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THE HIGH COURT
JUDICIAL REVIEW

2005 No.1183 J.R.

BETWEEN

MARIE FULLER AND OTHERS

APPLICANTS

AND
THE MINISTER FOR AGRICULTURE, FOOD AND FORESTRY
AND THE MINISTER FOR FINANCE

RESPONDENTS

Judgment of Mr. Justice Gilligan delivered the 8th day of February, 2008

1. All the applicants were members of the Civil and Public Service Union (hereafter referred to as the "C.P.S.U."). The first fourteen named applicants in these proceedings were at the material time, established civil servants working in the office of the Department of Agriculture and Food in Clonakilty, County Cork. One of the applicants held the rank of staff officer, while all other remaining applicants were clerical officers.

2. During the early part of 2003, an industrial dispute arose between the first named respondent and the C.P.S.U. concerning, *inter alia*, promotional and grading structures in the first named respondent's local offices. The members of the Union engaged in what is described as "limited industrial action" in a number of local offices throughout the country. In the Clonakilty office, which is the most relevant to these proceedings but typical of what occurred in various offices, the limited industrial action consisted of staff members concerned attending at their place of work but refusing for one week in three to deal with telephone and fax queries, both in the mornings and afternoons, and refusing to deal with counter queries in the afternoons. Dealing with these queries was part of the normal duties required of the officers concerned.

3. It appears that in early April, 2003 matters came to a head when the first named respondent's servants or agents advised the various applicants that unless they were willing to return to their normal duties a series of warnings would be given which, if not complied with, would be followed by removal from the payroll. The various applicants did not return to normal duties as requested.

4. Each of the applicants on various dates received a letter in the following terms:

> "I refer to the verbal and written warnings that have issued to you regarding your refusal to perform the core duties of your grade. Despite these warnings you have refused to perform these duties and accordingly arrangements have been made to remove you from the payroll pursuant to section 16 of the Civil Service Regulation Act, 1956 with effect from [a particular day in April] until you resume normal duties."

5. Section 16 of the Civil Service Regulation Act 1956 states:-

> "(1) A civil servant shall not be paid remuneration in respect of any period of unauthorised absence from duty.
>
> (2) If any question arises as to whether a particular period of absence from duty of a civil servant is a period of unauthorised absence from duty the question shall be determined by the appropriate authority."

6. From the date of their removal from the payroll, the various applicants declined to attend at work and placed a picket on their various offices. The first named applicant was working in the Clonakilty office at that time. This situation continued for a number of weeks until eventually the dispute was resolved.

7. However in the intervening period prior to the resolution of the dispute, on the 12th day of May, 2003, the first fourteen named applicants issued judicial review proceedings and were granted leave of this Court (Quirke J.) on that date to apply for various reliefs including orders of certiorari, mandamus and a number of declarations.

8. The first fourteen named applicants' application in *Fuller v. The Minister for Agriculture and Food and the Minister for Finance* [2005] 1 I.R. 529, proceeded through the High Court and was eventually successful. This decision was appealed by the respondents to the Supreme Court, where the appeal was dismissed. The Court held in dismissing the appeal that a partial withdrawal from work duties did not constitute unauthorised absence from duty pursuant to s. 16 of the Civil Service Regulations Act, 1956 and that the words "absence from duty" in s. 16 of the Act of 1956 should bear their literal meaning of physical absence from the place of work.

9. The Court (McGuinness J.) stated at pp.548 to 549 that:-

> "It is the duty of the court to construe s. 16 in the light of the plain meaning of the words used and also in the contextual light of the surrounding provisions of the statute. Taking this approach my view is that 'absence from duty' bears the literal meaning, as held by the trial judge, of physical absence from the place of work.
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> I am fortified in this view by another factor which was put forward by counsel for the applicants. If a partial withdrawal from work duties can constitute 'absence from duty', the question must arise as to what degree of withdrawal from duties is required to trigger the mandatory withdrawal of all remuneration. The respondents describe the applicants as having refused to perform 'core duties' and no doubt the duties in question were important duties. In future cases, however, the question as to whether particular duties are, or are not, core duties would be bound to arise, giving rise to what counsel for the applicants describes as 'grey areas'. Section 16 does not permit any partial withdrawal of remuneration. If the respondents' interpretation is correct, partial failure to perform duties, where these are held to be (somewhat ill-defined) core duties, must always result in entire withdrawal of remuneration. It seems to me unlikely that this can have been the intention of the legislature.
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> The trial judge suggested that where a civil servant decided that he or she would not perform certain duties the respondents' remedy would fall under s. 15 as neglect of official duties. Both in this court and in the court below it was submitted by the respondents that both the applicants and their trade union would certainly object to their action being described as grave misconduct or in the other terms used in s. 15, and that the use of ss. 13 to 15 would be totally inappropriate in the context of an industrial dispute. In this, I believe, the respondents are perfectly correct. I would suggest, however, that these strictures apply equally to s. 16.

