THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 146 J.R.]

BETWEEN

TOMASZ ZALEWSKI

APPLICANT

AND

ADJUDICATION OFFICER (ROSALEEN GLACKIN), THE WORKPLACE RELATIONS COMMISSION IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BUYWISE DISCOUNT STORE LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 8th day of February, 2018.

Background:
1. The applicant commenced employment with the notice party, as a security guard, on or around 31st March, 2012. In December 2014 he was assigned the position of supervisor in a store. He was subsequently promoted to the position of assistant manager.

2. Subsequently the applicant was dismissed from his employment with the notice party in circumstances which he set out in detail in his affidavit grounding this application. It is not necessary to detail those circumstances here. However, following his dismissal the applicant consulted Mr. Eamon O'Hanrahan of EM O'Hanrahan Solicitors on or about May 2016, seeking advice on legal remedies that may be available, including a claim for unfair dismissal pursuant to the Unfair Dismissals Act, 1977 (as amended).

3. Having received advice, the applicant decided to submit a complaint in respect of both a claim for unfair dismissal and a claim for alleged non payment of money in lieu of notice. This required the applicant to institute proceedings under the Unfair Dismissals Act, 1977 (as amended) and the Payment of Wages Act, 1991 (as amended). This would entail an application to the Workplace Relations Commission (hereinafter the WRC) for hearing before an adjudication officer, pursuant to the provisions of the Workplace Relations Act, 2015 ("the Act of 2015").

Proceedings before the WRC:
4. The applicant maintained that in order for his unfair dismissal and unpaid notice claims to be fairly determined it would be necessary for him to be afforded the opportunity to give evidence in respect of his claim and also have the opportunity, through his legal representative, to test the evidence adduced on behalf of his employer, the notice party, including cross examination of any witnesses.

5. The first named respondent ("Adjudication Officer") was assigned to hear the applicant's claim. Submissions on behalf of the applicant were furnished by his solicitor under cover of email dated 15th September, 2016. In the course of submissions it was made clear that the applicant was anxious to have the opportunity to cross examine all witnesses appearing on behalf of the notice party and it was specifically stated that objection was being taken to any hearing based exclusively on written submissions. Subsequently the notice party furnished a written submission.

6. A hearing was scheduled to take place on 26th October, 2016. The applicant attended with his solicitor. The notice party was also represented. The Adjudication Officer proceeded to clarify the names of the parties, the dates of employment and pay details. The Adjudication Officer then inquired as to whether the applicant was in receipt of social welfare payments. It was confirmed that he was in receipt of Jobseeker Allowance benefits and the Adjudication Officer asked the applicant's solicitor to obtain documentation from the Department of Social Protection to confirm the position.

7. The hearing before the Adjudication Officer then commenced with an outline being given by the notice party of its case. However, the solicitor for the applicant objected stating that any factual evidence should be given by the appropriate witness. At that point, the notice party's representative requested an adjournment of the hearing on the grounds that a particular witness was not present and could not be in attendance for family reasons. On hearing this, the solicitor for the applicant stated that he had no objection to an adjournment of the hearing. The Adjudication Officer agreed to adjourn the case and dates for a further hearing were considered.

8. Subsequently, a hearing date of 13th December, 2016 was fixed to hear evidence of the applicant's claims.

Hearing on 13th December, 2016:
9. On 13th December, 2016 the applicant attended at the hearing which was scheduled to commence at 11.30am. The applicant's solicitor was then approached by a representative of the notice party, who indicated that she wished to speak with him. The solicitor for the applicant was informed by the representative of the notice party that she had been informed by the Adjudication Officer's receptionist that the Adjudication Officer had already issued her decision in relation to the applicant's claim and that the hearing that morning had been scheduled in error.

10. At that point, the Adjudication Officer walked into the corridor where the solicitor for the applicant was speaking with the representative of the notice party. The Adjudication Officer apologised that the hearing date had been assigned in error. She stated that she had issued her decision the previous week and that the scheduling office had made an error in arranging the hearing that morning. The Adjudication Officer then encountered the applicant and spoke to him in words to the effect that "it was a pity we had all come down that morning for nothing". She apologised, stating that she had already heard the case on the last occasion.

11. The decision was issued in writing by the Adjudication Officer dated 16th December, 2016.

Written decision of 16th December, 2016:
12. The written decision of 16th December, 2016 contains the following:-

> (i) "Date of adjudication hearing: 26th October, 2016"
>
> (ii) "Procedure:
>
> > In accordance with s. 41(4) of the Workplace Relations Act, 2015 and s. 8(1B) of the Unfair Dismissals Act, 1977 and following the referral of the complaints to me by the Director General, I inquired into the complaints and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints."
>
> (iii) "Findings:
>
> > On the basis of the evidence and a written submission I find as follows…"
>
> (iv) "Decision – Unfair Dismissals Act, 1977 – CA – 4535 – 001.
>
> > On the basis of the evidence and my findings above I declare the respondent conducted the investigation, disciplinary and appeal hearings in accordance with the disciplinary procedures of the company…
> >
> > The complainant and his legal representative did not advance any argument or evidence at the hearing as to why they considered the dismissal "to be both procedurally and substantially unfair" as stated in the complaint form.
> >
> > The Complainant stated at the hearing that he was in receipt of jobseekers benefit from the Department of Social Protection since the date of his dismissal. He was requested to provide evidence of this but did not do so.
> >
> > In accordance with s. 8(1)(c) of that Act I declare the complaint of unfair dismissal is not well founded."

