Neutral Citation: [2014] IEHC 110

THE HIGH COURT

[2013 No. 148 MCA]

IN THE MATTER OF SECTION 57CL OF THE CENTRAL BANK ACT 1942 (AS INSERTED BY SECTION 19 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

BETWEEN

GRÁINNE NÍ MHATHUNA

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ZURICH LIFE ASSURANCE PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Michael White delivered the 15th of January, 2014.

1. The appellant by notice of motion issued on the 31st May, 2013, originally returnable for 24th June, 2013, sought the following reliefs:-

> (i) An order pursuant to s. 57CM(2)(b) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) setting aside the finding of the respondent dated 14th May, 2013 (reference No. 12/67076) wherein the respondent found that the appellant's claim was not substantiated.
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> (ii) An order pursuant to s. 57CM(2)(c) and s. 57CM(3) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) remitting the finding of the respondent dated 14th May, 2013 (reference No. 12/67076) to the respondent for review in accordance with such directions as this honourable court deems
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> (iii) Further and/or in the alternative an order that this Honourable Court remit the hearing of the complaint back to the respondent to hear further evidence and/or considering the evidence before it and reach findings on that evidence in light of any findings and/or directions of this Honourable Court.

Other ancillary relief was sought.

2. The application was heard on the 19th November, 2013, and judgment was reserved.

3. The appellant is a secondary school teacher. She commenced teaching in or about November, 1985. She joined a group disability scheme of the Association of Secondary School Teachers of Ireland (ASTI) which was insured by the notice party on or about November, 2000. The notice party was formerly known as Eagle Star Insurance.

4. In or about 2003, the appellant became ill. In 2005, she was diagnosed with polymyalgia/fibromyalgia/chronic fatigue syndrome (ME). She ceased work on the 8th September, 2005, but was on sick pay to the end of August, 2006.

5. The appellant was advised by Co. Wicklow Vocational Educational Committee of the cessation of financial entitlements at the end of August, 2006.

6. The appellant made a claim on the group disability scheme on the 20th June, 2006. She was referred for medical assessment and the notice party declined the claim on the 24th October, 2006. By letter of the 24th October, 2006, from Eagle Star to the appellant, she was notified that "from the information available to it you are not totally incapable of carrying out the occupational duties of a secondary school teacher. In the circumstances we must advise that we must decline your claim for benefit".

7. By letter of the 16th November, 2006, the appellant wrote to Cornmarket Group Financial Services, the brokers for the policy, stating that she was lodging an appeal against the decision.

8. By further letter of the 30th August, 2007, the appellant submitted to Cornmarket a medical report from Dr. Veronica Downs, fibromyalgia specialist, and notified the company that she was awaiting a report from Dr. Conor McCarthy. This was subsequently sent to Prof. Tompkins, CMO of Eagle Star on the 5th November, 2007.

9. A further medical review was arranged by the notice party and the appellant saw Dr. Michael Kelly, Consultant Rheumatologist, in December, 2007. In February, 2008 the notice party again notified the appellant that the initial decision to decline indemnity was being upheld.

10. In the meantime, the appellant had continued to pay the premiums due under the group disability scheme and those were accepted by the notice party until November, 2012.

11. The appellant engaged the services of solicitors, Whitney Moore, who wrote to the notice party on the 21st December, 2009.

12. The appellant visited a UK consultant physician, Dr. William RC Weir, and the solicitors enclosed a copy of his report of the 14th

November, 2009, in their letter of the 21st December, 2009.

13. A review of the original decision was requested. By letter of the 11th January, 2010, the notice party agreed to review the claim. The notice party arranged for a further medical examination with Dr. Deirdre Gleeson, Occupational Physician, for the 1st March, 2010.

14. By letter dated the 18th March, 2010, the notice party informed the appellant's solicitor that "having carefully reviewed the medical reports of Dr. Gleeson and Dr. Weir in addition to the existing medical evidence on file the decision to decline this claim remains unchanged".

15. By letter of the 29th March, 2010, the appellant's solicitors wrote to the notice party seeking to have the matter referred to arbitration.

