Neutral Citation Number: [2012] IEHC 514

THE HIGH COURT

[2011 No. 795 S.P.]

IN THE MATTER OF THE REDUNDANCY PAYMENTS ACTS 1967 TO 2007 AND IN THE MATTER OF AN APPEAL FROM DETERMINATION NO. RP1778/2010 OF THE EMPLOYMENT APPEALS TRIBUNAL AND

IN THE MATTER OF AN APPEAL BY MICHAEL HORAN

BETWEEN

MICHAEL HORAN

APPELLANT

AND

CWS – BOCO IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Roderick Murphy delivered the 7th day of November 2012

1. By special summons dated the 2nd December, 2011, the appellant claimed, *inter alia*, in relation to a determination of the Employment Appeals Tribunal (EAT) that there was sufficient evidence before the EAT on which it could properly find that the appellant's position with the rep company was made redundant with effect from the 27th November, 2009.

2. It was the appellant's case that he commenced employment with the respondent in April 2003, as a delivery driver who undertook heavy work. In late 2008, and in the service of his employer, he suffered injury as a result of a road vehicle crash. He had since submitted medical certificates to the respondent stating he was unable to work from that date. The certificates were issued regularly and continued to be furnished to the respondent up to and beyond the appellant's application for redundancy.

In early November 2009, the Labour Relations Commission had published a proposal for the orderly closure of the respondent's predecessor at two locations including that at which the appellant had worked.

Under the title Redundancy Terms was the heading "Long Term Absence" which provided as follows:-

> "On receiving a doctor's certificate confirming full fitness to return to work by the 27th November, the company will apply the terms of this agreement. Other cases will be reviewed by the company on a person-by-person basis."

The appellant received a letter dated the 9th November, 2009, stating his position with the respondent was being made redundant with effect from the 27th November. On the same day (9th November) the appellant obtained a medical certificate from his doctor stating that he was fit to return to work.

The appellant denied receiving a further letter dated the 12th November, rescinding the information contained in the letter of the 9th November and placed him in the long term absence category.

This certificate was not exhibited in the grounding affidavit of the appellant. The only exhibit was the determination of the Tribunal.

The Tribunal's decision was that since the respondent company maintained that the appellant was still an employee, there was no case to answer regarding the appellant's alleged cessation of employment and accordingly, concluded by majority decision that it found the claim under the Redundancy Payments Acts 1967 to 2007, failed.

3. Replying Affidavit

The replying affidavit of David Lennon, head of logistics of the respondent, referred to the medical certificate indicating that the respondent was fit to return to work from the 16th November, 2009, (the "Return to Work Certificate"), notwithstanding that the respondent was already in receipt of a medical certificate dated the 2nd November, 2009, in which it was clearly stated that the appellant was unable to work until the 2nd December, 2009.

On receipt of the Return to Work Certificate the respondent wrote to the appellant by letter dated the 13th November, 2009, asking him to attend the respondent company doctor for examination. On foot of that examination, on the 17th November, 2009, an occupational health assessment, which was exhibited, was received by the respondent and forwarded to the appellant. The occupational health assessment included an update on the review of the appellant following his road accident. The assessment referred to the likelihood of recurrence and to the worsening of the appellant's neck injury. His symptoms were then beginning to appear. There was a high likelihood of recurrence. There were problems with his lower back which had improved following injections, but he could develop symptoms after walking. In relation to fitness for work, the assessment was that the appellant had complex serious of injuries, cervical pain, carpel tunnel of his left wrist and degeneration of his lower spine with some evidence of spinal stenosis.

It was the company doctor's opinion that the nature of the appellant's previous job which involved driving and significant manual handling with the pulling of heavy trollies with linen would exacerbate and worsen his problem. He declared that the appellant was unfit to go back to his job.

The "Return to Work Certificate" was not exhibited in Mr. Lennon's affidavit. The court also notes that the EAT stated that the certificate and the occupational health assessment had not been presented in evidence.

