Neutral Citation Number: [2010] IEHC 178

**THE HIGH COURT**

**2009 198 JR**

**NITYENDRA SHARMA**

**APPLICANT**

**AND**

**THE EMPLOYMENT APPEALS TRIBUNAL**

**RESPONDENT**

**AND**

**J&I SECURITY LIMITED**

**NOTICE PARTY**

**THE HIGH COURT**

**2009 199 JR**

**UDAIVEER SAHARAN**

**APPLICANT**

**AND**

**THE EMPLOYMENT APPEALS TRIBUNAL**

**RESPONDENT**

**AND**

**J&I SECURITY LIMITED**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Hedigan delivered on the 13th day of May, 2010.**

**1.** These proceedings concern two joined cases. The applicants in both cases seek to quash determinations the respondent made in respect of their claims on the 6th January, 2009. They also seek to have their claims remitted to a differently constituted panel of the respondent, together with various declaratory reliefs.

**The Parties**

**2.** The applicants were both employees of the notice party whose employment was terminated.

**3.** The respondent is an independent statutory body established to deal with and adjudicate on employment disputes under certain statutes, including *inter alia* the Unfair Dismissals Acts 1977-2007. It was originally established under s.39 of the Redundancy Payments Act 1967 and was formerly known as the Redundancy Appeals Tribunal. Under s.18 of the Unfair Dismissals Act 1977 ("the Act of 1977") the name of the tribunal was changed to the Employment Appeals Tribunal. The scope of the disputes the respondent may deal with has been extended over the years by various enactments.

**4.** The notice party is a company which provides security services. Its address is 163 Lower Kimmage Road, Kimmage, Dublin 6W. It did not participate in these proceedings nor did it participate in the proceedings before the respondent.

**5.** Leave to apply by way of judicial review was granted by this Court (Charleton J.) in both cases on the 23rd February, 2009 for the following identical reliefs:-

> (a) An order of *certiorari* to quash the determination of the respondent of the 6th January 2009 as notified by letter of the 20th January 2009 on the grounds that it is fundamentally flawed and defective.
>
> (b) An order of *mandamus* directing the respondent to consider and determine in accordance with law the applicant's claim under the Unfair Dismissals Acts 1977-2007.
>
> (c) A declaration that the determination of the respondent dated 6th January, 2009 and as notified by letter of 20th January, 2009 declining jurisdiction to hear and refusing to proceed with the hearing of the applicant's claim for unfair dismissal under the Unfair Dismissals Acts 1977-2007 is *ultra vires* and without efficiency and/or is unreasonable, irrational and perverse and in breach of fair procedures and natural justice.
>
> (d) A declaration that the respondent erred in law in making its determination.
>
> (e) A declaration that the said determination has culminated in a nullity.
>
> (f) A declaration that the respondent did not make clear on what grounds it declined jurisdiction and on what legal principles were applied.
>
> (g) A declaration that the respondent's reasoning in declining jurisdiction was not sufficient to enable the applicant to understand the basis for its conclusions.
>
> (h) A declaration that the respondent, in failing to give adequate reasons for its decision in so declining jurisdiction did not provide due process and failed to observe the requirements of Article 6 of the European Convention on Human Rights.
>
> (i) An order remitting the claim to a different constituted division of the respondent.

**Factual and Procedural Background**

**6.** Both of the applicants submitted claims to the respondent pursuant to the Unfair Dismissals Acts, 1977-2007 on the 12th December, 2007 having both been dismissed from their employment by the notice party. Mr. Sharma was employed by the notice party as a security guard from the 19th November, 2006 until the 4th October, 2007 (approximately 11 months). Mr. Saharan was also employed by the notice party as a security guard from the 28th April, 2007 until the 4th November, 2007 (approximately 6 months). Both of the applicants are represented by Mr. John Connellan, Solicitor of Carley & Co. Solicitors. Mr. Connellan filled out two notices of claim on their behalf and submitted them to the respondent.

**7.** Both applicants alleged that they were constantly threatened with losing their jobs if they did not work the hours they were asked. In Mr. Sharma's notice of claim it was stated, *inter alia*, that he refused to work another night shift having worked for the previous fourteen nights and that he also refused to work as he had not been paid for 139 hours he claimed he was due. In Mr. Saharan's notice of claim it is stated, *inter alia*, that he was owed over 200 hours pay, that his employer refused to pay this and that the employer claimed Mr. Saharan's pay would be deducted in respect of damage caused at a break-in on a site Mr. Saharan had worked on. Both of the applicants also indicated in their notice of claim forms that they had been penalised and dismissed within the meaning of s.27 of the Safety, Health and Welfare at Work Act 2005 ("the Act of 2005"). That provision seeks to protect employees from dismissal and penalisation. Both of the applicants sought the remedy of compensation.