16. The notice party replied on the 23rd April, 2010, stating that the arbitration clause may only be invoked by the policy holder ASTI, or alternatively the appellant as an individual scheme member could refer her complaint to the Financial Services Ombudsman for adjudication.

17. On the 21st June, 2012, the respondent received a completed complaint form with various attachments from the appellant, furnished by her solicitors, Whitney Moore.

18. The final response letter of the notice party was sent to the solicitors for the appellant on the 16th August, 2012. In addition to confirmation of the refusal to indemnify the appellant, for the first time the notice party raised the issue of the appellant's membership of the scheme. The letter stated:-

> "Your client ceased to work as a full time teacher in September 2005 and has not returned to any form of teaching since this date. In line with the above policy conditions, your client is no longer eligible to be a member of the scheme. I note your client has continued to pay premiums during this period and I have requested that Cornmarket Financial Service contact your client directly in relation to a refund of overpaid premiums.
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> While I appreciate this is a very difficult matter for your client, I have reviewed the file and am satisfied that Zurich Life's decision to decline payment of salary protection benefit was correct. Furthermore as your client is no longer an eligible member of the scheme no further appeals can be considered. I trust this letter has fully explained Zurich Life's position but should you wish to pursue this matter with the Financial Services Ombudsman you may treat this letter as a Final Response letter."

19. The appellant declined to engage in mediation. The respondent confirmed by letter of the 30th August, 2012, that the matter would proceed to investigation.

20. By letter dated the 21st September, 2012, from the notice party to the solicitors for the appellant, the notice party stated:-

> "Zurich has considered this matter further and accepts that it should not have dealt with the appeals against the decline of the above claim given the position in respect of your clients [*sic*] illegibility under the policy."

21. By letter of the 27th September, 2012, the solicitors for the appellant replied to the notice party stating "that the notice party's conduct in relation to the appeals was wholly inconsistent with the position of illegibility under the policy".

22. After various exchanges, the determination of the respondent was made in writing on the 14th May, 2013.

23. In its findings at p. 3, the determination stated:-

> "Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence submitted do not disclose a conflict of facts such as would require the holding of an oral hearing to resolve any such conflict. Whilst I note that recent medical evidence submitted by the Complainant detail that her condition has deteriorated, I am satisfied that an oral hearing in this matter would not enable the Complainant to demonstrate the seriousness of her condition as it was when she first submitted her claim to the company in June 2006 or her ability to follow the occupational duties of a secondary teacher at that time. I am thus satisfied that in this instance the submissions and evidence submitted are sufficient to enable a Finding to be made in this complaint without the necessity for holding an oral hearing."

24. The determination went on to state at p. 9:-

> "I note that the Complainant submitted to the Company further medical evidence in support of her claim in 2007, 2009, 2010, 2012 and, as part of this complaints process, 2013. This evidence generally details the deterioration of the Complainant's condition and her inability to return to her work as a secondary school teacher. However, I accept the Company's position that as the Complainant submitted her claim n 2006, that the only medical evidence it can consider must be directly relating to whether or not the complainant met the policy definition of disabled, i.e. 'totally incapable by reason of illness or injury of following the occupational duties of a secondary teacher', at the time she submitted her claim i.e. in June 2006, and not any evidence that supports that the complainant may have subsequently, by way of her condition deteriorating, met the standard at some later point in time.
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> In any event, the Company submits that once it declined her claim, that the Complainant was no longer an eligible member of the salary protection scheme. I note that the Company declined the Complainant's claim on 24th October, 2006, and upon review upheld this decision in February 2008. I also note that the Complainant has not worked as a teacher since 8th September, 2005, and that her sick pay entitlements with her employer, the Department of Education were exhausted in August 2006."

25. The determination went on to state at p. 10:-

> "I am therefore satisfied that having assessed and declined the Complainant's claim on 24th October, 2006, and having subsequently reviewed and upheld its decision in February 2008, that the Company, in determining that the Complainant was no longer a member of the salary protection scheme in question, did so in accordance with the terms and conditions of her policy. Accordingly, I note that the third party scheme administrators have refunded to the Complainant all

premiums it collected from her since September 2006.

