Neutral Citation Number: [2010] IEHC 180

THE HIGH COURT

2009 448 JR

BRIAN McMONAGLE

APPLICANT

AND

EMER O'SHEA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

MINISTER FOR DEFENCE

NOTICE PARTY

JUDGMENT of Mr. Justice Hedigan delivered on the 25th day of March, 2010.

1. The applicant is a soldier and a member of the permanent defence forces of the State. He is stationed at Rockhill House, Letterkenny, County Donegal.

2. The first named respondent is a Rights Commissioner. The office of Rights Commissioner was first created by the Industrial Relations Act 1969. Section 35(1) of the Industrial Relations Act 1990 provides that Rights Commissioners shall operate at the service of the Labour Relations Commission. They have been conferred with first instance jurisdiction by many statues, including the Parental Leave Act 1998 ("the Act of 1998").

3. The notice party is the applicant's employer.

4. Leave was granted to the applicant by this Court (Peart J.) on the 27th April, 2009, to pursue the following principal reliefs by way of judicial review proceedings:-

> (i) An order of *certiorari* quashing the decision of the first named respondent dated the 29th January, 2009, that the Rights Commissioner has no jurisdiction to investigate the case as being precluded under s.18(1) of the Act of 1998.
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> (ii) An order of *mandamus* compelling the first named respondent to investigate and determine the applicant's claim under the Act of 1998.
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> (iii) A declaration that the first named respondent is entitled to hear and determine the applicant's dispute with his employer, the notice party, relating to his entitlements under the Act of 1998 and/or Council Directive 93/34/EC.
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> (iv) Further and/or in the alternative a declaration that the first named respondent and on appeal the Employment Appeals Tribunal have jurisdiction to hear and determine the applicant's claim against his employer, the notice party, relating to his claim concerning entitlements and issues arising under the Act of 1998.
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> (v) A declaration that s.18(1) of the Act of 1998 violates the EU principle of effectiveness.
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> (vi) Further and/or in the alternative a declaration that s.18(1) of the Act of 1998 is contrary to the European Convention rights of the applicant.
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> (vii) A declaration that the second and/or third named respondents are in breach of their obligations under Council Directive 96/34/EC by enacting s.18(1) of the Act of 1998.
>
> (viii) An order of *mandamus* compelling the second and third named respondents to comply with their obligations under Council Directive 96/34/EC.
>
> (ix) An order of *mandamus* and/or injunction directing the second and third named respondents to enact legislation complying with Council Directive 96/34/EC.
>
> (x) A declaration that s.18(1) of the Act of 1998 is unconstitutional.

The Factual and Procedural Background

5. On the 5th October, 2007, the applicant did not attend for duty and was, accordingly, marked absent on an internal army document called a form "AF120". The applicant subsequently applied for one day's *force majeure* leave in respect of that date. This leave was granted by the notice party. The recording of absent without leave was later expunged from the applicant's record. According to the second affidavit of Paul Connick, Assistant Principal Officer in the Department of Defence, sworn on the 11th February, 2010, the absence notification or AF120 was destroyed. There is no evidence as to when precisely this occurred.

6. The applicant took issue with the fact that he was recorded as being absent without leave. Section 137(1) of the Defence Act 1954, provides that a person who absents himself without leave is guilty of an offence against military law. The applicant submitted a complaint to a Rights Commissioner by notice of dispute dated the 15th February, 2008. He made the case that his employer had acted in contravention of s.13 of the Act of 1998 in causing him to be marked absent from duty in circumstances where he had been on *force majeure* leave. Section 13 of the Act of 1998 deals with *force majeure* leave. It provides that an employee shall be entitled to paid leave when for "*urgent family reasons*" owing to an injury to or the illness of certain specified persons, "*the immediate presence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable*". The specified persons are listed s.13(2) of the Act of 1998.

7. The matter came before the first named respondent, a Rights Commissioner, on the 14th July, 2008. At the hearing the applicant was represented by Mr. Gerard Rooney, General Secretary of the Permanent Defence Forces Other Ranks Representative Association (PDFORRA). The notice party was represented by Lieutenant Colonel Jerry Lane. Written submissions were filed with the Rights Commissioner beforehand and oral submissions were made at the hearing. At the outset the Rights Commissioner raised the issue of

her jurisdiction to hear and determine the applicant's complaint. On the part of the applicant it was contended that she had jurisdiction under the Act of 1998, notwithstanding the terms of s.18(1) of the Act of 1998. That section provides that Part IV of the Act of 1998, which sets forth dispute resolution procedures to be followed relating to the Act of 1998, the first step of which is a reference to a Rights Commissioner, is not to apply to a member of the defence forces. It was the notice party's position that the issue of jurisdiction was a matter of the application of the law. The Rights Commissioner reserved her decision. She issued a written decision on the 29th January, 2009, wherein she concluded that she did not have jurisdiction to investigate the applicant's case by virtue of being precluded from doing so by the terminology of s.18(1) of the Act of 1998. The applicant filed an appeal with the Employment Appeals Tribunal which was received by that body on the 25th February, 2009.

