Neutral Citation Number: [2010] IEHC 463

THE HIGH COURT

JUDICIAL REVIEW

2010 292 JR

BETWEEN

STAR HOMES (MIDLETON) LIMITED

APPLICANT

AND

THE PENSIONS OMBUDSMAN

RESPONDENT

AND

ANNA SZEFFS

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 21st day of December, 2010.

1. Application
The applicant seeks an order of *certiorari* quashing the determination of the respondent dated 2nd March, 2010, directing that €69,850 be paid to the notice party. The applicant also seeks a declaration that the determination was made in breach of natural justice and of Article 6 of the ECHR and is perverse and flies in the face of reason. Finally the applicant seeks an Order pursuant to Order 84 rule 26(4) remitting the matter back to the respondent.

2. Parties
The applicant is a limited liability company having its registered offices at Unit 20, Main Street, Midleton, County Cork and is in the construction business. The respondent is an independent authority, established pursuant to the Pensions Act 1990, charged with resolving complaints alleging financial loss occasioned by an act of maladministration and disputes of fact or law in relation to occupational pension schemes and personal retirement savings accounts. The first named notice party is the widow of Pawel Szeffs a former employee of the applicant company and the party whose death in service benefit was the subject of a complaint to the respondent.

3. Factual Background
The notice party's husband, Pawel Szeffs, a construction worker died 5 years ago, on 19th November, 2005. He was an employee of the applicant for a year and a half prior to his death in November 2005. The applicant registered the deceased with the Construction Workers Pension Scheme on 9th June, 2005, one year after he commenced working with them. The applicant made a total of twenty contributions to the scheme, these payments were made on dates between 24th November, 2005 and 16th January, 2006, i.e. subsequent to Mr Szeffs death. In order for a death in service benefit to be payable, 26 weeks of contributions must be paid. A complaint was made in a letter dated 8th May, 2008, by Terrence Cosgrave Solicitors on behalf of Mrs Anna Szeffs with respect to the refusal of the Construction Workers Pension Scheme to pay death in service benefits to the widow and dependants of Mr Szeffs. Arising from this, the Pension Ombudsman wrote to the applicant company on 6th October, 2008. He informed the applicant that because there were insufficient contributions paid to the pension scheme on behalf of the deceased, the applicant was solely liable for the equivalent of the death benefits, which in this case which amounted to €69,850.

The applicant company wrote back on 5th December, 2008 and stated that Mr Szeffs joined the company on 9th June, 2005, accordingly only 20 contributions had been paid by the time that Mr Szeffs was given his P45 on 18th November, 2005. The applicant stated that Mr Szeff's family would not be entitled to the death in service benefit as he was not an employee at the time of the accident. The applicant stated that Mr Szeffs was sent to the tax office on 18th November, 2005 and he was advised of the termination of his employment the week previously.

The Ombudsman had earlier discovered by obtaining social welfare records that the deceased had in fact been an employee of the applicant since 1st June, 2004. On 20th January, 2009, the Ombudsman wrote to the applicant pointing out that Mr Szeffs had in fact been employed by them since 1st June, 2004, he queried their assertion to the contrary by reference to the class of PRSI that they had paid for him. On 12th February, 2009, the applicant wrote to the respondent, on this occasion it was stated that Mr Szeffs resigned on 18th November, 2005. On 16th February, 2009, the Ombudsman wrote to the applicant asking them to reconcile as a matter of urgency their contention that Mr Szeffs was a sub-contractor prior to 9th June, 2005, with documentary evidence to the contrary. On 6th March, 2009, the applicant's solicitor stated that they were taking instructions on the issue of the extent to which Mr Szeffs may have been a sub –contractor prior to 9th June, 2005. The letter also maintains that Mr Szeffs resigned on 18th November, 2005 and states that if the applicant's honesty was being questioned in respect of same that an oral hearing would be necessary to resolve the issue.

In March, April and June 2005, the Ombudsman wrote to the applicants seeking documents and information. On 17th June, 2005, the applicants stated that they had neither contract documents nor any documents relating to Mr Szeffs employment. There is some dispute between the parties as to a telephone conversation that took place on 1st September, 2009, between an investigator of the respondent and a director of the applicant. The respondent claims that the director asked if the complaint could be put off until after a civil case brought by Mr Szeffs widow and indicated that if they lost that case they would liquidate. The applicant denies this.