13. There are a number of aspects concerning the written decision of 16th December, 2016 which give rise to very serious concerns:-

> (i) There are repeated references in the decision to it being based on "evidence" in circumstances where no evidence was given.
>
> (ii) The decision is dated 16th December, 2016, some three days after the date that was fixed for the hearing of evidence. That hearing did not proceed as the Adjudication Officer informed the applicant, his solicitor and the notice party that she had issued her decision the previous week.
>
> (iii) Notwithstanding the events of 13th December, 2016, the date that had been fixed for the taking of evidence, the Adjudication Officer proceeded to issue her written decision dated 16th December, 2016 which contained a number of matters, set out at para.12 above, which were manifestly incorrect.

Judicial review proceedings:
14. By order of the High Court dated 20th February, 2017 the applicant was granted leave to seek judicial review. The reliefs sought by the applicant can broadly be divided under two headings:-

> (a) Declarations that certain sections of the Act of 2015 are invalid having regard to the provisions of the Constitution, in particular Article 34.1, Article 37.1, Article 40.3.1 and Article 40.3.2, and a declaration pursuant to the provisions of s. 5 of the European Convention on Human Rights Act, 2003 that certain sections of the Act of 2015 are incompatible with the State's obligations under the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 6 and 13 thereof.
>
> (b) Consequent on the declarations sought in para. (a) above, an order of *certiorari* quashing the decision of 16th December, 2016 and certain further orders.

Response of the respondents:
15. In a letter dated 4th April, 2017, the solicitor for the respondents wrote:-

> "It is evident that at the hearing of the complaint on 26th October, 2016 an issue arose as to the availability of Mr. Costello, a witness on behalf of Buywise Discount Store Limited to give evidence. An adjournment was granted, without objection, for the purpose of enabling that witness to give evidence and to be made available for cross examination at a resumed hearing."
>
> Upon granting the adjournment the Adjudication Officer requested the administration unit to re-list the compliant for a further hearing. However, following the conclusion of the hearing on 26th October, 2016 the Adjudication Officer in error filed the compliant as a "decision to issue" rather than "adjourned to further hearing". Subsequently, the Adjudication Officer prepared her decision to enable it to issue within 28 days that is generally applicable in this context. The filing of the complaint as a "decision to issue" and the consequent issuing of a decision was an administrative error on the part of the Adjudication Officer, which our client sincerely regret. We are instructed that there was no intent to conduct the investigation and hearing of the complaint otherwise then in accordance with fair procedures and natural and constitutional justice. As already noted, the decision to adjourn the hearing of the complaint was made with the intent of having that evidence heard on the date of the resumed hearing…
>
> In those circumstances, I am instructed to consent to an order being made in the following terms on the return date of 25 April, 2017:

1 an order of *certiorari* quashing the decision

2 an order remitting the complaint of Tomasz Zanewski to the Workplace Relations Commission to be investigated and heard by an Adjudication Officer other than the first respondent

3 an order for the costs of these proceedings to be made in favour of the applicant, to be taxed in default of agreement…"

This explanation was repeated in an affidavit sworn by Ms. Sile Larkin, Registrar of the WRC.

16. The explanation given by the respondents for the written decision of 16th December, 2016 was that it was an "administrative error". In light of the fundamental errors of fact in the written decision, the complete failure to apply even the most basic rules of fair procedures and the words and actions of the Adjudication Officer on 13th December, 2016, the date for the hearing of evidence, this explanation lacks credibility.

17. It must be borne in mind that an Adjudication Officer is charged with hearing claims for unfair dismissal. The outcome of such claims can have profound consequences, both personally and financially, for people involved, such as the applicant and the notice party. This makes the explanation for the decision as being "an administrative error" all the more unacceptable.

Application before the court:
18. Having conceded that the applicant is entitled to an order of *certiorari* quashing the decision of 16th December, 2016, the respondent seeks an order from this Court dismissing the relief sought by the applicant to challenge the constitutional validity of the Act of 2015.

19. On behalf of the respondents, it was submitted that having conceded that the applicant is entitled to an order of *certiorari* he no longer has "*locus standi*" to seek reliefs concerning the Constitution and the European Convention on Human Rights Act, 2003. The respondents rely upon *Cahill v. Sutton* [1980] I.R. 269 where Henchy J. stated: -

> "On the contrary, in other jurisdictions the widely accepted practice of courts which are invested with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

20. As the applicant will return to the WRC to have his case determined, the respondents deny that the WRC is "poised to operate in such a way as to deprive him personally of the benefit of a particular constitutional right …", as per *Cahill v. Sutton*.