8. The applicant instituted the instant proceedings challenging the decision of the Rights Commissioner on the 6th May, 2009. The matter came on for hearing before this Court on the 12th March, 2009. An application to amend the statement of opposition was made by counsel for the second and third named respondents and the notice party. It was also indicated on behalf of those same parties that they were not pursuing any point with regard to delay or with regard to alternative remedies being available to the applicant.

The Applicable Law
9. The Act of 1998 transposes Council Directive 96/34/EC of the 3rd June, 1996 on the framework agreement on parental leave concluded by three cross-industry organisations, the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Employers and Enterprises providing Public Services (CEEP) and the European Trade Union Confederation (ETUC). Section 13 (1) of the Act of 1998 provides for leave on the grounds of *force majeure* and states:-

> *"13.—(1) An employee shall be entitled to leave with pay from his or her employment, to be known and referred to in this Act as 'force majeure leave', where, for urgent family reasons, owing to an injury to or the illness of a person specified in subsection (2), the immediate presence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable."*

10. Section 14 provides for the protection of employment rights. It states *inter alia*:-

> *"(4) An employee shall, while on force majeure leave, be regarded for all purposes relating to his or her employment as still working in the employment concerned and none of his or her rights relating to the employment shall be affected by the leave.*
>
> *(5) Absence from employment while on force majeure leave shall not be treated as part of any other leave from the employment (including sick leave, annual leave, adoptive leave, maternity leave and parental leave) to which the employee concerned is entitled."*

11. Part IV of the Act of 1998 sets forth the dispute resolution procedure that is to be followed arising from the entitlements of the employee under the Act. However, s.18(1) of the Act of 1998 states as follows:-

> *"18.—(1) This Part does not apply to a member of the Defence Forces."*

The remainder of s.18 of the Act of 1998 goes on to provide that disputes or differences between employees and employers "*relating to the entitlements of the employee under this Act (or to any matter arising out of or related to those entitlements or otherwise arising under this Act)*" other than certain specified disputes, may be referred by either of those parties to a Rights Commissioner. A Rights Commissioner may, under s. 21(2)(b) of the Act of 1998, award redress in the form of an award of compensation in favour of the employee and this may be up to 20 weeks' remuneration according to s. 21(3) of the Act of 1998. Section 19 of the Act of 1998 provides for a right of appeal to the Employment Appeals Tribunal and s.20 of the Act of 1998 provides for an appeal to this Court to be made on a point of law.

The Submissions of the Parties
12. Mr. Howard S.C., for the applicant, juxtaposed the terms of s. 18(1) of the Act of 1998 with the terms of the directive underlying that Act of 1998, which expressly applied to all workers as *per* clause 1.2 of the framework directive annexed to the directive. In addition, he noted that clause 4.5 of the framework agreement expressly provided that there must be enforcement procedures that assist in the resolution of disputes. In such circumstances he argued that there was a failure on the part of this State to properly transpose the directive as it had excluded members of the defence forces from accessing the dispute resolution procedures regarding disputes under the Act of 1998. His client, he submitted, was denied a remedy because of the State's breach in this regard.

13. Mr. Howard further submitted that the Rights Commissioner was incorrect in concluding that she did not have jurisdiction to entertain the applicant's complaint by reason that he was a member of the defence forces. The Rights Commissioner had, he argued, abdicated her responsibility by failing to afford the applicant directly effective rights and that despite the wording of s.18(1) of the Act of 1998 the applicant was obliged to hear the complaint. He relied on the decision of the Grand Chamber of the European Court of Justice in Case C-268/06 *IMPACT v. Minister for Agriculture* [2008] E.C.R. I-2483.

14. Any alternative remedy open to the applicant was cumbersome and ineffective and did not comply with the terms of the directive in his submission. For example, in his submission the redress of wrongs procedure under s.114 of the Defence Act 1954, as amended and the procedure under the Ombudsman (Defence Forces) Act 2004 ("the Act of 2004") did not comply the terms of the directive and were not effective remedies as they did not make any reference to the directive itself and because the redress of wrongs procedure concerned only disputes of an interpersonal nature and because the Ombudsman has no power to impose a decision to the parties in the dispute, given that s. 5(1)(d) of the Act of 2004 specifically excludes matters related to the contract of employment.

15. Mr. Howard argued that as a soldier the applicant came within the only category of worker not to be engaged in any of the dispute resolution procedures provided for under the Act of 1998. He noted that no reason had been advanced as to why this was the case nor had this exclusion been objectively justified. He contended that it constituted an invidious discrimination in contravention of the Constitution and he cited the decision of McKechnie J. in *Kelly v. Minister for the Environment* [2001] 4 I.R. 19161 in support of this argument.

16. Mr. Collins S.C., for the second and third named respondents and the notice party, submitted that these proceedings were entirely misconceived. He submitted that the very nature of *force majeure* leave was such that it had to be claimed retrospectively. It meant, in his submission, that overbearing circumstances had arisen which had replaced the *status quo* and it was, therefore, implicit that an employee would take leave and then make an application for that leave afterwards. He submitted that there could not be a dispute to resolve in these circumstances. He contended that there was no actual dispute in existence at the time the applicant

sent his notice of dispute to the Rights Commissioner as at that time his *force majeure* leave had been approved.

