THE COURT OF APPEAL

Neutral Citation Number : [2018] IECA 386

Record Number: 2017 No. 211

Peart J.
Edwards J.
McGovern J.

BETWEEN:

MOSTAFA CHATABBOU AND ADELKABIR TOUIGIR

PLAINTIFFS/APPELLANTS

- AND -

IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR SOCIAL PROTECTION

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 5TH DAY OF DECEMBER 2018

1. This is an appeal against an order of the High Court (Heneghan J.) dated the 24th April 2017 refusing an application for discovery of four categories of documents which the plaintiffs consider are both relevant and necessary for the proper determination of these proceedings.

2. In their proceedings the plaintiffs contend that the provisions of s. 1(3)(c) of the Protection of Employees (Employer's Insolvency) Acts, 1984 ("the 1984 Act") fail to properly transpose Article 2.1 of Directive 2008/94/EC ("the Directive") into Irish law, and therefore that they are entitled to certain declaratory orders, and damages, including aggravated damages, in accordance with the legal principles relating to state liability for damages, as stated in Joined Cases C-6/90 and C-9/90 *Francovich and others* [1991] ECR 1-5357 ("*Francovich* damages"). Such damages are claimed in respect of losses alleged to have been suffered following their failure to recover amounts awarded to them under the Organisation of Working Time Act, 1997 and the National Minimum Wage Act, 2000.

3. The four categories of documents of which the plaintiffs seek discovery are as follows:

> "A. All documents drawn up or otherwise generated relating to and/or concerning the implementation into national law of Directive 2008/94/EC and, in particular, the requirement in the Directive concerning the establishment of a state [of] insolvency on the part of a corporate employer;
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> B. All documents comprising advice received concerning the implementation into national law of Directive 2008/94/EC and, in particular, the requirement in the Directive concerning the establishment of a state of insolvency on the part of a corporate employer;
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> C. All documents comprising notification to the State or its agencies that Directive 2008/94/EC has not been fully and properly implemented;
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> D. All documents received from the Commission or any other agencies in the European Union concerning the implementation into national law of Directive 2008/94/EC and, in particular, the requirement in that Directive concerning the establishment of a state of insolvency on the part of a corporate employer.

4. Article 2.1 of the Directive provides:

> "For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of employer, as provided for under the laws, regulations and administrative provisions of a Member State and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:
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> > (a) either decided to open proceedings; or
> >
> > (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings."

5. Section 1(3)(c) of the 1984 Act, which purports to implement Article 2.1 into national law, provides that where the employer is a corporate entity it shall be considered to be insolvent if:

> "a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by any floating charge, of any property of the company comprising or subject to the charge".

6. The plaintiffs' complaint essentially is that they are unable to afford the legal and other costs involved in having the company with which they had been employed wound up by the court and a liquidator appointed. They go on to contend that while the 1984 Act

makes provision in relation to a company being deemed to be insolvent when a liquidation occurs and a liquidator is appointed, it fails to make provision for the less formal way of deeming a company to be insolvent which is provided for as an alternative by Article 2.1, namely (b) where it is "established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings".

7. In order to recover *Francovich* damages on the basis of a failure by the State to properly transpose the Directive, the plaintiffs will have to satisfy the test for recovery of such damages, which was stated in *Joined Cases Brasserie du Pecheur and Factortame III* [1996] ECR I-1029, as follows:

> "Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the parties."

8. In order to satisfy the second condition, namely that the breach must be sufficiently serious, the plaintiffs will have to establish that the State has "manifestly and gravely disregarded the limits on its discretion". This requirement was explained by the Court in *Brasserie du Pecheur and Factirtame III* [supra] as follows:

> "55. As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State of the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
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> 56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
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> 57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement." [Emphasis provided]

9. It is for the purpose of assisting them in satisfying these requirements that the plaintiffs seek discovery of the four categories of documents referred to, in the face of a plea by the defendants in their defence that (a) the State's obligations pursuant to the Directive have been transposed in full, and (b) that the pre-conditions for such a claim for damages against the State have not been met and/or that the State has not manifestly or seriously disregarded its obligations pursuant to the Directive.