The further letter of the 12th November, 2009, which the appellant said he did not receive referred to the letter of the 9th November, three days earlier, being incorrectly sent to him which reported to give notice of redundancy and which had not been issued and was therefore withdrawn. The letter referred to the agreement with SIPTU concerning redundancy terms and had a specific clause for staff currently on long term absence which stated that "on receiving a doctor's certificate confirming full fitness to return to work by the 27th November, 2009, the company will apply the terms of this agreement. Other cases will be reviewed on a case by case basis".

The letter continued:-

> "As you are aware you have been absent from work since the 1st February, 2008, and we would request that you would consider the terms of this agreement and provide us with an update on your medical condition no later than the 20th November, 2009.

The company will continue to reserve the right to refer you to a company medical adviser for independent assessment if necessary."

Further letters were received by the appellant on the 29th November, 2009, the first of which said that it was anticipated that "the ex gratia payment agreed as part of the LRC proposal will be paid by the 24th December, 2009. At this time, the company will contact you to arrange for you to come in and collect your ex gratia payment cheque."

The second letter, entitled "To whom it may concern" confirmed that the appellant had been made redundant from Linen Supply of Ireland (the respondent's then trading name) on the 27th November, 2009. It further stated that that redundancy had been made as a result of an extensive restructuring programme that the company unfortunately had to undertake and that "Michael's P45 would be issued on the 3rd December, 2009".

4. Affidavit of Mr. Nagle
The affidavit of Anthony Nagle, solicitor for the appellant, sworn on the 8th October, 2012, exhibited the file which had been given to the Tribunal by the appellant's Union representatives.

A list of contents referred to Form T1-A, RP50 Form, letters confirming redundancy on the 27th November, 2009 and regarding annual leave, notice, salary and ex gratia payment also on the 27th November, 2009. The contents also include Labour Relations document, email regarding non payment of redundancy, re-registration of the agreement, framework of the proposal for orderly closure, letter regarding proposed redundancies of the 9th October, and notice of all relevant employees.

The Labour Relations Commission document is that dated the 4th November, 2009, which was signed by two company representatives and thirteen SIPTU representatives, including the appellant. The document was a proposal for orderly closure of Linen Supply of Ireland facilities in Fonthill and Naas Road (the latter premises had been that where the appellant worked). It was clear that the proposal, if rejected, would be withdrawn and would have no status. The proposal referred to the examinership occasioning significant legal constraints in the nature of any commitments that could be provided. It referred to ex gratia payments being conditional in full cooperation with outgoing production and collection/distribution activities until the 27th November, 2009.

It dealt in some detail in redundancy terms. In respect of long term absence it provided, as already noted that "on receiving a doctor's certificate confirming full fitness to return to work by the 27th November, the company will apply the terms of this agreement. Other cases will be reviewed by the company on a person-by-person basis".

The court notes the first paragraph of the proposal which followed on from the announcement by the examiner of the proposed closure of the sites at Fonthill and Naas Road with a consequent redundancy of all staff working in or from those facilities.

5. Submissions on behalf of the appellant
The applicant referred to errors of law by the Tribunal being first, incorrectly applying the Redundancy Payments Acts and secondly, incorrectly analysing the facts.

In respect of the first error it was submitted that the determination did not contain any analysis provisions of the Redundancy Payments Acts or any attempt to establish whether the appellant came within the terms of that legislation. The focus of the Tribunal was on whether the appellant came within the terms of the proposed agreement. It was submitted that at no time did the respondent reserve any right to have the contents of the medical certificate which the appellant was required to furnish, reviewed or challenged by any third party including their own medical advisers as this was outside the terms of the agreement.

The court notes that the letter of the 12th November did reserve that right though the appellant denies having received it. The court also notes that the letter from the appellant which was not exhibited in the affidavits before this Court, nor, received by the Tribunal, appeared to be at variance with the certificate of what appears to be the same doctor who certified that on the 2nd November, 2009, that the appellant was suffering from neck and back injuries due to the road traffic accident and was unable to attend work from the 2nd November 2009 to the 2nd December, 2009 and also, by certificate dated the 30th November, 2009 that the appellant was unable to attend work from the 30th November, 2009, to the 30th December, 2009 and for over 24 months succeeding up to the 23rd February, 2012. Clearly this is inconsistent with the conditions in the proposal of the Labour Relations Commission.