On 7th September, 2009, the applicant requested an oral hearing. On 9th September, 2009, the Ombudsman informed the applicant of the circumstances in which the Ombudsman might choose to hold an oral hearing and stated that "it has been decided that for this investigation, no oral hearing will be necessary." On 2nd March, 2010, the Ombudsman issued its final determination. The Ombudsman determined that:-

> "7.1 On the basis of the above, I find as a matter of fact that the deceased was an employee of the Respondent at the time of his death. I further find the Respondent liable for the death benefit that would have been due had the Respondent complied fully with the rules and regulations of the REA and the Scheme and made all the necessary contributions for all the weeks that the deceased member was employed by the Respondent.
>
> 7.2 Having regard to the foregoing, and in exercise of the powers vested in me under Section 139 of the Pensions Act, 1990, it is my Final Determination that this complaint be upheld as one of maladministration on the part of the Respondent whom I find liable for the financial loss.
>
> 7.3 In relation to the financial loss to the Complainant, I direct the Respondent to pay the Complainant an amount of €69,850.
>
> 7.4 The financial loss has been arrived at by the death benefit payable which consists of a payment of €63,500 plus an amount of €3,175 for each dependent child, in this case two, giving an amount of €69,850 due.
>
> 7.5 The payment in the amount of €69,850 is to be made payable to the Scheme and forwarded to my Offices by way of a single payment, to issue within 30 days of the date of the Final Determination.
>
> 7.6 This final Determination is binding on all parties to the complaint.
>
> 7.7 Section 140 of the Pensions Act, 1990 provides that a Determination of the Pensions Ombudsman may be appealed to the High Court by any party to the complaint, within twenty-one days of the date shown bellow."

In these proceedings the applicant seeks to quash this determination on the basis that it was not afforded an oral hearing in circumstances where it alleges that there were material facts in dispute which required an oral hearing to resolve.

4. Submissions of the Applicant

4. 1 The determination

The applicant argues that in arriving at its determination the respondent found that the deceased was an employee at the time of his death. Paragraph 6.4 of the final determination states:-

> "If as the respondent (Start Homes Ltd) state, they gave the complainant (Mr Szeffs) the P45 on the 18th of December 2005 prior to his death, then why would the employer sign and post date this certification for Tuesday 22nd November 2005, some four days after the employee left the company? Perhaps there is a logical explanation as to why this might be, but I cannot think of one."

The applicant submits that this determination itself serves to reinforce the point that an oral hearing was necessary. Had an oral hearing taken place the applicant would have had an opportunity to provide a logical explanation as to why the P45 was dated 22nd November, 2005.

4.2

Section 138 of the Pensions Act 1990 deals with the procedures adopted by the Ombudsman in resolving complaints, it provides that:-

> Subject to the provisions of this Part and the regulations thereunder, the procedure for the making of complaints, the reference of disputes, and the conduct of investigations under this Part shall be such as the Pensions Ombudsman considers appropriate in all the circumstances of the case, and he may, in particular, obtain information from such persons and in such manner, and make such enquiries, as he thinks fit.

In a letter to the applicant dated 9th September, 2009, the respondent indicated its policy as to when an oral hearing is necessary:-

> "As a general rule, it is a policy of the Pensions Ombudsman to hold an oral hearing in the following circumstances:
>
> - Where there are differing accounts of a particular event and the credibility of witnesses needs to be tested;
>
> - Where the integrity or honesty of one of the parties has been questioned and that person has requested an oral hearing;
>
> - Where there are disputed material and primary facts that cannot be determined from the papers uncovered by the investigation on their own."

The applicant submits that all three circumstances are present in this case. There are differing accounts of whether Mr Szeffs was still employed as of 19th November, 2005. Solicitors for the notice party wrote to the respondent on 27th March, 2009, and maintained that the deceased was still employed by the applicant on the date of his death. The applicant insists that Mr Szeffs resigned on 18th November, 2005. The applicants claim that their honesty has been questioned and that they requested an oral hearing. By letter dated 6th March, 2009, the applicant's solicitor stated the following with respect to the fact that the deceased was no longer in employment on the date of his death:-

> "Our client is adamant that this is the position and if his integrity or honesty in respect of same is being questioned by your office then it will be necessary to hold an oral hearing to resolve the matter"

Finally the applicant submits that the disputed facts cannot be determined from the papers on their own and that a hearing is

required to tease out the issues regarding the inconsistencies relating to the P45 which seem to have been central to the final determination.

The applicant submits that the ombudsman took into account the fact that the P45 was dated 22nd November, 2005. The applicant states that the fact it was dated the 22nd is not important, what is important is the fact that the P45 takes effect from 18th November, 2005, and it was wrong of the Ombudsman to make his determination on this basis especially in the absence of an oral hearing on the matter.

The applicant cites the case *J & E Davy (trading as Davy) v. Financial Services Ombudsman* [2008] 2 I.L.R.M. 507. In that case a determination of the Financial Services Ombudsman was challenged on the basis, *inter alia*, that there should have been an oral hearing conducted by the Ombudsman. Charleton J. exhaustively reviewed the authorities with respect to the requirement to hold an oral hearing. In the course of his determination the learned Judge referred to a passage from Costello P. in *Doupe v. Limerick County Council* [1997] 3 I.R. 240:-

> "As to the nature of the opportunity to present a case to which the applicant for a licence is entitled, this too varies. The rule does not require that every administrative order which may adversely affect rights must be preceded by a judicial-type hearing involving the examination and cross examination of witnesses. It requires that adequate notice of the case which the applicant has to meet be given to him and an adequate opportunity be afforded to answer any objections which may be taken to his application. And it is clear that the requirements of the rule may be fully satisfied by the adoption of quite informal procedures. In some cases an applicant may be entitled to make his submissions orally, in others a written submission will meet the requirements of the rule."