10. The plaintiffs contend that the question as to whether the State's failure to implement the Directive constitutes a manifest and serious disregard of its obligations is central to their claim for damages. The justification for seeking the four categories of documents as explained in the plaintiffs' solicitors' letter dated the 15th December 2016 seeking voluntary discovery was stated as follows:

> "In the circumstances, sight of the said documentation is necessary to establish *inter alia* the extent to which the defendant considered whether Directive 2008/94/EC was fully incorporated by [the 1984 Act], whether any infringement of the Directive on the part of the defendant was intentional or involuntary and the extent to which any error of law was excusable or inexcusable. The above categories of documentation are relevant and necessary to prove the allegations made in these proceedings against the defendant in circumstances where the defendant has denied liability in full. The records and documents sought by the plaintiff are records and documents which are within the custody, control, power or procurement of the defendant. The defendant is denying liability in full. It is therefore necessary to get sight of the aforementioned documentation to narrow the issue between the plaintiff and the defendant and avoid the necessity of incurring extensive and excessive costs."

11. The agreed note of the judgment of the trial judge delivered on the 24th April 2017 states her reasoning for refusing the application as follows:

> "… Upon hearing the submissions by counsel of the plaintiff's motion seeking discovery of various categories of documentation in the above matter, the learned judge refused the order for all four categories sought. In delivering her judgment, the judge stated that counsel for the plaintiff had argued that the documentation sought was necessary for the plaintiff to prove their case and in furtherance of this had relied on the comments of the Court of Justice in the case of *Brasserie du Pecheur*. The judge reiterated the submissions made by counsel for the defendants who opposed the motion on the grounds that the substantive issue in the proceedings is a matter of law which will be decided solely on legal submissions, and therefore the documentation is not necessary or relevant to the proceedings. The judge stated that she accepted the defendants' submission that this was a matter of law and as such the documents were unnecessary. The judge commented that many of the documents sought were public documents that would be available through a FOI request. The judge stated that in respect of the judgment of the Court of Justice in Brasserie she did not accept that the High Court hearing an interlocutory application was necessary a 'competent court' as referred to in that judgment. The judge refused all four categories of documentation and awarded costs to the defendant…".

12. Counsel for the appellant has drawn attention to the judgment of Finlay Geoghegan J. on an appeal to this Court in Glegola v. Minister for Social Protection and ors [2017] IECA 37 which decided that the State has failed to correctly transpose Article 2.1 of the Directive into Irish law. While that judgment pre-dates the *ex tempore* judgment of the trial judge in this case by a few months, it does not appear to have been referred to in the High Court. In *Glegola*, the question of the applicant's entitlement to damages under *Francovich* principles, as well as by reference to *Brasserie du Pecheur* was considered. In concluding that an award of damages was warranted, Finlay Geoghegan J. stated:

> "Applying those principles to the facts herein, I have concluded that the breach by the State in failing to transpose fully Directive 2008/94/EC by failing to provide a procedure whereby a person, such as the present appellant, who is owed a debt by her employer, a company which is insolvent, but where no steps have been taken by the directors to wind up voluntarily and there are no assets available in the company to satisfy the probable costs to be incurred by a liquidator, to obtain the alternative type of order identified in Article 2(1)(b), is sufficiently serious in accordance with the principles set out above, to warrant an award of damages."

13. As to whether there was a manifest disregard by the State of the limits of its discretion in relation to transposition of the

Directive, Finlay Geoghegan J. stated the following:

