Neutral Citation: [2014] IEHC 66

THE HIGH COURT

[2013 No. 340 MCA]

IN THE MATTER OF THE PAYMENT OF WAGES ACT 1991 AND THE REDUNDANCY PAYMENTS ACTS 1967 AND ORDER 84C OF THE RULES OF THE SUPERIOR COURTS

DOMANTAS PETKEVICIUS

APPELLANT

AND

GOODE CONCRETE LIMITED (IN RECEIVERSHIP)

RESPONDENT

EMPLOYMENT APPEALS TRIBUNAL

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 31st day of January, 2014.

INTRODUCTION

This is an appeal from determinations of the Employment Appeals Tribunal (hereafter "the Tribunal") dated the 19th April, 2012, and the 23rd September, 2013. The appellant is seeking a declaration that the Tribunal erred in law in its interpretation and application of s.11 of the Redundancy of Payments Act 1967 and a declaration that the Tribunal erred in law in finding that the appellant's contractual and statutory right to pay during the period of lay-off was infringed.

Under s.5 of the Payment of Wages Act 1991 the appellant seeks full remuneration for a sixteen week period of lay-off in the sum of €6,552.00.

FACTS OF THE CASE

The appellant commenced employment with the respondent company in November, 2005. The respondent company is in the business of providing concrete and other by-products to the construction, building and maintenance industries. There was a contract of employment which described the appellant as a general operative. The respondent worked normal hours at the respondent's premises in Carbury, Co. Kildare.

On the 19th April, 2009, the appellant was given notice of the need to lay-off and a letter of notification was given to the appellant by a Mr. Y.T. The claimant was laid off on the 4th September, 2009. He was not in receipt of payment during this time. Despite questioning counsel was unable to inform the Court whether the appellant was in receipt of social welfare during the currency of his lay-off. On the 16th December, 2009, the appellant was notified that he would be made redundant. He was paid two weeks pay in lieu of notice and redundancy was also paid.

HISTORY OF THE PROCEEDINGS

The appellant brought a case before the Rights Commissioner who in his decision of the 13th October, 2010, held against the appellant and stated:-

> "Despite the fact that the Claimant was out on temporary lay-off from 4th September 2009, he was provided with a notice on 10th December 2009 notifying him that his job would be made redundant on 23rd December 2009. He received 2 weeks pay in lieu of notice and this was paid to him on 21st January 2010."

The appeal of the appellant from this decision came before the Tribunal by way of appeal on the 19th April, 2012, and the Tribunal held as follows:-

> "The Tribunal noted the arguments put forward by the representative on behalf of the appellant and in particular the case of John Lawe v. Irish Country Meats (Pig Meats) Ltd. [1998] ELR 266, but was not persuaded by them. The Tribunal upholds the decision of the Rights Commissioner".

By way of judicial review on the 26th November, 2012, the decision of the Tribunal of the 19th April, 2012, was quashed and a rehearing of the applicant's application was directed. Hogan J. held that the Tribunal failed to engage with the legal submissions in respect of the Acts of 1991 and 1967 and to hear evidence in relation to these matters. The court held that one could not discern from the pithy words of the Tribunal the essential rationale of its conclusions in the manner required by the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. The Tribunal was held not to have adequately ventilated the issue of custom and practice of payment or non-payment during periods of lay-off and whether this was in compliance with the Acts of 1991 and 1967. No essential rationale was set out within the remit of the requirements under *O'Donoghue v. An Bord Pleanala* [1991] I.L.R.M. 750.

The Tribunal in its determination of the 23rd September, 2013, again held against the respondent and stated:-

> "The Tribunal is satisfied that the Contract of Employment specifically allowed for and recognised the periodic need to operate a scheme of lay-off. The question of custom and practice is not so compelling where the Contract actually provides for lay-off……the Employer reasonably believed that the Lay off would not be permanent and that an appropriate notice to that effect was delivered….The Tribunal accepts that whilst the Contract does not specify that there will be no wages payable during lay-off any other interpretation would be a nonsense….The Tribunal determines…that the claim under the Payment of Wages Act 1991 fails."

RELEVANT LAW

Section 5 of the Payment of Wages Act 1991 upon which the appellant relies states:-

> "5.—(1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—

(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it.