Charleton J. also referred to the decision of Costello P. in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240:-

> "There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision maker is acting, and the subject matter with which he is dealing… The conclusion that I have reached is that the conflict between the parties cannot be properly resolved in the absence of oral testimony. I conclude that the appeals officer should have conducted an oral hearing…"

The applicant submits that in the instant case there was a conflict between the parties which could not have been resolved in the absence of oral testimony. The Ombudsman could have confined the hearing to that small portion of the evidence which could not be reconciled from the papers in the case i.e. the dispute as to whether Mr Szeffs was still employed by the applicant at the time of his death.

In the *Davy* case Charleton J. quashed the decision of the respondent and ordered a fresh investigation and adjudication of the complaint. On appeal to the Supreme Court, the Court dismissed the appeal in respect of the issue of fair procedures which included, *inter alia*, the right to an oral hearing. The applicant submits that as a result of Section 57 BK (4), the Financial Services Ombudsman is under a lesser obligation to have an oral hearing in respect of disputes than the Pensions Ombudsman where no similar provision exists in the Pensions Act 1990, therefore they argue an oral hearing should have been provided in this case.

4.3

The applicant submits that the starting point in terms of reviewing whether an oral hearing was necessary with respect to this complaint is to look at the extent of the disclosure of all relevant documentation and the opportunity to respond to same. In this case the applicant only learned that contact had been made with the notice party concerning the cessation of Mr Szeffs employment when the replying affidavit's in these proceedings were filed in March 2009. The applicant submits that it was entitled to have sight of what precisely was being said by the notice party with respect to such matters. It is submitted that no attempt was made by the respondent to furnish the applicant with any documentation which might potentially obviate the need for an oral hearing. The applicant submits that they were entitled to address the issue of why the P45 was dated later than the day it was handed over, before the respondent arrived at its determination. The respondent, by effectively making a finding against the applicant in this instance, is effectively refusing to accept that the claim by the applicant can have any basis in reality. It is submitted that this should not be permitted in the absence of the applicant's being given a chance to present its case by way of oral hearing.

4.4 Alternative remedy

The respondent has stated that the applicant could more properly have raised this issue by way of appeal rather than by way of judicial review proceedings. An appeal has been lodged by the applicant. The applicant submits that the issue concerning the nature of the investigation which took place and the issue of whether fair procedures applied are solely a matter for judicial review. They argue the same could not be cured by way of appeal to the High Court. The applicant argues that it is entitled to have a primary decision from the respondent at first instance in accordance with fair procedures and the possibility of a further appeal from that decision. The applicant states that given the respondent, as a specialist body was specifically set up to deal with such disputes, it is ideally equipped to deal with the complexities that this dispute has raised and in those circumstances it is just and appropriate that the matter be referred back to the respondent.

5. Submissions of the Respondent

5.1 Nature of judicial review proceedings

The respondent points out that the applicant bears the burden of proof in a judicial review. The applicant cannot seek to use judicial review proceedings to challenge the merits of the decision that was made. In other words, this court cannot act as a court of appeal or seek to second guess the decision reached.

The office of the Ombudsman and the nature of his role

The role of the Pensions Ombudsman is to act as an independent means of resolving complaints alleging financial loss due to maladministration and disputes in relation to occupational pension schemes. The Ombudsman is entitled to set his own procedures for resolving such disputes. In *Square Capital v. Financial Services Ombudsman* (Unreported, High Court, 27 August, 2009) Mc Mahon J observed that:-

> "From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions…it is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this Court from the Ombudsman's decision is not a full rehearing of the case where the Court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas."

The respondent submits that the court should not review the finding made by the Ombudsman as though it were reviewing the procedures adopted by an inferior court and should not apply the same standard of procedure as it would to a court.

The failure to hold an oral hearing

The Ombudsman has discretion as to whether or not to hold an oral hearing. It is submitted that in this case the Ombudsman legitimately exercised its discretion to refuse to hold an oral hearing. The case of *Killilea v Information Commissioner* [2003] 2 I.R. 402 contains a useful guide as to how the Court should review the exercise of discretion:-

> "…the Court ought only to upset the respondent's exercise of such discretion if the same were found to have fallen foul of the judicial review standard of reasonableness. In other words the Court ought not to interfere with the respondent's decision … unless it considers his decision to fly in the face of fundamental reason or common sense or to be so irrational or unreasonable that no reasonable Commissioner could have come to it."

The nature of the discretion to hold an oral hearing was again considered in *J & E Davy v. Financial Services Ombudsman* [2010] IESC 30. The Court stated:-

> "Assuming, as conceded by the Ombudsman, that there is power to direct an oral hearing then it will be appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact."

