THE COURT OF APPEAL

Ryan P.
Irvine J.
Hogan J.

No. 2015, 379

CHANELLE MULLALLY, ALAN POWER, NOEL BURNS, RICHARD DOYLE AND THE PSYCHIATRIC NURSES ASSOCATION

APPELLANTS

- AND –

THE LABOUR COURT

RESPONDENT

- AND –

WATERFORD COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 20th day of October 2016

1. This is an appeal from a decision of the High Court (Noonan J.) delivered on 12th June 2015. The essence of the decision of Noonan J. was that the High Court had no jurisdiction in judicial review proceedings to review a recommendation in respect of a trade dispute made by the Labour Court under s. 68(1) of the Industrial Relations Act 1946 ("the 1946 Act") (as substituted by s. 19 of the Industrial Relations Act 1969): see *Mullally v. Labour Court* [2015] IEHC 351. The issue arises in the following way.

2. The first four applicants are retained fire fighters employed by the Waterford County Council ("the Council"). The Council has some 530 employees, of whom 76 are retained fire fighters. Of that figure, 61, or 80%, are members of the registered trade union, the Psychiatric Nurses Association ("the PNA") (which is the fifth-named applicant in these proceedings) and, of its branch, the Irish Fire and Emergency Service Association ("IFESA"). The Council currently recognises five different unions representing its employees for negotiation purposes, but it does not recognise the PNA or IFESA. The PNA is a registered trade union with a negotiation licence, but it is not a member of the Irish Congress of Trade Unions.

3. On the 22nd of May 2013, the general secretary of the PNA wrote to the County Manager of the Council requesting recognition of IFESA for negotiation purposes. The Council responded by letter of the 11th of June 2013 stating that as IFESA is not recognised nationally for negotiation purposes, the Council could not accord it the appropriate recognition.

4. On the 27th September 2013, the applicants formally requested the respondent ("the Labour Court") to investigate the trade dispute pursuant to its powers under s. 20(1) of the Industrial Relations Act 1969. In order, however, to understand the legal issues at issue in these proceedings, it is necessary first to set out relevant provisions of the Industrial Relations Acts.

The Industrial Relations Acts

5. Section 20(1) of the Industrial Relations Act 1969 ("the 1969 Act") provides as follows:-

> "Where the workers concerned in a trade dispute or their trade union or trade unions request or requests [the Labour Court] to investigate the dispute and undertake or undertakes before the investigation to accept the recommendation of the Court under section 68 of the [Industrial Relations Act 1946] in relation thereto then, notwithstanding anything contained in the Principal Act or in this Act, the Court shall investigate the dispute and shall make a recommendation under the said section 68 in relation thereto."

6. Section 68(1) of the 1946 Act (as substituted by s. 19 of the 1969 Act), provides as follows:-

> "68(1) The Court, having investigated a trade dispute, may make a recommendation setting forth its opinion on the merits of the dispute and the terms on which it should be settled."

The Hearing Before the Labour Court

7. A hearing concerning this issue took place before the Labour Court on the 4th March 2014. The applicants were represented by solicitors and senior counsel. The Council was represented by Mr. Don Culliton, acting Assistant Chief Executive of the Local Government Management Agency. Both sides made oral and written submissions.

8. The Labour Court then issued its recommendation on the 14th of March 2014 in a formal three page document. This document summarises the background and the party's respective arguments in a concise form. The Labour Court's recommendation was as follows:

> "RECOMMENDATION:
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> Unlike all other cases in which the Court has recommended that a trade union be recognised for industrial relations purposes, the employer in this case has in place well established arrangements for the conduct of collective bargaining with authorised trade unions. The applicants in this case are, in effect, a breakaway group who are seeking to establish negotiating rights with the employer through the convenience of another trade union that has no recognised involvement in negotiations with local authorities.
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> While the applicants have an acknowledged right to be members of whatever organisation they choose, the exercise of that right cannot, in the circumstances of the present case, imply a concomitant obligation on the employer to negotiate with their chosen organisation. In the Court's opinion, recognition of this group would have a highly undesirable destabilising effect on the established negotiating arrangements currently in place. It would also greatly impair the orderly

conduct of industrial relations within the local authority sector. On that account, it would be irresponsible for the [County] Council to accede to the applicants' request for recognition.

For these reasons the Court does not recommend concession of the worker's claim."

9. The applicant contended that the conclusions reached by the Labour Court were not factually sustainable and were tainted by reason of the fact that irrelevant considerations had been taken into account. It was also submitted that the Labour Court had failed to give any adequate reasons for its decision.

