunately, in the intervening period the FEMPI 2 Act was enacted which prohibited salary increases for public servants from 1 January 2010, and while the Minister for Finance could approve an exemption under this Act and allow payment of the increase, he did not do so. While the appellant refers to these matters in his [Form T1- B], he clearly sets out under the heading "Reasons for Appeal" that his application is for payment of the increase with effect from 14 September 2007. No argument was made for the consideration of a later date based on intervening events. Neither was this dealt with or mentioned by the appellant in his oral submissions to the Tribunal."

The point of law the appellant seeks to raise

16. It will be remembered that the point of law that the applicant now seeks to raise on this appeal is whether "[the Tribunal] in its determination incorrectly applied section 6(4) of the Payment of Wages Act 1991 in respect of the time limits applicable to the bringing of [the appellant's] complaint under the Act to a Rights Commissioner, and incorrectly ruled that [the appellant's] complaint was time barred."

17. The appellant is here referring to the view expressed by the Tribunal on the proper construction of section 6(4) of the 1991 Act. That portion of the determination states:

> "[Section 6(4) of the 1991 Act] makes it clear that the time frame of 6 months within which the complaint must be made runs from the beginning of the date of the contravention of the complaint or, where exceptional circumstances prevented the making of the complaint within the time frame,"...such further period of six months as the Rights Commissioner

considers reasonable...". The language used in this section is clear and unambiguous. In particular, the use of the word "beginning" in the third line is no accident and was used deliberately by the draftsman to make it clear that the time frame of six months runs from the start of the contravention and no other point. Accordingly, the appellant's contention that the complaint can be made at a subsequent time to the beginning of the complaint is unfounded and without merit, as it could lead to the farcical situation where a claim can never be out of time, and this was clearly not the draftsman's intention."

18. The parties to this appeal have exchanged extensive written legal submissions on the proper construction of section 6(4) of the 1991 Act. In support of the construction for which he contends, the appellant places particular reliance on the terms of section 5 of the 1991 Act. S. 5(1) prohibits the making of deductions by employers, save in certain limited circumstances, none of which is relevant here. Section 5(6) provides (in relevant part):

> "Where-
>
> (a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act),
>
> …
>
> then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency, or non payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

19. The appellant contends that the term "contravention" as employed in section 6(4) of the 1991 Act should be viewed as equivalent to, or synonymous with, the term "deduction" as defined in section 5(6) of the Act, so that, regardless of the date upon which any issue or controversy in relation to the amount of wages "properly payable" to an employee arises, the employee concerned can complain on any subsequent occasion on which he or she is paid wages (however long afterwards that may be), as long as that complaint is made within 6 months (or, where special circumstances are found, within up to 12 months) of each such payment. The appellant contends that this is what a literal reading of Section 6(4) requires.

20. The notice party puts forward several arguments in response, perhaps the most compelling of which is that the construction contended for by the appellant would lead to an absurd result, whereby the relevant section would function not as a time-bar, requiring complaints to be made within a reasonable time and preventing stale claims, but simply as a limitation of damages clause in respect of such complaints and claims. The notice party submits that this cannot and does not reflect the plain intention of the Oireachtas. Accordingly, if the appellant is correct in the literal meaning he seeks to ascribe to that provision, the notice party contends that, by operation of section 5(1) of the Interpretation Act 2005, the provision must instead be accorded a construction that does reflect the plain intention of the Oireachtas, which intention, ascertained from the Act as a whole, is to require complaints to be made reasonably promptly in order to promote the speedy and efficient dispatch of any issue that arises between an employer and an employee concerning the payment of wages.

Conclusion

21. 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."

22. 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.

23. As Carroll J. confirmed in the case of *MhicMhathuna 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.

24. 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 of6 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.

25. For the reasons I have given, the present appeal fails *in limine* and is dismissed.