**8.** The respondent sat to hear the applicants' claims on the 4th December, 2008. The applicants' solicitor made oral submissions, having also furnished written submissions to the respondent in advance of the hearing. The written submissions stated that the applicants made complaints to their employer regarding a lack of rest breaks, a health and safety matter. The final paragraph of those written submissions stated as follows:-

> *"There was no time requirement within the Health Safety and Welfare Work Act 2005 and therefore the Applicant respectfully submits that they are entitled to bring a claim of unfair dismissal arising out of that act and may be compensated in accordance with that act."*

The notice party was not present at the hearing. A determination was issued by the respondent on the 6th January, 2009 declining jurisdiction in the matter. The relevant passage from the determination reads as follows:-

> *"The Tribunal discussed at length the case put forward by the claimants' solicitor. The Tribunal came to the conclusion it does not have jurisdiction to hear the case, as under the Unfair Dismissals Acts, 1977 to 2001 the claimants must have the requisite service of one year. The Safety, Health and Welfare at Work Act 2005 Section 27 is silent regarding the length of service.*
>
> *Under Section 28(1) of the Safety, Health and Welfare at Work Act 2005:-*
>
> *'Without prejudice to section 27(4) an employee may present a complaint to a rights commissioner that his or her employer has contravened section 27."*

**9.** The applicants instituted the instant proceedings on the 23rd February, 2009.

**Applicable Law**

**10.** Section 2(1)(a) of the Act of 1977, as amended, provides for the following exclusion:-

> "**2.***(1) This Act shall not apply in relation to any of the following persons:*
>
> > *(a) an employee (other than a person referred to in section 4 of this Act) who is dismissed, who, at the date of his dismissal, had less than one year's continuous service with the employer who dismissed him and whose dismissal does not result wholly or mainly from the matters referred to in section 6(2)(f) of this Act."*

**11.** Section 6(1) of the Act of 1977 provides for dismissals to be deemed unfair unless there are substantial grounds justifying the dismissal. Section 6(2) goes on to state that the dismissal of an employee shall be deemed unfair *"if it results wholly or mainly from"* specified grounds. Those grounds include membership or proposed membership of a trade union or engaging in trade union activities; religious or political opinion; legal proceedings against an employer where an employee is a party or a witness; race; sexual orientation; age; membership of the travelling community; pregnancy or matters connected with pregnancy and birth; penalisation; availing of rights under legislation to maternity leave, adoptive leave, carer's leave, the National Minimum Wage Act 2000, parental or force majeure leave and unfair selection for redundancy.

**12.** Section 27 of the Act of 2005 states as follows:-

> **"27***(1) In this section 'penalisation' includes any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.*
>
> *(2) Without prejudice to the generality of subsection (1), penalisation includes—*
>
> > *(a) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2001), or the threat of suspension, lay-off or dismissal,*
> >
> > *(b) demotion or loss of opportunity for promotion,*
> >
> > *(c) transfer of duties, change of location of place of work, reduction in wages or change in working hours,*
> >
> > *(d) imposition of any discipline, reprimand or other penalty (including a financial penalty), and*
> >
> > *(e) coercion or intimidation.*

*(3) An employer shall not penalise or threaten penalisation against an employee for—*

*(a) acting in compliance with the relevant statutory provisions,*

*(b) performing any duty or exercising any right under the relevant statutory provisions,*

*(c) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work,*

*(d) giving evidence in proceedings in respect of the enforcement of the relevant statutory provisions,*

*(e) being a safety representative or an employee designated under section 11 or appointed under section 18 to perform functions under this Act, or*

*(f) subject to subsection (6), in circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, leaving (or proposing to leave) or, while the danger persisted, refusing to return to his or her place of work or any dangerous part of his or her place of work, or taking (or proposing to take) appropriate steps to protect himself or herself or other persons from the danger.*

*(4) The dismissal of an employee shall be deemed, for the purposes of the Unfair Dismissals Acts 1977 to 2001, to be an unfair dismissal if it results wholly or mainly from penalisation as referred to in subsection (2)(a).*

*(5) If penalisation of an employee, in contravention of subsection (3), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2001, relief may not be granted to the employee in respect of that penalisation both under this Part and under those Acts.*

*(6) For the purposes of subsection (3)(f), in determining whether the steps which an employee took (or proposed to take) were appropriate, account shall be taken of all the circumstances and the means and advice available to him or her at the relevant time.*

*(7) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (3)(f), the employee shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he or she took (or proposed to take) that a reasonable employer might have dismissed him or her for taking (or proposing to take) them."*