Finally I note that the Company accepts that as a result of an administrative error, the Complainant was misled through its continuing to acknowledge a number of appeals when in fact the Complainant was no longer an eligible member of the scheme. Administrative errors of this nature are unsatisfactory and can cause considerable confusion."

26. The determination concluded that the complaint was not substantiated pursuant to s. 57CI (2) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) ("the Act of 1942".

27. Section 57CI (2) of the Act of 1942 states:-

"(2) A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:

(a) the conduct complained of was contrary to law;

(b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;

(e) the conduct complained of was based wholly or partly on a mistake of law or fact;

(f) an explanation for the conduct complained of was not given when it should have been given;

(g) the conduct complained of was otherwise improper."

The Legal Principles

28. Section 57BK of the Act of 1942 states that the principle function of the Financial Services Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication.

29. Subsection 4 of the same section states that the Ombudsman:-

"when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

30. The foregoing statutory requirement was elaborated by Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 at p. 2:-

"It is clear from the terms of s. 57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of *et aequo et bono* which go beyond the traditional limitations of the law of contract."

31. The test to be applied by this Court in hearing this appeal is well established. Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors* [2006] IEHC 323, (Unreported, High Court, 1st November, 2006) stated the following:-

"To succeed on an appeal the plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying that test, the Court should have regard to the expertise and specialist knowledge of the defendant. The deferential standard is that applied by Keane C.J. in *Orange v The Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v Stardust Compensation Tribunal*."

32. The onus on the appellant and the nature and scope of this kind was reiterated by the decision of Keane C.J. in *Orange v. Director of Telecommunications Regulator & Anor* [2000] 4 I.R. 159 at p. 184 as follows:-

"In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant."

Legal Principles on Oral Evidence

33. I have already referred to the finding on the issue of an oral hearing.

34. In *Twomey v. Financial Services Ombudsman* (Unreported, High Court, 26th July, 2013) Feeney J. stated:-

"The Ombudsman is not a medical expert, and it is not clear what type of an oral hearing the applicant envisages should have been held. The Ombudsman is not seeking to come up with his own diagnosis in place of a diagnosis reached by the doctors. Rather the Ombudsman was assessing the conduct of Irish Life in assessing whether or not it had acted properly in declining the claim."

35. In *Davy v. Financial Services Ombudsman* [2010] IESC 30, [2010] 3 I.R. 324 at 364, the Supreme Court held that:-

"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. There is here such conflict in relation to the oral advice given by Davy to the Credit Union and also in relation to the expert evidence as to the nature of the bonds. In *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240, Costello P. held it was not possible on the records available to determine that the applicant's wages for the relevant period exceeded the insurable limit. In the course of his judgment Costello P. said at p. 251:-

> '(c) 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 and account should also be taken as to whether an oral hearing was requested. In this case there is no doubt that an important right was in issue (that is the applicant's right to a pension for life). The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide, in *The State (Boyle) v. General Medical Services (Payments) Board* [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and
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> (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer.
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> (d) I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case.'"

36. In *Ryan v. Financial Services Ombudsman* (Unreported, High Court, 23rd September, 2011), MacMenamin J. stated:-

> "The FSO enjoys a broad discretion as to whether or not to hold such a hearing."

He added that:-

> "It is important to recognise that, if the Ombudsman's office is to be permitted to carry out its statutory function, effectively it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law."

Determination on Oral Hearing

37. This appeal to the respondent did not revolve around a material dispute of fact. Medical experts differed in their opinion on the appellant's incapability by reason of illness or injury of following the occupational duties of a secondary teacher.

38. The responsibility placed on the respondent was to decide if the notice party, had decided incorrectly to refuse compensation under the group policy scheme to the appellant.

39. If the respondent formed the view after careful consideration that this matter could be decided without oral evidence. It was within his discretion to do so.

40. There is one particular matter in the determination on an oral hearing which the court wishes to comment on during the determination on the issue of eligibility under the scheme and the relevant medical evidence to be considered.