The second error of law referred to was that the Tribunal incorrectly analysed the facts. Reference was made to the decision of McCracken J. in *National University of Ireland Cork v. Ahern [2005] I.E.S.C 40*, [2005] 2 I.L.R.M. 437.

McCracken found:-

"The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts, is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal under section 8(3)."

It was submitted that the appellant did not accept that there was any or insufficient evidence before the Tribunal on which it could deny that the appellant's position within the respondent company had become redundant on the closure of the Naas plant on the 27th November, 2009.

It was further submitted that the Tribunal erred in law in failing to give any or any undue weight to the letters dated the 9th and the 27th November, 2009, to the effect that the appellant's position with the respondent was redundant with effect from the 27th

November, 2009, and that there was no suitable alternative position for the respondent.

The court is satisfied that the Tribunal did, indeed, take into account the letters which were before it and were aware that the Naas Road plant had closed down and that no suitable alternative position was offered (nor indeed applied for) by the appellant.

The Tribunal did not err in law in considering the findings of the respondent's occupational health assessment to be relevant given the court's findings in relation to the inconsistency of the fitness to work certificate and the sick certificates.

It was submitted that it was only when the appellant became aware in or on March 2010, that some of his former colleagues had received statutory redundancy payments that he began making inquires as to his employment status. The court notes that he was not legally advised at the time, but is of the view that the issue was whether or not he was entitled to the benefit of the Labour Relations Commission Agreement.

The court is also of the view that the mandatory nature of the provision relating to long term absences was, indeed, considered by the Tribunal.

The certificate by the appellant's own treating General Practitioner regarding his fitness to work on the 16th November, in the circumstances of the contradictory certificates by the same General Practitioner, could not, be in compliance with the terms of the agreement.

6. Submissions on Behalf of the Respondent
The respondent referred to the role of the court in reviewing the decision of specialist Tribunals referred to in Kerr's Termination of Employment Statutes (January 2012 at pp. 1-79) where it is stated that the High Court must consider whether the body based its decision on an identifiable error of law or an unsustainable finding of fact. Reference was made to the *National University of Ireland Cork v. Ahern*, already referred to, that although findings of fact must be accepted by the High Court on appeal, the court could still examine the basis on which those facts were found. The relevance of the matters relied on in determining the facts were a question of law.

It was submitted that no identifiable error of law had been shown nor had any unsustainable finding of fact had been considered by the EAT in the coming to the conclusions of its determination.

7. Decision of the Court
7.1 The court considers the roles of the EAT and of the court in relation to claims of unsustainable findings of fact and errors of law.

7.2 The Role of the EAT
The EAT is an independent body established to provide speedy, inexpensive and relatively informal means for the adjudication of disputes on employment rights (Forty Third Annual Report (2010) of the Tribunal as cited in Kerr's *Termination of Employment Statutes* (January 2012) at pp. 1-79). Part of its remit, pursuant to s. 39(15) of the Redundancy Payments Act 1967, is to consider any application brought by an employee who is dissatisfied with ". . . any decision of an employer under this Act . . .". It is a specialist Tribunal. The EAT determined Mr. Horan's claim under the Redundancy Payments Act and found by a 2 to 1 majority, that Mr. Horan's claim failed.

7.3 This appeal by Mr. Horan comes before the court by way of special summons as already summarised above in relation to the determination of the EAT.

7.4 The Role of the High Court
The function of the High Court in reviewing the decision of specialist Tribunals is well summarised in Kerr's *Termination of Employment Statutes* (January 2012) at pp. 1-79:

"The circumstances in which the High Court will overturn a decision of a specialist Tribunal such as the Employment Appeals Tribunal have been considered in many cases, (see Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare [1998] 1 I.R. 539) and in particular the comments of Hamilton C.J. at para 37. In considering whether to allow an appeal against a decision of such a Tribunal, the High Court must consider whether the body based its decision on an identifiable error of law or an unsustainable finding of fact. A decision cannot be challenged on the grounds of irrationality if there is any relevant material to support it: see *Mulcahy v. Waterford Leader Partnership Limited* [2002] E.L.R. 12 (O'Sullivan J.) and *Thompson v. Tesco Ireland Limited* [2003] E.L.R. 21 (Lavan J.). In *National University of Ireland Cork v. Ahern* [2005] 2 I.R. 577, the Supreme Court held that, although findings of fact must be accepted by the High Court on appeal, that court could still examine the basis upon which those facts were found. The relevance or admissibility of the matters relied on in determining the facts was a question of law." (Emphasis added)