17. If he was wrong in this, Mr. Collins argued that the applicant did not have standing to seek *certiorari* and he referred to the motion before the court in this regard. He submitted that, in any event, the court could raise the issue of standing of its own motion also and he placed reliance on the *dicta* of Keane C.J. in *Shannon v. McCartan* [2002] 2 I.R. 377 on this point.

18. Mr. Collins submitted that a number of the remedies sought in the instant case were wholly inappropriate in the context of judicial review proceedings. Challenges to constitutionality were more appropriately dealt with in plenary proceedings, he contended. He relied on *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. 343 in support of this proposition. In addition, he submitted that the applicant did not satisfy the requirements laid down by the European Court of Justice in Case C-268/06 *IMPACT v. Minister for Agriculture* [2008] E.C.R. I-2483 and he sought to distinguish that case from the instant one.

The Decision of the Court

19. Having regard to the evidence I find that that these proceedings are misconceived. I am satisfied that *force majeure* leave must, by virtue of its immediate and urgent nature, be applied for retrospectively and indeed this is reflected in the wording of s.13 of the Act of 1998 which provides for the "*immediate presence*" of the employee at the place where the relevant family member is. It is not envisaged that the employee would make a formal application for *force majeure* leave there and then. As was his entitlement the applicant made his application for *force majeure* leave after his absence from work and this was granted. For that reason at the time the applicant submitted his notice of dispute to the Rights Commissioner it is clear that no dispute in respect of the Act of 1998 had in fact arisen. In addition, as has been averred to by Mr. Connick, the AF120 form has in fact been destroyed. It was indicated on behalf of the applicant in these proceedings that he never knew if that form had been destroyed or not. This, in itself, suggests that there could never have been a dispute on the part of the applicant regarding the existence of the form (i.e. he could not have argued that it was not destroyed) since the applicant was not aware of what had happened to it. The court may, however, proceed on the assumption that the AF120 was, in fact, destroyed when the applicant submitted his claim. In this regard the court refers to the written submissions prepared by Lieutenant Colonel Lane for the hearing before the Rights Commissioner, exhibited in his affidavit sworn on the 9th July, 2009. The relevant portion of those submissions read as follows:-

> *"The administrative granting of FML is by its nature retrospective. However Defence Forces personnel who are absent from duty without leave/permission may be subject to disciplinary action pursuant to Section 137 of the Defence Act, as amended. In administrative terms such physical absence from duty is administratively recorded by means of an internal document referred to as AF (Army Form) 120. The AF 120 forms part of the documentary proof that a member of the Defence Forces may have been absent. Obviously an AF120 is not required when there is no question of absence as in this case when Private McMonagle submitted an Annex 'B' (on 9th Oct 2007) (attached as Annex 'B') and his days FML was granted. In this case the AF120 when no longer required was destroyed."*

20. As to *locus standi* of the applicant to maintain these proceedings, Walsh J. outlined the following approach to be adopted in the *State (Lynch) v. Cooney* [1982] I.R. 337 at p.369:-

> *"The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates. In so far as it may be thought that such a matter can be deemed to be a question of practice rather than of substantive law, it is sufficient to point out that the Rules of the Superior Courts make no reference whatever to this subject. However, such rules as do exist, or appear to exist, regarding what is 'sufficient interest' for the purpose of applying for certiorari or a declaratory order are judge-made rules and, as such, can be changed and altered by judges. More importantly, they must be flexible so as to be individually applicable to the particular facts of any given case. Such a question cannot be regarded as a preliminary point unless there is an admission of all the facts necessary to determine the issue. In the absence of any admission in any case where the point is raised, it is necessary for the court to enter into a sufficient examination of the facts and, having heard them, to decide whether or not a sufficient interest has been established."*

Walsh J. in referring to "*sufficient interest*" and the Rules of the Superior Courts is alluding to O. 84, r. 20(4) of the Rules of the Superior Courts which provides:-

> *"The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."*

Although O. 84, r. 20(4) operated at the time leave was granted, this Court, having considered the entirety of the evidence in this case, must inevitably reach the conclusion that the applicant does not indeed have the requisite *locus standi* in circumstances where there was no legal or factual dispute between him and his employer at the time the notice of dispute was filed.

21. In these circumstances I would allow the application of the second and third respondents and the notice party to amend their statement of opposition to include the *locus standi* argument on the basis that judicial review is a discretionary remedy and that it is just and proper for this Court to exercise its discretion in the instant case.

Conclusion

22. In circumstances where at the time the complaint was made to the Rights Commissioner by the applicant he had already had his *force majeure* leave approved and he was unaware of whether the form AF120 was destroyed or not, this Court is satisfied, applying the *dicta* of *State (Lynch) v. Cooney* [1982] I.R. 337 that the applicant has no *locus standi* in this application. This is because on the facts herein when he applied to the Rights Commissioner he had no dispute upon which she could adjudicate. For this reason the applicant's case must fail.