21. The respondents seek to depict the applicant's challenge to the Act of 2015 as being "a pre-emptive strike" which deprives him of his "*locus standi*". Reliance is placed on *Nawaz v. Minister for Justice* [2013] 1 I.R. 142. This case involved a challenge to the Immigration Act, 1999 which, according to Mr. Nawaz, failed to provide him with an opportunity to leave the State voluntarily in the event that his application for humanitarian leave to remain was denied. In the course of his judgment, Clarke J. (as he then was), stated: -

> "The only purpose of Mr. Nawaz questioning the constitutionality of s. 3 of the Act of 1999 is so that any measures which might be adopted under that section will be regarded as invalid. If Mr. Nawaz were not exposed to the risk of orders being made under s. 3 then he would, of course, have no *locus standi* to challenge the constitutionality of the section in the first place. It is only because he is exposed to such orders (dependent on the Minister's decision on humanitarian leave) that he could have locus standi. However, that very fact seems to me to place Mr. Nawaz in a category where it can be said that the only purpose of his constitutional challenge is to render any such measures as might be adopted by the Minister invalid. It is a pre-emptive strike designed to prevent the Minister from making a deportation order at the same time as communicating a decision to decline humanitarian leave (assuming that such be the Minister's decision). It seems to me that such a pre-emptive strike is clearly one designed to question the validity of any order which might be made…"

The Court proceeded to make an order striking out the aspects of the plenary proceedings that sought to question the validity of s. 3 of the Immigration Act, 1999.

22. Finally, the respondents submit that the Superior Courts are traditionally reluctant to engage with proceedings that are speculative or which may be considered to give rise to academic questions of law.

23. Mr. Peter Ward S.C., on behalf of the applicant, submits that there has been a failure on the part of the respondents to either identify or address the gravamen of the applicant's claim. The applicant was granted leave to bring the action that he had a constitutional right to have his claim for unfair dismissals determined by a court of law and to have his claim adjudicated by a process that applied and followed fair procedures, in particular, that he be afforded an opportunity to examine and cross-examine witnesses.

24. The applicant maintained that the Act of 2015 was constitutionally flawed in that:

> (i) there is no requirement that the adjudication officer, who has to determine disputes of fact and/or law, must have any legal qualification or experience;
>
> (ii) evidence is not heard on oath;
>
> (iii) there is no penalty for any person who gives false evidence;
>
> (iv) hearings are held in private.

25. Further, the solicitor for the applicant in his affidavit states:

> "23. It has been my experience that hearings of complaints of unfair dismissal and complaints under the Payment of

> Wages Act 1991, and indeed complaints made under the other statutes which confer jurisdiction on adjudication officers, are very often heard in a manner whereby there is no *viva voce* evidence adduced and no opportunity given to test that evidence by means of cross-examination. It is because of my experience of adjudication officers hearing cases and deciding cases on the basis of written submissions and brief and extremely informal hearings where there is no formal evidence or indeed any opportunity to properly test it …"

26. Consideration of Submissions:
The law on *locus standi* is clear. I refer, again, to the passage from *Cahill v. Sutton*, set out above. It is clear that a particular set of facts is required against which a court can determine an issue of constitutionality. No such facts now exist, given the inevitable concession by the respondents that they could not stand over the decision of December 16th, 2016. The other aspect which I have to consider is whether in returning his claim for hearing to the Workplace Relations Commission to be heard by a different adjudication officer, the applicant will be, in the words of *Cahill v. Sutton*, "in real or imminent danger of being adversely affected, by the operation of the statute…"

27. It could be that the decision of December 2016 may have been as a result of some of the alleged constitutional infirmities in the Act of 2015, as the applicant says he has identified, but it seems to me that it was as a result of a complete failure on the part of the Adjudication Officer to follow fair procedures.

28. The WRC have produced a document entitled "Procedures in the Investigation and Adjudication of Employment and Equality Complaints". Page 6 provides:

> "The adjudication officer can ask questions of each party and of any witnesses attending. He or she will give each party the opportunity to give evidence, to call witnesses, to question the other party and any witnesses, to respond and to address legal points…"

29. One of the facts of the applicant's case was that the hearing was adjourned to enable evidence to be heard and tested by examination and cross-examination. The problem arose because on the adjourned date fixed for the taking of evidence the first named respondent, for some reason that has yet to be properly explained, informed the parties that she had already made a determination. Therefore, in my view, the WRC have procedures which, had they been followed, would have avoided the decision of December 2016.

30. I note the experiences which Mr. O'Hanrahan, solicitor, said he has had in dealing with other cases before the WRC which would tend to suggest that the case of the applicant was not an isolated incident. However, this cannot form the basis for a constitutional challenge.

31. Therefore, I cannot conclude that in returning the applicant's case to the WRC that he is thereby "in real or imminent danger of being adversely affected by the operation of the statute".

Conclusion

32. It follows from the above that the applicant does not have *locus standi* to challenge the constitutional validity of certain provisions of the Act of 2015 or maintain a claim under the provisions of the European Convention on Human Rights Act, 2003.