7.5 Hamilton C.J. in Henry Denny held:-

"I agree with the judgments about to be delivered but I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

7.6 The function of the High Court was also considered in *Wilton v. Steel Company of Ireland Limited* [1999] E.L.R. 1. O'Sullivan J., dealing with an appeal from the labour Court (in relation to an equal pay claim) observed at p. 5 that:-

". . . I would make it clear, of course, that it is no part of my function to test the strength or weaknesses of such arguments. This is not a Court of appeal, but only a Court of appeal on a point of law, which is an entirely different matter. No argument was made on behalf of the Plaintiff that the Labour Court was irrational in reaching its decision and therefore it is not for this Court to weigh the strengths or weaknesses of the arguments or evaluate its determination thereon."

The Supreme Court distinguished fact and law in its judgment in *O'Leary v Minister for Transport* [1998] 1 I.R. 558 (in the context of a decision of the labour Court. Murphy J. referred with approval (p. 564) to the decision of Barron J. in the High Court (14th February, 1997) in which Barron J. having referred to the original and additional grounds of appeal said:-

"In my view, these grounds of appeal in reality are no more than an appeal on the facts rather than on the law. Saving one

paragraph, there is no averment that findings were not supported by evidence. I have no doubt that the applicant believes that she, and those in her grade, do like work with radio officers and are being discriminated against by reason of their sex. But the facts to support such a claim must be established before the Labour Court. They were not established there and in my view the controversy must end with that failure."

7.7 A similar approach had previously been adopted in *Irish Shipping v Adams* [1987] WJSC-HC 855, in which Murphy J. noted that:-

"On behalf of the respondent it was contended that the conclusion of the Tribunal was based on findings of fact which were within the jurisdiction of the Tribunal and not reviewable on appeal to this Court. In my view that argument is well founded."

7.8 Insofar as a point of law is to be determined by the court such a point should be precisely identified. As observed by Laffoy J. in *Minister for Finance v. McArdle* [2007] I.E.H.C. 98 (in the context of Fixed Term Work Act):-

". . . I have found the process of these proceedings to be very unsatisfactory. First, the special summons procedure, as it was implemented, even though it may have followed the usual practice, lacked precision as to the points of law for determination by this Court and the grounds on which it was asserted the Labour Court erred."

7.9 The respondent submitted that there was no identifiable error of law nor unsustainable finding of fact on the part of the EAT in its determination.

7.10 Unsustainable finding of fact
The reliefs 1-10 are, in essence all matters of fact, notwithstanding that they are referred to as being errors of law. The matters of which the appellant complains were in fact fully considered by the EAT. There was evidence before the EAT to reach the conclusion which it did. Reliefs 11-16 allege errors of law on the part of the EAT in failing to give any or any due weight to matters put in evidence.

7.11 There is no assertion in the appellant's affidavit that such conclusions were not supported by evidence. The EAT's determination is based on a full consideration of both sides' evidence as recorded in the determination. The facts were considered were within the jurisdiction of the Tribunal. The conclusions reached were based on those facts. There is no assertion in the appellant's affidavit that such conclusions were irrational.

7.12 The EAT's determination recorded in some detail the arguments made by both sides and the fact that one member had a dissenting opinion. The determination sets out the facts upon which the EAT came to is conclusion.

7.13 Identifiable Error of Law
Reliefs 11-16 allege errors of law on the part of the EAT in failing to give any or any due weight to evidence before it. In the first instance reliefs 11-16 also present as matters of fact. However, insofar as complaint is made at reliefs 11-16 inclusive as to the matters which ought or ought not to have been considered or ought or ought not to have been taken into account, it is acknowledged that this can, in principle, be considered a matter of law insofar as it concerns the relevance or admissibility of the matters relied on by the Employment Appeals Tribunal (McCracken J. in *National University of Ireland Cork v. Ahern* [2005] 2 I.R. 577 at 580). However, as observed by Laffoy J. in *Minister for Finance v. McArdle*, there is a lack of precision as to the points of law to be put in issue also in the present case.