> In my view ss. 13 to 16 of the Act of 1956 were intended by the Oireachtas to deal with matters of discipline concerning individual civil servants. The Oireachtas has through other legislation provided a framework for the resolution of industrial disputes and has established bodies such as the Labour Relations Commission, the Labour Court and other specialist negotiation and arbitration bodies to this end. These means are available to the applicants and the respondents as a means of resolving their dispute.
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> I am in agreement with the trial judge in holding that the partial withdrawal from work duties does not constitute unauthorised absence from duty under s. 16. I am also in agreement with her that the question of whether the removal from the payroll was carried out in breach of natural justice and fair procedures does not arise and nor does the issue as to whether the applicants were in fact suspended."

10. It appears that when the dispute was actually resolved on the ground between the parties, no provision was made for loss of earnings and pension entitlements arising from the days that were lost between the date of removal from office and the date when the dispute was eventually resolved and the various applicants returned to their normal duties. It further appears that in the first set of judicial review proceedings; no application was made or relief sought in respect of the issue of payment of wages and pension entitlements for the period during which each of the first fourteen named applicants was out of work.

11. In these proceedings, the applicants were given leave from this Court by McKechnie J on the 7th November, 2005, to seek a number of reliefs arising from the failure of the respondents to give effect to the decision in *Fuller v. The Minister for Agriculture and Food and the Minister for Finance* [2005] 1 I.R. 529 (hereafter known as "*Fuller No. 1*"). The relief's sought are:

> I. An Order of Mandamus directing the Respondents to pay the first to fourteenth Applicants all monies due and owing arising out of the Order of *Certiorari* granted to the said Applicants by the High Court and affirmed by the Supreme Court in proceedings entitled *Fuller & Ors v. Minister for Agriculture and Ors*, record no. 307/2003.
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> II. An Order of Mandamus directing the Respondents to take all steps in respect of the first to fourteenth Applicants arising out of the said Order of *Certiorari* and in particular to restore the Applicant's pension entitlements.
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> III. An Order of Mandamus directing the Respondents to determine the fifteenth to the two hundred and sixtieth Applicant's request for restoration to the payroll in respect of the period of their removal in or about the months of April 2003, May 2003 and June 2003 as appropriate.
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> IV. In the alternative, a Declaration that the Respondents' failure to determine the said application amounts to a refusal of the said Applicants' request for restoration to the payroll in respect of the period of their removal in the months of April 2003, May 2003 and June 2003 as appropriate.
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> V. *Certiorari* of the Respondents' refusal of the said Applicants' request for restoration to the payroll in respect of the period of their removal in or about the months of April 2003, May 2003 and June 2003 as appropriate.
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> VI. An Order of Mandamus directing the Respondents to pay the fifteenth to the two hundred and Sixtieth Applicants all monies due and owing arising out of such Order of *Certiorari*.
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> VII. An Order of Mandamus directing the Respondents to take all other appropriate steps in respect of the fifteenth to the Two hundred and Sixtieth Applicants arising out of such Order of Certiorari and in particular to restore the said Applicants' pension entitlements.

12. In these proceedings the 15th to 260th named applicants were not parties to the action in *Fuller No. 1*. In fact, what occurred was that seventy-five of those applicants did not receive the relevant letter and were not removed from the payroll. The action in respect of each of those applicants is now discontinued. This case involves those applicants who received the relevant letter, were removed from the payroll, and thereafter joined the picket line, declining to work normal duties until the dispute was eventually resolved after several weeks.

13. The issue as regards pay and pension entitlements revolves, on a discrete point. The applicants contend that their removal from the payroll has been held by the High Court and Supreme Court to be an unlawful act and *ultra vires* the first named respondent and accordingly, for the period of time which flows from that unlawful act, regardless of any action taken by any applicant, each is entitled to their full loss of earnings and the reinstatement of their pension entitlements. The central argument raised on the respondents' behalf is that, although admitting each applicant's removal from the payroll was unlawful, once each applicant joined the picket line, was unavailable for work and went on strike, they cannot expect to be paid.

14. Insofar as the first named respondent raises an issue regarding their entitlement to refuse to pay the applicants for the period during which they were engaged in strike action and picketing the first named respondent's offices, counsel on the applicants' behalf submits that this was not a contention which was advanced by the respondents in the course of *Fuller No. 1* and therefore it is not open to them to do so now. It is submitted on the applicants' behalf that the only basis advanced in *Fuller No. 1* for the removal of the applicants from the payroll was on the basis of s. 16 of the Civil Service Regulation Act, 1956. They stated that in delivering the judgment of the Supreme Court, McGuinness J. pointed out that the statement of opposition relied exclusively on s. 16 and that (at p.545):-

> "In the present case also the respondents have at all material times relied on the statutory power contained in s. 16 of the Act of 1956 and, if this appeal is to succeed, the respondents must in my view show that s. 16 expressly permits them to remove the applicants from the payroll of the first respondent in the circumstances described in the evidence which is before the court."