**13.** Section 28(1) of the Act of 2005 goes on to state:-

*"Without prejudice to section 27(4), an employee may present a complaint to a rights commissioner that his or her employer has contravened section 27."*

**Submissions of the Parties**

**14.** Mr. Stewart S.C., for the applicants, submitted one of the exceptions to the requirement of one year's continuous service to bring claims under the Unfair Dismissals Acts 1977-2007 was for employees whose dismissal resulted from penalisation. In this regard he referred to a number of extracts from legal textbooks. He noted that s.27 of the Act of 2005 was silent as to any requirement to have one year's continuous service. He argued that if an employee is dismissed because of complaining about health and safety issues that such a dismissal is deemed unfair and that person can make a claim under the Unfair Dismissals Acts 1977-2007 or the Act of 2005 and that it was an error in law to exclude the applicants from the Unfair Dismissals Acts 1977-2007.

**15.** An additional point was made by Mr. Stewart regarding the failure of the respondent to give adequate reasons for the determination it reached. The rationale for the decision reached was not apparent, he argued, from the wording of the determination. He referred to the decision of MacMenamin J. in *Clare County Council v. Kenny* [2009] 1 I.R. 22, which outlined the nature and extent of the duty to give adequate reasons in the District Court. As the respondent had jurisdiction equivalent to the Circuit Court in respect of its ability to award compensation and as it was required by statute to issue written determinations, the extent of the respondent's duty to give reasons must be considerable, he contended.

**16.** In his reply Mr. Stewart advanced the argument that the respondent, once it received the applicants' notices of claim should have put their solicitor on notice that it did not have jurisdiction or that they would be looking at this issue once it received the notices of claim from the applicants.

**17.** Mr. Quinn S.C., for the respondent, submitted that the Unfair Dismissals Act had been amended several times since 1977 and the mere fact that a ground for unfair dismissal had been added to the original list of grounds by the Act of 2005 could not mean that one year's continuous service was not required in circumstances where the Act of 2005 was silent on this matter. He pointed out that other legislation introducing the additional grounds to the Act of 1977 made express references to the fact that the one year service requirement did not apply but that the Act of 2005 contained no such provision. It could not be the case, he argued, that by remaining silent in the Act of 2005 that the legislature had, by implication, lifted the one year's service requirement in the Act of 1977. He further submitted that a claim could have been made by the applicants to a Rights Commissioner under s.28 of the Act of 2005, in respect of which no time limit was specified, but this did not occur.

**18.** As to the duty upon the respondent to give reasons Mr. Quinn referred to the *dicta* of O'Flaherty J. in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107. In his submission this authority supported the view an applicant need only be made aware of the reasons in very general and broad terms. In his submission the applicants in this case were made so aware. He also relied on *O'Neill v. Governor of Castlerea Prison* [2004] 1 I.R. 298 and *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51.

**Decision of the Court**

**19.** The grounds for presumed unfair dismissals have grown over the years through a series of amending legislation to the Act of 1977.

It is expressly stated in several of the amending pieces of legislation that the one year's continuous service requirement, as set down in s.2(1)(a) of the Act of 1977, is not applicable to particular grounds for presumed unfair dismissal. Those pieces of amending legislation are as follows:-

**Section 14 of the Unfair Dismissals (Amendment) Act 1993**

This provides *inter alia* that s. 2(1)(a) of the Act of 1977 shall not apply *"if the dismissal results wholly or mainly from one or more of the matters referred to in subsection (2)(a) of the said section 6"* i.e. the employee's membership or proposed membership of a trade union or excepted body under the Trade Union Acts 1941 and 1971.

**Section 38(5) of the Maternity Protection Act 1994**

This provision inserted s.6 (2A) into the Act of 1977. In essence, it provides, *inter alia,* that for the purposes of the sections of the Act of 1977 which deal with pregnancy and maternity matters, the term *"employee"* includes a person who would otherwise be excluded from the Act by virtue of *inter alia* paragraph (a) of section 2(1) of the Act of 1977.

**Section 25 of the Adoptive Leave Act 1995**

Section 24 of the Act of 1995 inserted a new ground for a presumed unfair dismissal i.e. the exercise or contemplated exercise by an adopting parent of her right under the Act of 1995 to adoptive leave or additional adoptive leave. Section 25 of the Act of 1995 substituted the above s.6(2A) of the Act of 1977 so that the term *"employee"* and *"adopting parent"* include a person who would otherwise be excluded from the Act by *inter alia* paragraph (a) of section 2(1) of the Act of 1977.