10. Although the Labour Court has not participated in the proceedings, counsel on behalf of the Council submitted that the recommendation of the Labour Court was not justiciable as it did not constitute a determination of any rights or obligations and that, accordingly, judicial review did not lie. As the High Court agreed with the Council's submission that the recommendation emanating from the Labour Court consisted of a non-justiciable controversy which was not amenable to judicial review, the question of justiciability is presented on this appeal as a jurisdictional issue which the applicants must surmount before the individual legal merits of that dispute can be examined.

Whether the recommendation of the Labour Court is amenable to judicial review

11. The Labour Court may be said to have been granted two fundamental roles by the *corpus* of industrial relation legislation which started with the Industrial Relations Act 1946 right up to the more recently enacted Workplace Relations Act 2015. The first of these roles is to make a binding adjudication (subject to an appeal) in relation to issues of employment law and entitlements. In such cases the Court is engaged *qua* administrative tribunal in resolving questions of fundamental legal entitlements in respect of discrete aspects of employment law ranging from redundancy payments to unfair dismissal. In such cases a right of appeal is provided by law: see, *e.g.,* s. 46 of the Workplace Relations Act 2015 which provides for a right of appeal on a point of law to the High Court in respect of certain determinations of the Labour Court.

12. The second role is quite a different one and it effectively requires the Court to act as a form of independent arbiter in matters of industrial relations policy. In this sphere its task is confined simply to making recommendations which do not bind the parties. The present appeal concerns the second of these roles.

13. In any evaluation of the role of the Labour Court in making a recommendation of this kind, it must be recalled that its fundamental role in matters of this nature is to act as something in the nature of an industrial relations mediator whose task it is to advance the cause of industrial peace by making recommendations to the parties. Nor is the Court when performing this function engaged in the process of making an evaluation of the rights of the parties gauged by reference to purely legal standards: the Court when discharging this role will often – quite properly – make recommendations based on purely practical and pragmatic considerations.

14. The nature of this jurisdiction was examined by me as a judge of the High Court in *MacDonnacha v. Minister for Education and Skills* [2013] IEHC 226. In that case the two applicants were Chief Executive Officers of Vocational Educational Committees and, as such, were in receipt of certain allowances. These allowances were paid to CEOs for administering the operation of the school transport system. The Minister decided in 2010 to transfer the administration of the school transport system to the transport providers and to abolish these allowances. This constituted a significant pay reduction for CEOs and gave rise to a trade dispute between the CEOs and the Minister which was referred to the Labour Relations Commission and, ultimately, to the Labour Court pursuant to s. 26(1) of the Industrial Relations Act 1990, which gave the Court a jurisdiction to investigate the trade dispute similar to that contained in s. 20(1) of the 1969 Act.

15. The Labour Court issued a recommendation in which it stated that the elimination of the allowances was justified in the circumstances and it further recommended that the offer of the Department of Education to compensate the CEOs be accepted. One of the issues considered by the High Court was whether this recommendation created a res judicata which would have had the effect of precluding the applicants from applying to the Court for relief in relation to the issue of the withdrawal of these allowances.

16. In my judgment in *MacDonnacha* I held that the Labour Court recommendation did not serve to create a res judicata, precisely because what was at issue was a non-binding recommendation:

> "35. Here it may also be noted that the Labour Court assumed jurisdiction under s. 26(1) of the Industrial Relations Act 1990 (albeit in the context of the dispute resolution procedures envisaged by the CPA [Croke Park Agreement]) and that it merely issued a recommendation. The whole purpose of the Labour Court's functions in matters of this nature is to advance a solution to industrial relations disputes. Although the Court's functions are sometimes clothed in the language of law (e.g., the very use of the term "Court") and while it employs legal principles when adjudicating on matters relating to legal rights, (such as, for example, cases involving the rights of part-time workers or employees on fixed term contracts), in the present context it is really acting as a form of industrial relations mediator. When adjudicating on matters relating to the [Croke Park Agreement], therefore, the Labour Court is accordingly not deciding legal rights or employing exclusively legal concepts to resolve such disputes. On the contrary, when issuing recommendations in this context the Court will often - perfectly properly - adopt a purely pragmatic and practical approach to such questions. Its role in such cases is to resolve disputes and to maintain industrial peace and the criteria which underpin its recommendations are not strictly legal ones.
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> 36. In summary, therefore, the recommendation of the Labour Court at most amounts to a binding resolution of any such dispute for industrial relations purposes. While the decision to terminate the [allowance] was one which was (probably) taken outside of the strict confines of the CPA, it cannot be said that the use of the CPA dispute resolution procedures (such as, in this instance, the reference to the Labour Court) rendered the outcome binding or final for legal purposes. This is not only because the Court's jurisdiction under s. 26(1) of the Industrial Relations Act 1990 is not invested with that quality of legal finality, but also because for all the reasons set out in *Holland v. Athlone Institute of Technology* [2011] IEHC 414 the CPA itself does not create - and was not intended to create - legally justiciable rights.
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> 37. It follows, therefore, that the Labour Court recommendation does not create res judicata nor does it preclude the applicants from applying to this Court for declarations as to the legality of the withdrawal of the TLOA allowance…"