The Ombudsman is perfectly entitled to take the view in a particular case that any conflicts are not such as to require him to hold an oral hearing. The conflict in this case surrounds the P45. The applicant signed a P45 for Mr Szeffs on 22nd November, 2005, despite the fact that it stated to the Ombudsman in correspondence dated 5th December, 2008, that it had given him the P45 on the 18th of November 2005. Nowhere in its affidavit does the applicant offer any explanation for this. If there is no good explanation for this then it is unclear what an oral hearing on the issue could possibly achieve. Nor can the Ombudsman be criticised for stating:-

> "Perhaps there is a logical explanation as to why this might be, but I cannot think of one."

The respondent also submits that when the court considers the procedure adopted by the Ombudsman it should take into account the concern that at any stage the applicant might liquidate. The Ombudsman claims that on 1st September, 2009, Mr Sean Walsh phoned the Ombudsman and asked if the determination could be put off until after a civil case brought by Mr Szeffs widow and indicated that if he lost that case he would liquidate.

5.4 The challenge to the merits of the finding

The respondent submits that the final determination was made within jurisdiction and was not perverse and did not fly in the face of fundamental reason. It is not the case that the final determination was based primarily on the fact that the P45 was signed on 22nd November, 2005. The most crucial finding was that the deceased had commenced employment with the respondents on 1st June, 2004. The significance of this was that it meant that if the applicant had made all the payments (i.e. if they had made 76 payments instead of the 20 that they actually made) then the death benefit would have been payable on the death of the deceased. In reaching his final determination, the Ombudsman had regard to all of the material available to him and submitted by the parties to the investigation. He correctly identified the issues to be determined by him in the context of the investigation and his determination is supported and substantiated by the material before him.

5.5 The European Convention of Human Rights - Article 6

It is submitted that invoking the provisions of Article 6 of the European Convention of Human Rights does not add anything to the applicant's case. It is the system as a whole that is required to comply with the Convention, namely the decision of the respondent, combined with the statutory right of appeal and the right to bring judicial review proceedings. Thus, it would only be at the very end of the whole process i.e. once the judicial review and the appeal have been heard, that one could assess whether or not the system in place breaches any of the convention rights of the applicant.

5.6 Non-disclosure of appeal

It is further submitted that the applicant is not entitled to relief by reason of his failure, when he sought leave, to disclose the fact that he was also bringing a statutory appeal against the impugned determination. In the grounding affidavit there is no reference to any intention to bring a statutory appeal against the final determination. Thus the Judge who granted leave was unaware of this intention and was so deprived of the opportunity of deciding whether or not the bringing of such a statutory appeal would be a basis for declining to grant leave in respect of some or all of the grounds raised in the statements of grounds. An *ex parte* application for

judicial review requires *uberrima fides* on the part of the applicant. It is submitted that the applicant failed to meet its obligation to disclose all relevant facts to the court.

5.7 The exercise of the Court's discretion

The respondent submits that in all of the circumstances of this case the applicant is not entitled to relief by means of the discretionary remedy of judicial review. The applicant has disentitled itself to relief by reason of its conduct in:

a) Failing to provide the respondent with the correct date the deceased's employment commenced.

b) Failing to disclose its intention to bring a statutory appeal.

c) Indicating on 1st September, 2009, that if matters went against it then it would liquidate.

The respondent also submits that there was acquiescence by the applicant in the decision making process. In paragraph 5.3 of the final determination the Ombudsman states

> "On the 1st of September 2009, my investigators spoke to one of the directors of the respondent firm and informed him that my Office was going to make a determination possibly holding his company responsible. The director accepted the position but requested holding off making this determination until after November 2009"

The respondent submits that the applicant acquiesced in the decision making process and is not therefore entitled to the relief sought.

6. Submissions of the Notice Party

6.1 Alleged breach of natural justice-denial of an oral hearing

The applicant requested an oral hearing as it felt its integrity and honesty was being questioned in regard to the purported dismissal/ resignation of the deceased. The respondent indicated that although as a general rule it was the policy of the respondent to hold an oral hearing where *inter alia* the integrity or honesty of one of the parties has been questioned and that person requests an oral hearing, the respondent decided for this investigation no oral hearing was necessary. The entitlement to an oral hearing varies depending on the circumstances of each case; there is no general right to an oral hearing. The principle of *audi alteram partem* can be complied with in the absence of an oral hearing. The notice party submits that all relevant contemporaneous documentation in relation to the purported dismissal/resignation was available to the Ombudsman. If an oral hearing were granted in this case it is submitted that in effect it would simply allow the applicant to re-iterate what the applicant had already submitted in writing to the respondent.

6.2 No engagement with the notice party

The notice party points out that in paragraph 4 of its statement of grounds exhibited at p. 5 of the book of pleadings the applicant asserts as follows:-

> "There is no evidence from the determination by the Respondent that, as part of his investigation, he raised with the Notice Party the defence put forward by the Applicant that the deceased had left the Applicant's employment on the day prior to his death. In the absence of any engagement with the Notice Party on this issue, the Respondent had no basis whatsoever, in the absence of an oral hearing, to reach a determination which effectively dismisses the claim made by the Director of the Applicant."