**Section 25(2)(b) of the Parental Leave Act 1998**

Section 25(2)(a) of the Act of 1998 inserted s.6(2)(dd) into the Act of 1977. It provides for the dismissal of an employee for the exercise or proposed exercise of the right to parental leave or force majeure leave under and in accordance with the Act of 1998 to be deemed unfair. Section 25(2)(b) provides that the term *"employee"* includes a person who for the purposes of s.6(2)(dd) would otherwise be excluded from the Act of 1977 by *inter alia* paragraph (a) of section 2(1) of the Act of 1977.

**Section 27(2)(b) of the Carer's Leave Act 2001**

Section 27(2)(a) of the Act of 2001 added, in s.6(2)(dd) the exercise or proposed exercise by the employee of the right to carer's leave under and in accordance with the Carer's Leave Act 2001 to the list of grounds for presumed unfair dismissal. Section 27(2)(b) goes on to provide that the term *"employee"* includes a person who would otherwise be excluded from the Act of 1977 by *inter alia* paragraph (a) of s.2(1) of the Act of 1977.

**Section 36(2) of the National Minimum Wage Act 2000**

This provision stipulates that the dismissal of an employee in contravention of s.36(1) (including *inter alia* for having exercised or proposing to exercise a right under the Act) will be deemed to be an unfair dismissal for the purposes of the Unfair Dismissals Acts 1977-1993 and that it is not necessary for such an employee to have at least one year's continuous service.

**20.** In contrast, s.27 of the Act of 2005 makes no mention of whether s.2(1)(a) of the Act of 1977 is applicable or not. I am satisfied, having regard to the *expressio unius est exclusio alterius* principle that the one year's continuous service requirement must apply. This Court may not read into the Act of 1977 a specific provision lifting the service requirement specified in s.2(1)(a) in circumstances where the legislature has expressly stated in other enactments that the requirement was not to apply in respect of other grounds for dismissal but has not done so therein in respect hereof. It seems to me for these reasons that the respondent rightly concluded that it did not have jurisdiction to hear the applicants' claims.

**The reasons given for the decision of the respondent**

**21.** The courts have held that the duty of administrative tribunals to give reasons in their decisions is not a particularly onerous one. Only broad reasons for the decision need be given. In *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107 O' Flaherty J. stated as follows at p.111:-

> *"I would reiterate, what has been said on a number of occasions, that when reasons are required from administrative tribunals they should be required only to give the broad gist of the basis for their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."*

In *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 52 at p.55 Finlay C.J. summarised the duty on administrative tribunals as follows:-

> *"Once the Courts have a jurisdiction and if that jurisdiction is invoked, an obligation to enquire into and, if necessary, correct the decisions and activities of a tribunal of this description, it would appear necessary for the proper carrying out if that jurisdiction that the Courts should be able to ascertain the reasons by which the tribunal came to its determination. Apart from that, I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi-judicial nature."*

**22.** The reasons given by the respondent for its determination are set out above in paragraph 8. The reasons given could well be described as telegraphic. It is doubtful they would satisfy the requirement for broad reasons. It would have been preferable that the reasons for the decision be outlined in clearer, more expansive language.

**23.** However, the applicants were aware from the outset that an issue might arise regarding the application of s.2(1)(a) of the Act of 1977 given that it was addressed by their solicitor in his written submissions furnished in advance and in oral submissions on the day

of the hearing. More importantly, the case the applicant made in these very proceedings was centred around whether the one year's service requirement applied to dismissals under the Act of 2005. The challenge to the reasons the respondent gave was presented only as an ancillary matter to this Court. There was nothing in the lack of reasons given that prevented the applicants from coming to this Court to make their case. In this case the lack of reasoning on the part of the respondent cannot have affected the interests of the applicants in circumstances where they demonstrated an understanding of the decision reached by virtue of the principal point they canvassed in these proceedings.

**The non-notification of the applicants by the respondent of the jurisdictional issue**

**24.** As to the argument Mr. Stewart made in reply regarding the failure of the respondent to alert the applicants that a jurisdictional issue would be raised at their hearings, I note that leave was not granted in respect of this and ought not to be entertained for this reason. In any event, in my view, this argument is not sustainable given that the applicants' solicitor was aware in advance of the hearing, from the content of his submissions, that the service requirement may pose a problem.

**Conclusion**

**25.** In summary, I am satisfied that employees who pursue claims under the Unfair Dismissals Acts 1977-2007 for penalisation, as defined in s.27(1) of the Act of 2005 must have one year's continuous service with the employer who dismissed them. In addition, I find that the reasons provided to the applicant are not clear on their face but were clear to the applicants, having regard to the central challenge they made in these proceedings and thus adequate. I would refuse the reliefs sought in these proceedings.