17. In my judgment, this reasoning applies, *mutatis mutandis*, to the circumstances of the present dispute. The Labour Court was not purporting to determine or otherwise adjudicate upon the legal rights of the parties: it was, at most, expressing a view as to how a particular issue of industrial relations relating to union recognition might be resolved.

18. The authorities bear out the submission of the Council that decision-making of a purely advisory or admonitory kind is generally

regarded as non-justiciable in nature. This was fundamentally the reason why I concluded as a judge of the High Court in *Holland v. Athlone Institute of Technology* [2011] IEHC 414 that the Labour Court's recommendations concerning the Croke Park Agreement were non-justiciable in nature.

19. This general point was also well made in a different context by the Supreme Court in *Riordan v. An Taoiseach* [2000] IESC 35. In that case the Supreme Court had been asked to declare unlawful a recommendation made by the Government to the European Investment Bank that a particular candidate be appointed to a position with that organisation. As Keane C.J. observed:

> "The need for such restraint is clearly even greater where, as here, the High Court was invited to declare unlawful a recommendation, having no effect in law, conveyed by the executive to another body. The Government collectively or individual ministers may, over a huge area of activity, indicate their wishes or preferences to other persons or bodies and it would be a remarkable and novel step for a court to take it upon itself to declare political decisions of this nature unlawful."

20. It is true that, as counsel for the applicants, Mr. McGarry S.C., forcefully argued, the modern law on judicial review often looks beyond the rather formalistic question of simply examining whether the legal rights of individual have been affected. The present case is nevertheless wholly different to cases such as *Maguire v. Ardagh* [2002] 1 I.R. 385 or de *Búrca v. Wicklow County Council* [2009] IEHC 54. In marked contrast to those cases there is no attempt in the present case to adjudicate upon contentious and disputed facts in a way which reflects might well adversely upon the constitutional right to a good name of any of the parties. To repeat: the Labour Court's decision represents in truth no more than a recommendation from an expert body which has considerable practical industrial relations experience.

The language of s. 20(1) of the 1969 Act: "undertake...to accept the recommendation"

21. In arriving at this conclusion I have not overlooked a point so strongly emphasised by Mr. McGarry S.C. for the applicants, namely, that s. 20(1) of the 1969 Act requires that the workers or trade unions concerned "undertake before the investigation to accept the recommendation" and that this undertaking forms the very basis of the Labour Court's jurisdiction to make a recommendation.

22. One is obliged to agree that the wording of this section is unusual and, some might think, unsatisfactory. It seems curious that the Oireachtas would insist that one side only to an industrial relations issue would agree to be bound in advance when what ultimately issues from the Labour Court is simply a recommendation which does not bind the other relevant party. If a particular recommendation were to be rejected by the employers' side, it would be striking – and, frankly, somewhat meaningless - if this recommendation were still to bind the workers and the trade unions who had invoked the jurisdiction of the Labour Court in the first place.

23. In these circumstances, I am driven to the conclusion that the reference in s. 20(1) of the 1969 Act to the employees and trade unions agreeing to be bound is simply a legal mechanism which enables the Court to assume jurisdiction to issue a recommendation, but beyond that such undertakings have no further lasting or enduring quality. The critical point, however, from a consideration of the legislation as a whole is that what issues from the Court is not, in fact, a binding determination, but is simply a recommendation which, by definition, cannot have the legally enforceable characteristics of a binding decision, the ostensible language of s. 20(1) regarding prior undertakings by the trade union and employees notwithstanding.

Conclusions

24. All of this is to say that if the decision of the Labour Court was not simply a recommendation, but had binding legal consequences, then, of course, the result of this case so far as the jurisdictional issue of justiciability is concerned would be quite different. As this, however, is not the case, I entirely agree with the conclusion of Noonan J. that the recommendation of the Labour Court pursuant to s. 20(1) of the 1969 Act "has no strictly legal effect but rather relies upon the moral authority of the expert statutory body from which it emanates." Nor can it be said that such a recommendation creates any form of *res judicata* or any other form of binding resolution.

25. It follows, therefore, that the recommendation of the Labour Court does not give rise to justiciable rights or issues such as would permit the applicants to seek judicial review of that decision.

26. It is, accordingly, for these reasons that I would dismiss this appeal.