(2) An employer shall not make a deduction from the wages of an employee in respect of—

(a) any act or omission of the employee, or

(b) any goods or services supplied to or provided for the employee by the employer the supply or provision of which is necessary to the employment,

unless—

(i) the deduction is required or authorised to be made by virtue of a term (whether express or implied and, if express, whether oral or in writing) of the contract of employment made between the employer and the employee, and

(ii) the deduction is of an amount that is fair and reasonable having regard to all the circumstances (including the amount of the wages of the employee), and

(iii) before the time of the act or omission or the provision of the goods or services, the employee has been furnished with —

(I) in case the term referred to in subparagraph (i) is in writing, a copy thereof,

(II) in any other case, notice in writing of the existence and effect of the term,

and

(iv) in case the deduction is in respect of an act or omission of the employee, the employee has been furnished, at least one week before the making of the deduction, with particulars in writing of the act or omission and the amount of the deduction, and

(v) in case the deduction is in respect of compensation for loss or damage sustained by the employer as a result of an act or omission of the employee, the deduction is of an amount not exceeding the amount of the loss or the cost of the damage, and

(vi) in case the deduction is in respect of goods or services supplied or provided as aforesaid, the deduction is of an amount not exceeding the cost to the employer of the goods or services, and

(vii) the deduction or, if the total amount payable to the employer by the employee in respect of the act or omission or the goods or services is to be so paid by means of more than one deduction from the wages of the employee, the first such deduction is made not later than 6 months after the act or omission becomes known to the employer or, as the case may be, after the provision of the goods or services.

[……..]

(6) 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), or

(b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee, 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."

Section 11(1) of the Redundancy Payments Act 1967 is as follows:-

"11.—(1) Where after the commencement of this Act an employee's employment ceases by reason of his employer's being unable to provide the work for which the employee was employed to do, and—

(a) it is reasonable in the circumstances for that employer to believe that the cessation of employment will not be permanent, and

(b) the employer gives notice to that effect to the employee prior to the cessation, that cessation of employment shall be regarded for the purposes of this Act as lay-off.

(2) Where by reason of a diminution in the work provided for an employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for any week is less than one-half of his normal weekly remuneration, he shall for the purposes of this Part be taken to be kept on short-time for that week."

APPEAL
The appellant claims that the respondent contravened its obligation under s.5 of the Act of 1991 which said section generally prohibits employers from making deductions in wages save in circumstances specifically provided for and regulated for under section 5. The appellant further asserts that any deduction from wages can only be made by virtue of a term so permitting in the employee's contract. There is no said express term. The appellant claims that the employer must also genuinely believe that the cessation of employment will be temporary only.

There was no appearance on behalf of the respondent.

DISCUSSION
The court may only interfere in a finding of an expert tribunal where there was no evidence whatsoever to support it. In *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 I.L.R.M. 421 Kenny J. in the Supreme Court noted that "findings on primary facts [of a commissioner should not be set aside by the courts unless there was no evidence whatever to support them", he went on to note that "[i]f however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw." In the case presently before the Court the findings of the Tribunal are comprehensive and discuss relevant legislation and caselaw.

Under s.11(1) the Act of 1967 the employer must give notice and must reasonably believe that a lay off is not permanent. It cannot be said that the respondent knew or ought to have known around that time of the "freefall" that was to occur in the construction industry and so many other industries at that time. The letter of the respondent of the 19th April, 2009, to the appellant operates as the notice required under the Act of 1967.

There is no right to lay-off with pay. It is well established law that lay-off without pay may occur where it can be established that that is the custom and practice of the trade. This custom must be reasonable, certain and notorious; Jelp J. *Devonald and Rosser* (1906) 2 K.B. 728.

It is notable that the caselaw as referenced by counsel for the appellant which highlights the need for custom which allows for lay-off without pay has generally been considered where there is no contract or where the contract is silent on the issue of lay-off.

The appellant's contract of employment states as follows:-

> "The employer reserves the right to lay you off from work or reduce your working hours where through circumstances, beyond its control it is unable to maintain you in full time employment. You will receive as much notice as is reasonably possible prior to any such lay-off."

DECISION
Deference must be extended to the Tribunal which must be taken as knowing and being aware of the general terms that arise in the construction industry. The Tribunal stated the position and practice to be that lay-off means lay-off without pay within the custom and practice of the construction industry. It is to be noted in this case that, despite requests made by the Court, it is not confirmed whether or not the applicant was in receipt of social welfare during the currency of his lay-off.

I refuse the appeal as any other conclusion would be quite illogical and it is not for the court to come to illogical conclusions unless forced to do so by statute.