15. Authorities concerning the common law duties in contract were of no real relevance to the case in the opinion of McGuinness J., as there had been no mention either in the pleadings or in evidence of the common law duties of contract as between the applicants and the respondents.

16. That being the case, the applicants submit that the respondents are now estopped by the doctrine of *res judicata* from seeking to justify their decision to remove those applicants from the payroll on the basis of a justification other than s. 16.

17. Counsel for the applicant relies on the statement by Diplock L.J. in *Thoday v. Thoday* [1964] 1 All E.R. 341 at p. 352, wherein he stated:-

> "….there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

18. Counsel submits that the elements that must be satisfied for issue estoppel to arise were identified by Lord Guest in *Carl-Zeiss-Stiftung v. Rayner and Keeler Limited and Ors (No.2)* [1966] 2 All E.R. 536 at p.565 of his judgment as follows:-

> "The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

19. I do not consider that the first test, as proposed above, was satisfied in the particular circumstances of this case because the issue that was determined previously was as to whether or not the actual removal from the payroll was lawful. No consideration was given to deciding the issue as to whether or not the applicants were entitled to be paid pending the duration of their removal from office, and as to whether or not they were entitled to the reinstatement of their pension entitlements.

20. Counsel for the applicants further relies on the rule in *Henderson v. Henderson* (1843) 3 HARE 100 at p. 115, wherein Wigram V.C. laid down the principle that:-

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

21. The rule in *Henderson v. Henderson* was considered by the Supreme Court *in AA v. Medical Council* [2003] 4 I.R. 302 at p.316 where Hardiman J. endorsed the broad discretionary approach to its application that had been advocated by Lord Bingham in *Johnson v. Gore Wood & Co* [2002] 2 A.C. 1, who stated at p.31:-

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceeding necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not".

22. I see no reason why the issue as to the payment of the applicants' wages and clarification as regards the position pertaining to their pension entitlements could not have been raised in the earlier judicial review proceedings. Counsel for the respondent does not raise any issue in these proceedings as regards the applicants' entitlement to maintain these issues before this Court. In all the circumstances, in the exercise of my discretion, I take the view that what is at issue in this case is a separate and distinct point which was not at issue or argued in the previous judicial review proceedings of *Fuller No.1*. I do not consider in all the circumstances that the raising of the issue by the applicants is in any way an abuse of process. Equally, I can see no reason why the respondent should not be allowed to make out an argument that the applicants have no right to be paid their wages or a right to their pension entitlements, notwithstanding that they were unlawfully removed from the payroll, by reason of the fact that in the circumstances which occurred, almost immediately after their removal from the payroll, they chose to go on strike and to make themselves unavailable for work.

23. It is conceded on the applicants' behalf that if the individual applicants had not been removed from the payroll and had chosen not to carry out their normal duties, and subsequently went on strike, that they would not be entitled to be paid or have any right to have their pension entitlements reinstated.

24. Accordingly, the issue to be decided in this application is as to whether or not the very fact of each applicant, having been unlawfully removed from the payroll is entitled to be paid their full wages and to the reinstatement of their pension entitlements as if they had been available to work their normal duties, whereas in fact they were not available for work by reason of the fact that they were on strike.

25. The respondents submit in this regard that due to the applicants going on strike, they were not entitled to be paid during that period on the basis of no work, no pay. They rely on the authority of *Deane v Wilson* [1906] 2 I.R. 405, whereby an employer was charged with a violation for withholding a bonus payment from an absent employee. The employee was absent for part of one day of the week and as a result, a bonus amount, which would have been payable had she had full attendance was deducted from her wages. Andrews J held at p.409 that:-

> "There was no contract to pay it unless it was earned. If she had not worked at all during the week, though the contract for service remained, she would not have been entitled to any payment; and could it be said that when, being entitled to nothing, she was paid nothing, the non payment was an offence under the Act? Further, even if this non-payment of the 2s. which she did not earn could be possibly held to be a deduction from the sum contracted to be paid to her, it could not, in my opinion, be held to be a deduction for, or in respect of a *fine*. The non-payment took nothing from her to which, in any view, she had become entitled, or to which, when the week ended, she could have ever become entitled. It

was simply withholding payment of what she had not earned, and never could earn."