The notice party disputes this claim and points out that on 13th March, 2009, the respondent wrote to the solicitors for the notice party, this letter is exhibited at p.81 PK2 in the book of pleadings, it states:-

> "I would be grateful if you could advise me of what plans the late Mr. Szeffs might have had for employment consequent on his no longer working for Star Homes from 18th November 2005. In particular it would be helpful to know if Mr. Szeffs had any formal arrangements in place in respect of new employment."

The solicitors for the notice party replied on the 27th March, 2009, this letter is exhibited at p. 85 PK2 in the book of pleadings, it states:-

> "Mr Szeffs was still employed by Star Homes at the time of his death… he was planning to continue working for this company".

It is clear from this correspondence that the respondent did raise the applicants defence with the notice party hence it was fully aware of the notice party's answer when making its decision.

6.3 Discretionary remedy- conduct and bona fides of the applicant

The applicant has given varying accounts as to why they say the deceased was not an employee on the date of his death. It is not clear whether the applicant says that the deceased was dismissed or resigned as the applicant avers to both scenarios.

The applicant says that it initially took the view that the deceased only became an employee from 9th June, 2005 (a year after the

deceased had commenced work). The applicant states that it believed the deceased was a "sub-contractor" prior to that date. The notice party submits that this is a distortion of the truth as the applicant could not have had any mistaken belief as to the employment status of the deceased. In order to qualify as as a sub-contractor the deceased would have had to fill out a RCT46 revenue form and the employer would have had to keep withholding tax until they received a payments card from the Revenue. Neither of these steps were taken and in these circumstances the notice party submits that it is not credible that the applicant did not initially know that the deceased was an employee.

The applicant further says that it later transpired that the social insurance contribution records showed the deceased to be an employee since a year earlier (i.e. June 2004). The notice party again submits that this is a misrepresentation of the situation as the applicant who was the employer would have known from the beginning the terms of engagement of the deceased. The applicant only accepted that the deceased was employed by the company after the social welfare contribution record was produced.

The Registered Employment Agreement (REA) (Construction Industry Pensions Assurance and Sick Pay) placed a legal obligation on the applicant to make contributions of €36.35 per week on behalf of Mr Szeffs. The applicant should have paid this contribution from 1st June, 2004 when Mr Szeffs commenced employment. If it had done so Mr Szeffs would have had 76 contributions to his credit at the time of his death. Contributions only commenced when Mr Szeffs died. It is also the case that the deceased was not furnished with any payslips at all in the course of his employment with the applicant and therefore he could not have known whether or not the relevant weekly contribution was being deducted from his wage. Certiorari is a discretionary remedy and it is submitted by the notice party that the court should exercise its discretion having regard to the bona fides of the applicant to refuse the relief sought.

6.4 Acquiescence

In *J & E Davy Trading as Davy v. Financial Services Ombudsman and ors* [2008] 2 ILRM 507, Charleton J. referred to the discretion of the court in judicial review to refuse relief where the applicant acquiesced in the defect although in the circumstances of the *Davy* case he found no such acquiescence:-

> "It is a principle of judicial review that where an applicant complaining of a procedure has knowingly acquiesced in the defect in respect of which a complaint is made, that the High Court may refuse relief, even though an apparent entitlement to redress is made out on the basis of a failure to follow constitutionally-mandated procedures."

The applicant was informed by the respondent by letter dated 9th September, 2009, that the respondent would not hold an oral hearing. The notice party submits that the applicant effectively 'sat on its rights' and did not review this decision to not hold an oral hearing.

7. Decision of the Court

7.1 The requirement to hold an oral hearing

The applicant bears the burden of proof in a judicial review. The applicant must establish that this court should intervene by way of judicial review and remit this matter back to the Pensions Ombudsman directing that an oral hearing be held. The entitlement to an oral hearing varies depending on the circumstance of each case. There is no general right to an oral hearing. This is clear from the case of *Galvin v The Chief Appeals Officer* [1997] 3 I.R. 240. The right to an old age pension was in issue. The Department's records for several relevant years were missing. The applicant maintained that these would show he had worked and made the relevant pension contributions. Mr Galvin maintained that there was evidence that he had paid insurance contributions between 1948 and 1961, that his evidence in this regard was supported by the independent evidence of the accountant in the firm in which he was employed and that the appeals officer erred in concluding that the absence of departmental records of such payment meant that they had not been made. It was submitted on behalf of Mr Galvin that the only way in which the dispute which had arisen could be resolved was by way of oral hearing at which the applicant could give oral evidence and that he should be at liberty to cross-examine witnesses called on behalf of the Minister as to the relevant departmental records. Costello P. stated:-

> "There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision maker is acting, and the subject matter with which he is dealing… The conclusion that I have reached is that the conflict between the parties cannot be properly resolved in the absence of oral testimony. I conclude that the appeals officer should have conducted an oral hearing…"

The right to an oral hearing was again analysed in the case of *J & E Davy Trading as Davy v Financial Services Ombudsman and ors* [2008] 2 ILRM 507 wherein Charleton J stated:-