7.14 No substantive issue arose as to relevance or admissibility in this case. It is clear that the evidence advanced before the EAT was considered and factored into the EAT's determination; that there is a dissenting opinion highlights this. It is alleged at relief 12 that the EAT failed to have regard to the "appellant's reasonable expectation that his case would be reviewed as to redundancy entitlement". The EAT did in fact consider this: it is explicitly stated in the dissenting opinion. The appellant's real complaint, is that the EAT did not weigh the balance of evidence in his favour. As such it is submitted that, to use the *Henry Denny* test, there is no "identifiable error of law" either in relation to the evidence considered by the EAT or indeed to the applicability of the provisions of the Redundancy Payments legislation.

7.15 Concluson
It is not the function of the court to, in essence, re-weigh the evidence before a specialist Tribunal such as the EAT. There were sufficient facts on the evidence before the EAT to allow it come to the conclusion which it did.

The EAT considered the letter of the 9th November, 2009, regarding redundancy which was sent to the appellant as well as to the general workforce. The EAT also considered the non receipt by the appellant of the letter of the 12th November, 2009, which sought to rescind the information contained in the letter of the 9th November, and placed the plaintiff in the long term absence category.

In its determination the EAT found that the appellant was still an employee, who was submitting sick certificates to the respondent. He did not come within the Labour Relations Commission agreement which required that an employee on long-term sick leave had to submit a doctor's certificate stating fitness to work. As he was still submitting sick certificates even after his fitness to work certificate, he did not come within that agreement.

7.16 There was no identifiable error of law nor unsustainable findings of fact by the EAT in its determination of the matters before it. The appellant had failed to prove the facts entitling him to redundancy and ex gratia payments. The inconsistency between the medical certificates that the appellant was unfit for work which were sent to the respondent at the time and, indeed, after the doctor's certificate confirming full fitness to return to work. The finding of fact is within the jurisdiction of the EAT and is not reviewable by this court

7.17 The court is not satisfied that the Tribunal erred in law in finding that the appellant was still an employee of the respondent company; that they erred in law in finding that the appellant was still on sick leave from his employment with the respondent; that the Tribunal erred in law in failing to give any or any undue weight to the letters dated the 9th November, 2009 and the two letters dated the 27th December, 2009, or that it erred in law in failing to give any or any undue weight to the evidence that the Naas Road plant where the appellant was employed closed down and no alternative was offered to the appellant.

In the circumstances the court refuses the plaintiff's claim.

Appendix
1) April 2003 - appellant commenced employment.

2) January 2008 - sustained injury due to road traffic accident.

3) 2nd November 2009 - appellant submits medical certificate to the respondent stating he is unable to attend work until 2nd December 2009.

4) November 2009 - Labour Relations Commission proposes closure of two locations of the respondent company.

5) 9th November 2009 - appellant receives letter from respondent stating he was being made redundant from 27th November 2009. Letter includes a Form RP50.

6) 10th November 2009 - appellant submits a medical certificate from his GP to the respondent confirming his fitness to return to work on 16th November 2009.

7) 12th November 2009 - respondent claims letter rescinding the details contained in the letter of 9th November 2009 was sent to the appellant.

Appellant denies receiving same.

8) 18th November 2009 - Occupational health assessment carried out by Medmark - found appellant was "unfit to go back to his job".

9) 27th November 2009 - respondent wrote to appellant stating he had been made redundant.

10) 27th November 2009 - respondent wrote to appellant stating holiday and notice pay would be paid into his final week's salary on 3rd December 2009 and could be collected from the respondent. Also advised appellant to bring the RP50 form to the respondent when collecting the payment.

11) May 2010 - appellant submits application to the Employment Appeals Tribunal.

12) February 2012 - appellant continued to submit medical certificates stating unfitness to work.