Eligibility Under the Scheme and the Relevant Medical Evidence to be Considered

41. Under the ASTI Salary Protection Scheme, para. 3.3 states:-

> "If liability is not admitted the member will no longer be an eligible member of the scheme (in accordance with para. 4.4(c)). The insurance of the member will cease and the company shall have no further liability."

Paragraph 4.4 states:-

> "The insurance of any member shall immediate terminate upon the happening of any one of the following events:-
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> (c) The date on which the member ceases to work as a full time eligible part time or a job sharing teacher unless that member is in receipt of benefit or submitted a request for benefit when he ceased to be a teacher which is being considered by the company. Any member who is on secondment from the Department of Education may continue to be eligible for benefits subject to the approval of the company."

42. The notice party subsequent to its decision to decline cover on the 24th October, 2006, considered an appeal and also agreed to a further review of the medical evidence by letter of the 11th January, 2010. In considering an appeal on review, the notice party had the appellant medically examined. The notice party continued to accept premiums under the policy from the appellant during this time. It was open to the notice party not to agree to a review.

43. The appellant was in receipt of sickness benefit from her employer up to the end of August, 2006 and had made her claim under the policy prior to this on the 20th June, 2006. She indicated on her claim form that she intended to return to work in January, 2007.

44. She was a member of the salary protection scheme when she made her original application on the 20th June, 2006.

45. The court does not accept that the refusal of the claim on the 24th October, 2006, automatically terminated her membership of the scheme.

46. By enabling an appeal and a review and continuing to accept premiums, the notice party accepted that she came within the parameters of 4.4c of the policy up to the notice party's letter of the 18th March, 2010, already referred to.

47. As the alleged medical illness ME is progressive, medical evidence tendered in respect of her deteriorating condition or making more certain the original diagnosis and its impact on her ability to work was and is relevant in the determination of her claim. It is

particularly relevant in relation to the issue of credibility which was an issue between the parties. If subsequent medical expert opinion was in a position to affirm the original diagnosis that she suffered a genuine medical illness leaving her totally incapable of following her occupational duties as a secondary school teacher then clearly it has relevance. The respondent is correct that the finding must relate to the date of the original application in June, 2006.

48. To return to the issue of oral hearing, there seems to be some suggestion in the findings at p. 3 that subsequent medical evidence of her deteriorating condition would not be relevant in the determination of her claim, and this would have a bearing on the respondent's discretion to direct an oral hearing. That is incorrect for the reasons stated in para. 47 above. All medical evidence up to the 18th March, 2010, is relevant in determining whether an oral hearing should be held or not.

49. The respondent referred to the following reports and recorded extracts in its determination of the 14th May, 2013.

(i) Private medical attendance report prepared by Dr. Raymond Murphy, the appellant's G.P., on the 18th July, 2006.

(ii) Functional capacity evaluation carried out at the Irish Centre for Occupational Rehabilitation on the 11th and 12th September, 2006.

(iii) Assessment and report by Robert Ryan, Specialist in Occupational Medicine requested by the notice party, completed on the 17th October, 2006.

(iv) Report by Dr. Michael Kelly, Consultant in Rheumatology and Rehabilitation, prepared at the request of the notice party and dated the 20th December, 2007.

(v) A further letter from Dr. Raymond Murphy, dated the 6th December, 2006.

(vi) Report prepared by Dr. Veronica Downes, Quantum Clinic of Integrative Medicine in Cork, dated the 28th May, 2007.

(vii) Report from Dr. Conor McCarthy, Consultant Rheumatologist at the Mater Private Hospital, dated the 18th October, 2007, prepared at the request of the appellant.

50. The respondent did not refer to the following reports in its determination.

(i) Report of the 14th November, 2009, prepared by Dr. William RC Weir at the request of the appellant and sent to the notice party by the appellant's solicitors on the 21st December, 2009.

(ii) Report from Dr. Deirdre Gleeson, specialist in Occupational Health, prepared at the request of the notice party of the 1st March, 2010.