> "… there are circumstances where an oral hearing is necessary for the purpose of resolving a dispute of fact. Central to the complaint and central to the response, is whether a limited number of people at Enfield Credit Union had explained to them by a limited number staff at J. & E. Davy what the nature of a perpetual bond is in terms of return on investment, the rigidity of the capital being tied up and the risks associated with the market. No matter how I look at the decision of the Financial Service Ombudsman, I cannot avoid thinking that even though he expresses his decision in terms of what was, or was not, in the documents emanating from J. & E. Davy, that an underlying reality was there to be explored by an oral hearing as to whether an explanation had been provided, as to whether there was a sufficient understanding of that explanation, and as to whether fault might be found with Enfield Credit Union and not J. & E. Davy, in the conduct of this matter. It is not unknown that a person to whom financial misfortune has occurred, will wrongly blame their advisor. Nor is it impossible that a person complaining about their financial advisor will pretend to have ignorance of, or an inability to grasp, simple facts. I do not know what happened here…The ultimate test as to whether any portion of an investigation and adjudication should involve an oral hearing with cross examination is as to whether that process is necessary for a fair adjudication of the issue in question"

In the *Davy* case Davy sought to establish that they had carefully explained the nature of the investment. An oral hearing would have provided an opportunity to cross examine Enfield staff who maintained that the investments were not adequately explained. In the instant case the applicant seeks an oral hearing on the matter of why a P45 dated the 22nd was handed over to Mr Szeffs on the

18th. Mr Szeffs obviously cannot be cross-examined and he is the only person in a position to contradict their version of events. The applicant could have provided such an explanation in written submissions to the respondent however no explanation was forthcoming. Such an explanation might have weighed with the Ombudsman. The Ombudsman has a discretion whether or not to hold an oral hearing and in these circumstances the Ombudsman was entitled to take the view that the conflict surrounding the P45 was not such as to require him to hold an oral hearing. The applicant has also failed to satisfy this court that it had an explanation which required an oral hearing to adjudicate upon. If an oral hearing were granted in this case its effect would simply be to allow the applicant to re-iterate what the applicant had already submitted to the respondent in writing, therefore fair procedures did not require the holding of an oral hearing in this case. In any event there are further reasons that support the Ombudsman's decision herein.

7.2 Inconsistencies with Mr Szeffs P45

There are a number of suspicious inconsistencies relating to Mr Szeff's P45's. The P45 for Mr Szeffs which is exhibited at "PK2", contains the address 89 Elsmore Rise, Midleton, Co Cork. This P45 also states that the total number of weeks at Class A PRSI is 23. A second P45 for Mr Szeffs is exhibited at "PK2", there is no address on this P45. In the section marked total number of weeks at Class A PRSI the figure 46 is written over 23. One could assume that because 46 weeks is written over 23 weeks on the second mentioned P45, that this P45 post-dates the first-mentioned P45. These glaring inconsistencies have not been explained by applicant.

There are further inconsistencies in the applicant's case regarding who exactly was given the P45. In correspondence dated 5th December, 2008 and exhibited at "SW1", the applicants solicitors state that "Mr Szeffs was given his P45 on the 18th of November 2005 prior to his death." In oral submissions counsel for the applicant claimed the applicant gave the P45 to Mr Szeffs wife. A further inconsistency is that the P45 describes Mr Szeffs as deceased. The applicants could not have given Mr Szeffs a P45 on 18th November, 2005, that describes him as deceased, as Mr Szeffs did not die until the 19th of November 2005. Also the P45 allegedly given to Mr Szeffs on the 18th of November 2005 is dated the 22nd of November 2005. The applicant makes an attempt to explain this away by stating that:-

> "Mr Kenny appears to take the view that anyone who states they gave an employee a P45 on a specific date would also have usually such P45 signed on the same date. I say that it is incredulous that Mr. Kenny maintains that he would have expected the P45 to have been executed on 18th November rather than on a later date when it would have been processed in the usual way."

This explanation is non committal and fails completely to address the disparity in the dates and fails further to explain why the P45 given on the 18th of November states that Mr Szeffs was deceased.

7.3 Two versions of how Mr Szeffs employment allegedly ceased

The applicant has given two contradictory versions of how Mr Szeffs employment ceased. The applicant cannot seem to make up its mind whether Mr Szeffs resigned or was dismissed, and it switches back and forth between the two versions.

Originally Mr Szeffs was said to have been dismissed. In a letter exhibited at "SW1" written by the applicant's solicitor to the Pensions Ombudsman on 5th December, 2008, it is stated that:-

> "Mr Szeffs was sent to the tax office on 18th November and he was advised of the termination of his employment the week previously."

Three months later Mr Szeffs is later said to have resigned. In a letter exhibited at "SW1" written by the applicant's solicitor to the Pensions Ombudsman, on 6th March, 2009, it is stated that:-

> "Mr Szeffs was no longer in service as he resigned from the Company on the 18th of November 1995, the day prior to his death."

