2005 IEHC 417

THE HIGH COURT

2004 NO. 362SP

BETWEEN

DUNNES STORES (CORNELSCOURT) LIMITED
TRADING AS DUNNES STORES

APPELLANT

AND
MARGARET LACEY
AND
NUALA O'BRIEN

RESPONDENTS

Judgment of Finnegan P. delivered on the 9th day of December 2005.

1. This is an appeal from a determination of the Employment Appeals Tribunal pursuant to the Payment of Wages Act 1991 section 7(4)(b).

2. The Act in section 5 prohibits an employer from making a deduction from the wages of an employee unless the deduction is authorised to be made by virtue of any statute or any instrument made under statute or is required or authorised to be made under the employee's contract of employment or the employee has consented to the same. The Act in section 6 provides that an employee may present a complaint in relation to a breach of the Act to a Rights Commissioner who shall hold a hearing. Section 7 provides for an appeal from a decision of the Rights Commissioner under section 6 to the Employment Appeals Tribunal and in section 7(4)(b) for an appeal from a determination of the Employment Appeals Tribunal to the High Court on a point of law.

3. Historically service pay has been a feature of wage scales for the Appellant's employees. The first named Respondent at the time of the application to the Rights Commissioner was entitled to service pay of €3.81 per week and the second named Respondent €3.17 per week. Relevant employees with over five years service were entitled to receive between 50 cent and €3.50 per week payment being by way of staged increases up to 30 years service. In relation to Dublin based employees the payment was made pursuant to a Registered Employment Agreement but similar terms were applied to employees outside Dublin. In 1999 MANDATE the Respondent's trade union sought the introduction of a long service increment for its members. The Appellant refused and the matter was referred to the Labour Relations Commission but no agreement was reached there. The dispute was then referred to the Labour Court pursuant to the Industrial Relations Act 1990 section 26(1). In its recommendation dated 26th October 2001 the Labour Court recommended that a long service increment of £7.83 per hour (sic) effective from the date of the recommendation be introduced at ten years service. I assume that this should correctly refer to €7.83 per week but that is irrelevant to the issue I have to decide. Such a recommendation is not of binding effect. The Appellant issued a memorandum dated the 18th September 2002 designed to give effect to the Labour Court recommendation as understood by the Appellant. This provides as follows –

"Long Service Increment to Existing Staff with more than Ten Years Service

4. In addition, long service increment of 0.23c per hour will be paid to all sales assistants with more than ten years service. This payment will not apply to canteen, cleaning, security or timepiece. This payment will be backdated to October 26th 2001. Therefore sales assistants with more than ten years service will actually be paid €10.47 per hour.

5. The old system of weekly service pay for fulltimers is now being abolished for all staff with more than ten years service as of October 26th 2001. Any service pay received by fulltimers in the interim will be set against the back pay for the new service rates by the Wages Department. Again this payment will be made directly into staff bank accounts this Friday.

6. However fulltimers with between five and ten years service will continue to receive their weekly service pay until they reach ten years service when this will be replaced by the hourly payment. Therefore on an ongoing basis staff who have over five years service will continue to receive weekly service pay until they have reached ten years service when their weekly pay will be replaced by hourly service pay."

7. The effect of the memo is that staff with less than ten years service continue to receive service pay. Staff with ten years service no longer receive service pay but receive a higher sum described as a long service increment.

8. MANDATE responded to the memorandum by letter dated 23rd September 2002 the relevant part of that letter reading as follows –

> "Service Pay
>
> There is no agreement with MANDATE Trade Union or its members to abolish service pay after ten years. Dunnes Stores sought clarification from the Court on this matter and was advised that the issue of service pay was not before the Court. Therefore we are seeking the full restoration of service pay."

9. The Respondents complained to a Rights Commissioner pursuant to the Payment of Wages Act 1991 section 6(1) the complaint being that in discontinuing service pay for employees with ten years service but in substituting a higher payment by way of long service increment the Appellant is in breach of section 5 of the Act: in short the complaint was that such employees are entitled to both service pay and long service increment. On the 1st December 2003 the Rights Commissioner found in favour of the Respondents he holding that the cessation of service pay amounted to an unlawful deduction. The Appellant appealed to the Employment Appeals Tribunal pursuant to section 7 of the Act. On the 10th August 2004 in its determination the Employment Appeals Tribunal upheld the recommendation of the Rights Commissioner.

10. The Appellant's case is this. Section 5(6) of the Act provides as follows –

> "5(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 there from that fall to be made and are in accordance with this Act) or
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> (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 insofar 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 that occasion."

11. For the Appellant it was argued that regard must be had to the phrase "properly payable". The recommendation of the Labour Court is not binding upon the Appellant. This is so whether remuneration is determined under the Registered Employment Agreement or an agreement simpliciter. Accordingly the Appellant was not obliged to implement payment of a long service increment but nonetheless decided to do so and thereby increased the remuneration of the relevant employees. The Employment Appeals Tribunal in order to make a determination ought first properly to have had regard to the remuneration "properly payable" to the employee. In the case of the Respondents the remuneration properly payable was their remuneration at the appropriate hourly rate together with service pay but increased in accordance with the memorandum of the 18th September 2002. The terms "service pay" and "long service increment" are not terms of art but each refer to additional remuneration to employees with long service. The Employment Appeals Tribunal erred in law in failing to address the question of the remuneration properly payable to the Respondents or in the alternative erred in implicitly finding that the remuneration properly payable as a result of an agreement reached between the Appellant and MANDATE was the appropriate hourly rate, the service pay and the long service increment there having been no agreement on the part of the Appellant to make such payment.

12. For the Respondents it was argued that on construing the memorandum of the 18th September 2002, the letter dated 23rd September 2002 MANDATE to the Appellant and the reply of 21st October 2002 the Appellant to MANDATE together with the submissions by the Appellant to the Rights Commissioner and the Employment Appeals Tribunal there is evidence of agreement on the part of the Appellant to pay both service pay and long service increment to the Respondents. These documents should be considered as containing no denial by the Appellant of an obligation to make such payment and so evidencing an agreement to make such payments: accordingly such payments are properly payable for the purposes of the Act.

Conclusion

13. I am satisfied upon careful perusal of the documents relied upon by the Respondents that the same cannot represent the agreement or an acknowledgement of the agreement contended for but rather contain a clear denial of the existence of any such agreement. No other evidence of an agreement was proffered. In these circumstances I am satisfied that the Employment Appeals Tribunal erred in law in failing to address the question of the remuneration properly payable to the Respondents such a determination being essential to the making by it of a determination. Insofar as implicit in the determination of the Employment Appeals Tribunal is a finding that the Appellant agreed to pay to the Respondents service pay and a long service increment then such finding was made without evidence and indeed in the face of the evidence: I am satisfied that there has been no deduction of pay from the Respondents within the terms of the Act but rather their remuneration has been unilaterally increased by the Appellant making a payment which recognises their long service in excess of that which was payable prior to the 18th September 2002. In either case there has been an error or law. Accordingly I allow the appeal.