(iii) Report of the 28th December, 2010, from Dr. William RC Weir, commenting on the report of Dr. Deirdre Gleeson.

(iv) Report dated the 4th July, 2006, of Diarmuid P. O'Donoghue MDF or CPF or CPI, Human Professor of Clinical Research in St. Vincent's Hospital, Dublin 4.

(v) Report of Dr. Raymond Murphy of the 6th December, 2006.

51. The court notes that further substantial medical reports have been furnished since the letters from the notice party to the appellant on the 18th March, 2010, and the 23rd April, 2010. To this Court's knowledge, the notice party did not agree to conduct any further reviews subsequent to this date. The notice party on the 23rd April, 2010, advised the solicitors for the appellant that the arbitration clause in the policy could only be invoked by ASTI and as an individual scheme member she could refer her complaint to the respondent for adjudication.

52. The following further medical reports were prepared and submitted:-

(i) Report of Dr. Joseph P. Keavney, Consultant Anaesthetist and Pain Specialist, dated the 6th March, 2012.

(ii) Report of Jean A. Monro, Medical Director of Breakspear Medical Group Limited UK, dated the 2nd April, 2012.

(iii) Report of Dr. Peter Julu MBChB, MSc, PhD, Specialist Autonomic Neurophysiologist, Breakspear Medical Group, dated the 18th April, 2012.

(iv) Report of Derek Enlander MD, New York, USA, dated the 18th April, 2012.

(v) Report of Dr. William C. Weir, Consultant Physician, dated the 4th January, 2013.

(vi) Post script from Dr. Derek Enlander dated the 8th January, 2013.

(vii) Report of Dr. Raymond Murphy dated the 10th January, 2013.

(viii) Further letter from Dr. Joseph P. Keavney dated the 13th January, 2013.

(ix) Further letter of the 17th January, 2013, from Jean A. Monro, Medical Director of Breakspear Medical Group Limited.

(x) Further medical report of Dr. William C. Weir, dated the 17th January, 2013.

53. The only reports that appear relevant to the period of time prior to the 18th March, 2010, are the report of Dr. Weir of the 28th December, 2010, commenting on Dr. Gleeson's report, both reports of Dr. Weir which comment on the surveillance of the appellant which was undertaken on behalf of the notice party, and the report of Dr. Raymond Murphy of the 10th January, 2013.

54. The respondent should consider the appellant as a member of the ASTI Salary Protection Scheme up to the period when the notice party continued to review her claim. This period came to an end on receipt by the appellant of the letter from the notice party of the 18th March, 2010.

55. The appellant cannot continue furnishing different medical evidence subsequent to that date.

56. The reports of Dr. William C. Weir of the 28th December, 2010, the 4th January, 2013, and the 17th January, 2013, are relevant as they refer to matters prior to the 18th March, 2010. The report of the 28th December, 2010, refers to Dr. Gleeson's report of the 1st March, 2010 and the reports of the 4th January and the 17th January, 2013, are relevant to the surveillance of the appellant carried out by the notice party in 2007. Dr. Murphy's report may be considered as an update of previous reports from him.

57. The decision of the respondent to call into question the appellant's membership of the scheme was a serious and significant error. It also had the effect of preventing the respondent from considering some relevant medical evidence. It is not clear from the determination what weight if any the respondent gave to medical evidence submitted after the original date of rejection of the claim on the 24th October, 2006.

58. The court grants orders in favour of the appellant in the terms of paras. 1, 2 and 3 of the notice of motion of the 31st May, 2013, with the following directions:-

> (i) there is no obligation on the respondent to direct an oral hearing, this decision is a matter of discretion for the respondent;
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> (ii) the appellant should be considered as a member of the scheme up to the 18th March, 2010;
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> (iii) all medical evidence up to the 18th March, 2010, should be considered by the respondent;
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> (iv) The reports of Dr. Weir of the 28th December, 2010, the 4th January, 2013, and the 17th January, 2013, should be considered by the respondent as they refer to matters prior to the 18th March, 2010. The report of Dr. Raymond Murphy of 10/01/13 should be considered in the context of previous reports.