Twelve months later the applicant reverts to stating that Mr Szeffs was dismissed. In the affidavit of Mr Sean Walsh sworn on 12th March, 2010 and exhibited at "SWI" it is stated that:-

> " I say that in the months leading up to the death of the deceased in November 2005, the deceased had been working on a site in Cloyne, Co Cork. I say that the deceased appeared to present himself for work intoxicated on a couple of Monday mornings and I had called him aside on a few occasions and warned him of the consequences of being drunk on site. I say I gave him a verbal warning on or around the 2nd of October 2005 and gave him a further verbal warning on the 7th of November, 2005. I say that the deceased did not appear to take any notice of the said warnings and also gave some indication to me that he was going to return to Poland in any event. I say that I told the deceased on the 14th of November, 2005 that we would be dismissing him on the following Friday primarily as a result of his turning up in an intoxicated state."

The applicant finally chooses the resignation version, as can be seen from the affidavit of Mr Sean Walsh, sworn on 16th July, 2010, in which Mr Walsh states:-

> "It is not at all clear to me why the Office of the Ombudsman did not specifically inform the Notice Party that I was maintaining that Mr Szeffs had resigned his employment on the 18th of November...I say and am so advised that the failure of the Ombudsman to properly investigate the matter as set out above further strengthens my position that I was entitled to an oral hearing in order to vindicate my position."

It is difficult to understand why an oral hearing would have assisted in circumstances where the applicant itself cannot decide whether it dismissed Mr Szeffs or whether he resigned. The applicant has not explained either to the Ombudsman or to this Court why it has advanced two contradictory versions concerning the alleged termination of Mr Szeffs employment.

7.4 Death in Service Benefit

The Registered Employment Agreement (REA) (Construction Industry Pensions Assurance and Sick Pay) placed a legal obligation on the applicant to make contributions of €36.35 per week on behalf of Mr Szeffs. The applicant should have paid this contribution from 1st June, 2004 when Mr Szeffs commenced employment. Contributions however only commenced after Mr Szeffs died. The fact that contributions were made at this time is highly suspicious and strongly suggests a plan by the Director's of the applicant to cover their tracks. It is noteworthy that due to the applicant's failure to pay this modest €36.35 per week Mr Szeffs widow and two dependent children are at the loss of the death benefit of €69,850 to which they would have been entitled, had the applicant honoured its duty to Mr Szeffs. Such an act of injustice and fraud on the part of the applicant is of itself sufficient to disentitle the applicant to the relief sought, even were the court satisfied they had made out a case for Judicial Review.

7.5 Absence of Paper Records

In a letter dated 17th June, 2009 and exhibited at "PK2" the applicant wrote to the respondent claiming that it had no paper records for Mr Szeffs:-

> "We have no contract document neither do we have any documents relating to his employment except for a P45, as explained to you during our telephone call, at that time we did not issue payslips until 2007 and hold no other documentation in relation to Mr Szeffs. We enclose copy P45 which we hold on file which are for employees who left our employment."

It is hard to reconcile this statement that the applicant has no records for Mr Szeffs with the replying affidavit of Sean Walsh dated 16th July, 2010, where at para. no 5 Mr Walsh states:-

> "I say and believe that I did initially believe that Mr Szeffs had only become an employee in June 2005 but the position was clarified when the payroll records revealed that he had in fact been an employee for a much longer period."

Either the applicant had records for Mr. Szeffs or it did not have such records. The applicant cannot seek to rely on an absence of records, then later when it suits its case claim that payroll records revealed the true situation.

7.6 Start Date of Employment

The applicant's solicitors in a letter dated 5th December, 2008, which is exhibited at "SW1" state that:-

> "a number of employees from Star Homes Limited joined the Construction Workers Pension Fund including Mr Szeffs on 9th June, 2005 accordingly only 20 weeks contributions had been paid by the time Mr Szeffs was given his P45 on 18th November 2005 prior to his death."

The applicants sought to maintain that although Mr Szeffs had worked for them since 1st June, 2004, he was in fact working as a sub-contractor until 9th June, 2005, thereafter he was an employee. When the Ombudsman conducted enquiries it discovered that the applicant had paid Class A PRSI for Mr Szeffs from 1st June, 2004. If Mr Szeffs had been a sub-contractor, Class S PRSI would have been paid. It is clear therefore that the applicant attempted to deceive the Ombudsman regarding the date on which Mr Szeff's became an employee of the company. It also attempted to deceive the Ombudsman in claiming 20 contributions had been paid at the date of Mr Szeffs death. As it transpired no payments had been made on that date.

7.7 Availability of an alternative remedy

There was an alternative remedy open to the applicant. It would have been more appropriate for the applicant to bring its case by appeal rather than by way of judicial review proceedings. The applicant in fact chose to pursue both remedies. The infirmity alleged in this case is a failure to grant an oral hearing allowing factual disputes to be resolved. The correct means of dealing with such a dispute would be by way of appeal rather than judicial review.