26. The respondents further submit in relation to the cause of the strike that the applicants did not go on strike because of the decision to be removed from the payroll but rather that it was an escalation of ongoing industrial action. Furthermore, the respondents contend that there is no legal basis upon which employees who strike can claim to be paid on foot of that strike because they are proved correct in their grievance. It is the respondent's contention that the applicants could have continued to work while disputing the legality of the steps taken by the respondent or remained available for work.

27. It is submitted on behalf of the applicants on this issue that the result of the judgment in *Fuller No. 1* is that the decision to remove the applicants from the payroll was ultra vires, null and void and of no legal effect relying on the authority of Lord Diplock in *Hoffman-La Roche v. Secretary of State for Trade and Industry* [1975] A.C. 295 where he stated at p.365 of the judgment that:-

> "It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a mean of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was *ultra vires* were to have any lesser consequence in law than to render the instrument incapable of ever having any legal effect upon the rights or duties of the parties to the proceedings (cf. *Ridge v. Baldwin* [1964] A.C. 40)."

28. The applicants contend that it follows that the first fourteen named applicants are entitled to be treated as though they were never removed from the payroll and to receive monies and other entitlements withheld by the respondents on foot of the said removal. This is conceded by the respondents in relation to the days upon which they were removed from the payroll but it is submitted does not follow for the days upon which the applicants chose to go on strike.

29. The applicants rely on *Murphy v. The Attorney General* [1982] I.R. 241 wherein Henchy J identified the general approach to be applied when there has been a finding of invalidity of a statutory instrument when he stated at p.313 of the judgment:-

> "Once it has been judicially established that a statutory provision enacted by the Oireachtas is repugnant to the Constitution, and that it therefore incurred invalidity from the date of its enactment, the condemned provision will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress."

30. The applicants submit that although the above passage relates to the consequences of finding that a statutory provision is invalid; the same principle applies in respect of the consequences of a finding of invalidity in respect of an administrative decision. In relation to this submission, I am of the view that the principles applicable to the finding that a statutory instrument is invalid and the finding of a Minister's decision being invalid are not related and that therefore this argument must fail. It does not correspond that because the respondent's decision to remove the applicant's from the payroll was null and void, that it therefore follows that all actions subsequent are affected as a result and that ultimately, the applicant's should be paid for all events following that decision. The applicant's were free to address the validity of the decision to remove them from the payroll while maintaining a position that left them still available for work.

31. An issue arises as to whether the strike was precipitated by the unlawful action of the respondents in removing the applicants from the payroll or whether it was an escalation of an ongoing dispute. The first named applicant in her verifying affidavit as sworn on the 3rd day of November, 2005, avers at para. 5 thereof that the matter "arises out of an industrial dispute between C.P.S.U. and the Department of Agriculture and Food regarding the grading structures in local offices which arose in or about 2002/2003". She further went on to refer to a C.P.S.U. document entitled "Agriculture Dispute Update" setting out the background of this dispute.

32. It is clear from that document that there were other issues at the heart of the dispute. Firstly, it was indicated that industrial action was deemed necessary due to the failure of management in the Department of Agriculture to deliver on a promised improvement to the promotional and grading structures in local offices. A further issue concerned the right of the C.P.S.U. to negotiate and represent members across Government Departments. It was further indicated in the document that; "It is essential that the Union wins this dispute and fights back against the provocative tactics of both the Department of Agriculture and Finance."

33. It appears accordingly, that the dispute involved not only the aspect of the promotional or grading structures in local offices but also the actual right of the C.P.S.U. to negotiate and represent members across Government Departments. I take the view that the strike action was an escalation of an ongoing dispute which involved significant matters apart from the issue of an alleged promised improvement to the promotional and grading structures of the applicants in local offices.

34. I do not accept as a proposition in law that an employee who goes on strike and makes themselves unavailable for work and who subsequently may succeed in having the particular grievance rectified, is entitled to be paid wages and pension entitlements during the period wherein they made themselves unavailable for work. While on strike an employee is negotiating for better working conditions and therefore as a result, is aware that by going on strike they are rendering themselves unavailable for work. Once an employee is unavailable for work they are not entitled to be paid or to their pension entitlements for the relevant period.

35. Accordingly, the applicants in these proceedings are entitled to be paid for that period of time between being unlawfully removed from the payroll and going on strike but the reality is that, in the particular circumstances of this case, it is a *de minimis* situation pertaining in most cases to a period of between a few hours and a few days. In essence the applicants seek the relevant relief's for the period while they were on strike following their removal from the payroll and for the reasons I have outlined, I come to the conclusion that by rendering themselves unavailable for work while being on strike, the applicants lose their entitlement to be paid their wages and to have their pension entitlements reinstated.

36. Accordingly, I decline to grant the relief's as sought and dismiss the proceedings.