Neutral Citation [2015] IEHC 428

THE HIGH COURT

[2014 388 JR]

JUDICIAL REVIEW

BETWEEN

MAGDALENA GLEGOLA

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

AND

IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered the 23rd day of June 2015

1. In these proceedings, the applicant seeks an order of mandamus requiring the respondent to pay to her the amount of €16,818.75 being the measure of an award made to her against her former employer (the company) by a rights officer on the 11th of October 2012 in respect of her unfair dismissal, holiday and back pay. The rights officer further found that the company had not been placed in liquidation and continued to trade. She seeks this either by way of the direct implementation of Article 3 of EU Directive 2008/94/EC (the Directive) or alternatively by way of so called "Frankovich" damages because;

(a) The State has failed to adequately transpose this Directive. The applicant also seeks declarations that the state is in breach of the requirements of the Directive insofar as it requires the appointment of a liquidator or a receiver before an employer is deemed insolvent under the Protection of Employees (Employers Insolvency) Acts 1984 to 2012 (the 1984 Act);

(b) a declaration the State has failed to properly transpose the Directive,

(c) a declaration that a court declaration made under s. 251 of the Companies Act 1990 that a company is insolvent is adequate to deem an employer insolvent within the meaning of the Directive and/or the 1984 Act.

2. The applicant claims that under this Directive she has a right to receive the amount of her award from the Employers Insolvency Fund (the fund). She argues that it was for this purpose that she brought a petition seeking to restore the company to the register. It had been removed due to non furnishing of accounts. In this petition she also sought the appointment of a liquidator, an order winding up the company and alternatively a declaration pursuant to the s. 251 of the Companies Act 1990 (the 1990 Act). In that application she ultimately sought only a s. 251 declaration. The court therein made a declaration that *"…the reason or the principle reason for its not being wound up is the insufficiency of its assets."* The applicant argues that this declaration was sufficient to entitle her to payment from the fund. Alternatively, if it is not, then Ireland has failed to implement the Directive and she is entitled to the equivalent in damages to the amount awarded (Frankovich damages).

3. The respondent argues that the applicant has failed to meet the requirements of Article 2 (1) of the Directive in that she has not established that a request has been made for *"the opening of collective proceedings based on insolvency of the employer"* nor that the competent authority has established that her employers business has *"definitively closed down"*. She thus does not have *"locus standi"*. Moreover, the respondent argues that the applicant failed to pursue her claim within the time period prescribed by the 1984 Act. Whilst the respondent accepts that the applicant brought a s. 251 petition and that the court made the declaration as pleaded herein, they deny that such a declaration does or could entitle the applicant to the benefit of the fund given the provisions of the 1984 Act. The respondent accepts that the 1984 Act is the implementing provision of the Directive. It argues that this Directive defers to the insolvency law of member states and does not harmonise the concept of insolvency. Thus s. 4 of the 1984 Act provides for insolvency *"…within the meaning of s. 285 of the Companies Acts 1963"*. This means the winding up of the company. This the respondent argues is rational and proportionate and compliant with the Directive. Thus the respondent argues that the company has not been wound up and therefore is not insolvent. Moreover it has not been established that the applicant employers *"…undertaking or business has been definitively closed down."* In fact it argues, the applicant made the case to both the rights commissioner and the High Court that the business was in fact continuing.

4. ***The decision of the court.***

It seems to me that the first question to be determined is as to whether the applicant has brought herself within the terms of Article 2 of the Directive because this is the point of departure for her claim upon the fund or in frankovich damages. It is in fact the first hurdle she must cross. The Directive in its relevant part provides as follows;

"Article 2

1.For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:

(a) either decided to open the proceedings, or

(b) established that the employer's undertaking or business has been definitively closed down and that the available

assets are insufficient to warrant the opening of the proceedings."

In *Mustafa v. Direktor na Fond Garantirani Vzemania na Rabotnitsite i Sluzhitelite' Kam Natsionalnia Osiguritelen Institut,* C-247/12, the Court of Justice considered whether or not an employer's business had to be terminated before the guarantee institutions liability to pay accrued. At para. 32, the court stated as follows;

> *"32. Accordingly, it is apparent that, in order for the guarantee provided by Directive 2008/94 to apply, two conditions must be satisfied. First, there must have been a request for the opening of proceedings based on the insolvency of the employer and, second, there must have been a decision either to open those proceedings or, where the available assets are insufficient to warrant the opening of such proceedings, it must have been established that the undertaking has been definitively closed down."*

Paragraph 33 of the judgment is not relevant herein because no decision was in fact made to open insolvency proceedings. The alternative, as provided in the Article and referred to in the above judgment was what occurred in this case.

5. Thus the key questions appear to me to be a). whether there has been an opening of collective proceeding as provided in Article 2, b). whether it has been established that the applicant employers business or undertaking "*has been definitively closed down*". What is the evidence in this regard ?;

> (a) On the 16th October 2013, the company was struck off the company register for failing to file accounts. The applicant subsequently presented a petition to the High Court seeking orders *inter alia* to restore the company to the register pursuant to s. 12 (B) (3) of the Companies Act 1982 as inserted by s. 46 of the Companies (A) (No.2) Act 1999. The applicant's grounding affidavit therein confirmed that she was not seeking to wind up the company. She reserved the right to make such an application should it be necessary. Thus no application was made for the opening of collective proceedings based on the insolvency of the employer.
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> (b) The recommendation of the Rights Commissioner dated the 11th October 2012 records that the claimant (who is the applicant herein) does not accept that a redundancy situation exists, that the respondent company has not been placed in liquidation and that it continues to trade. It records that there were plenty opportunities for her to be reengaged and retrained. Thus it has not been established as required by Article 2.1 (b) that the employers undertaking or business has been definitively closed down. In fact the applicant has maintained during her application to the Rights Commissioner that it was continuing to trade notwithstanding a letter from the solicitors for the company that it had ceased trading. This letter dated the 7th of June 2012 claiming it had ceased trading in November 2011 plainly was not accepted by her or by the Rights Commissioner.

6. The requirements of Article 2.1 of the Directive have not therefore been met in regard to these two crucial matters. They are *sine qua non* to an entitlement to claim upon the fund and thus the application fails at this first hurdle. In the result none of the other questions raised in these proceedings arise. The application sought is refused.