7.8 Summary

The manner in which the applicant has conducted itself throughout this sorry saga has been characterised by fraud and deceit. The fraud involved was the failure to honour its obligation to Pawel Szeffs, deceased, who worked for it since the 1st June, 2004. The applicant was legally obliged by the Registered Employment Agreement (REA) governing their business to contribute €36.35 per week on behalf of Mr. Szeffs. They made no contributions whatever on his behalf during his employment. This failure on their part resulted in Mr. Szeffs's widow and two children being left without the death benefit of €69,850 to which they would have been entitled from the REA Scheme involved. It is a noteworthy feature of this case that over five years after Mr. Szeffs's death, the applicant has apparently made no attempt to meet its moral, whatever about its legal, obligations to the notice party and her two dependent children arising from their dereliction of duty in this regard.

7.9 The deceit involved commenced with their payment, after his death, of these contributions with the number of them clearly attempting to suggest that Mr. Szeffs had only worked with them since the 9th June, 2005. Their deceit continued in the manner in which they dealt with the Ombudsman. Firstly, they represented to the Ombudsman that Mr. Szeffs had worked with them until 9th June, 2005 as a sub- contractor. When it became clear the Ombudsman had available social welfare records showing the applicant had paid Class A PRSI (Employee contributions) as opposed to Class S PRSI (sub-contractors) it then acknowledged the deceased's status since the 1st June, 2004. It represented at this initial stage by letter dated the 17th June, 2009 that it had no documentary records relating to the deceased's employment. In his affidavit of the 16th July, 2010, however, Sean Walsh, one of the directors of the applicant, stated they did in fact have payroll records.

7.10 The applicant's conduct was also reflected in the manner in which they dealt with the alleged ending of Mr. Szeffs's employment. By letter of the 5th December, 2008 to the Ombudsman, the applicant's solicitor stated that Mr. Szeffs's employment had been terminated on the week previous to the 18th November, 2005. However later, by letter the 6th March, 2008, the solicitors stated to the Ombudsman that Mr. Szeffs had resigned on the 18th November, 2005. In paragraph 6 of the grounds for relief herein the resignation version is confirmed and was further confirmed in the affidavit of Sean Walsh sworn herein on the 16th July, 2010. This

was to the effect that Mr. Szeffs had resigned. Yet in his affidavit sworn on the 12th March, 2010, Sean Walsh had stated in graphic detail the original dismissal version purporting to give a very detailed account of how and why Mr. Szeffs had been dismissed. No explanation has been proffered for these contradictory accounts of how Mr. Szeffs's employment ended if it did in fact.

7.11 The applicant's real complaint herein is that an oral hearing should have been held in order to give it an opportunity to explain why the P45 was dated the 22nd November, 2005, when as it maintained, it had handed the P45 to Mr. Szeffs on the 18th November, 2005. Yet it is apparent in these proceedings that the applicant has presented a most bizarre, contradictory and not credible account in relation to the P45. What appears to be the first version of the P45 is exhibited at "PK2" (at page 135 of the book of pleadings). It shows an address of 89, Elsmore Rise, Midleton, Co Cork. This P45 shows a total number of weeks at Class A PRSI as 23. Yet a second P45 from Mr. Szeffs is exhibited later at "PK2"(at page 311 of the book of pleadings) and contains no address. On this version of the P45 the figure 46 is written over the number 23 which appears in the first version. Clearly the second version was produced after the first. No explanation has been forthcoming for this bizarre inconsistency. The applicant further has given two different accounts of who was served with this P45. In their letter dated 5th December, 2008 the applicant's solicitors stated to the Ombudsman that Mr. Szeffs was given his P45 on the 18th November, 2005. It is to be noted that Mr. Szeffs is described thereon as "deceased". Counsel for the applicant in Court however stated that the P45 was given to the deceased's widow.

7.12 Despite being asked to do so, the applicant's counsel was unable to tell the Court what concrete explanation the applicant would have presented had he been given the chance to do so. That failure to engage directly with the issue they have raised would alone be enough to disentitle the applicant to any order in that regard. However in addition to this, on the basis of their untruthful account of the commencement of his employment, together with their contradictory accounts of the alleged termination of Mr. Szeff's employment on top of the clear fact that they had made no contributions pursuant to the REA, it seems completely reasonable to me that the Ombudsman should decline to hold an oral hearing. What possible credibility could he attribute to any explanation proffered by the applicant? None, I would have thought. His decision was well within the bounds of reasonableness.

7.13 Even had the applicant herein established a case for an order as sought, I would have refused to make such an order on a number of bases. Firstly because of the existence of an alternative remedy. The dispute alleged was purely of a factual nature and is therefore better dealt with on appeal by the High Court rather than in judicial review. Secondly the applicants were aware in September 2009 that the respondents would not hold an oral hearing. They sat on their hands and awaited the decision before moving for Judicial Review. Such acquiescence defeats the right to the remedy sought. Thirdly the applicant withheld from the Judge hearing the ex parte application the existence of the remedy of an appeal and the consequent significance thereof in the light of the dispute being essentially a factual one. It failed thereby in its duty of disclosure as required in an ex parte application.

The application is refused.