> "49. As Laffoy J. observed in *Re: Davis Joinery Ltd*, the problem with what she refers to as "informal insolvencies" was well-recognised and known for some time prior to her judgement in that case in 2013. The Oireachtas has addressed the issue of insolvent companies not being formally wound up for other purposes, such as in s. 251 of the Companies Act 1990. The written reserved judgement of Laffoy J. delivered on 19th July, 2013 sets out with great clarity the problem at issue, and the resolution reached in that case for the petitioner with the assistance of his solicitor, counsel and the insolvency practitioner who was willing to act as official liquidator. That judgment was delivered approximately eight months prior to the petition presented by the appellant herein to the High Court seeking the winding up order.
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> 50. Hence, whilst I have noted that there were no infringement proceedings commenced against Ireland by the Commission, nevertheless it appears to me, for the reasons outlined above there was a manifest disregard by the State of the limits of its discretion. The State was not called upon to make a legislative choice in transposing Article 2(1) of the Directive so as to provide in Irish law a procedure which would enable an employer which was a company, which appeared to have definitively ceased trading and where there was an insufficiency of assets, to enable a liquidator be appointed be deemed to be in a state of insolvency so that the employee could benefit, as intended by the Directive, by payment from the Social Insurance Fund.
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> 51. Whilst the amount of the debt due to the appellant herein is relatively small, nevertheless, it is a sufficiently serious breach where it leaves the employee intended to benefit from the provisions of the Directive unable to recover monies due to her by her employer in circumstances in which the Directive provides they should be recoverable from the Social Insurance Fund."

14. Having so concluded, Finlay Geoghegan J. went on to consider the question of whether there was a causal link between the failure to transpose the Directive, and the claim for damages made, being the third limb of the *Francovich* test for State liability in damages. Since that question will always be decided on the facts of any particular case, it is unnecessary to set out what was stated in that regard in *Glegola*, except perhaps simply to state that ultimately it was concluded that the appellant in that case was entitled to damages, since the Court was satisfied that the absence of the relevant procedure in the State required by Article 2(1)(b) of the Directive had caused the appellant's loss in failing to recover the amount awarded to her.

15. In urging this Court that the categories of documents sought by the plaintiffs should be discovered as being relevant and necessary to the question of entitlement to damages herein, counsel has referred to the Supreme Court's judgment in *Bupa Ireland Limited v. The Health Insurance Authority & ors* [2014] 2 I.R. 67 where damages were sought for breach of Directive 92/49/EC arising from the alleged unlawful imposition of the Risk Equalisation Scheme 2003. While the Supreme Court ultimately decided that no liability in damages arose as there had been no manifest and grave disregard of obligations, counsel draws attention to the fact that in that case the Supreme Court first considered a significant amount of documentation, including expert reports, white papers, consultation papers and so forth which were made available by the Minister for Health relevant to the manner of implementation. It is submitted that the documents sought in categories A and B are relevant in the same way in the present case.

16. Counsel also referred this Court to the judgment of O'Malley J. in the Supreme Court in *Ogieriakhi v. Minister for Justice & Equality & ors* [2017] IESC 52. In that case the Minister was found not to be in "sufficiently serious" breach so as to entitle the applicant to an award of damages, and in arriving at that conclusion looked at whether the Minister had been on notice of the infringement or any potential infringement at the relevant time. O'Malley J. in her judgment indicated that it was not a sufficient defence to such a claim for the purposes of the *Brasserie du Pecheur* principles that the officials "acted honestly on foot of a misapprehension that was not 'bizarre or eccentric", and in good faith. It is submitted therefore that the documents sought by way of discovery will assist the plaintiffs in establishing manifest and grave breach of the State's obligations, this being something that they must establish in order to recover damages.

17. Counsel for the Minister emphasises the essentially legal nature of the issues that arise when the Court determines whether or not the national law has properly transposed the Directive. It is submitted that the requirement of necessity in the context of discovery is not satisfied in this case in those circumstances. It is submitted that the test to be applied in deciding the question is not a subjective test, but rather an objective one. In that regard, the Minister has referred the Court to para. 56 of the CJEU's judgment in *Brasserie du Pecheur* which is already quoted above at para. 8 herein. It is submitted that this passage explains the objective nature of the test to be applied, and submits that this is confirmed by the judgment of O'Malley J. in *Ogieriakhi* where she refers to the insufficiency of any plea by way of defence that officials have acted in good faith. This, it is submitted, confirms the objective nature of the examination to be undertaken by the Court.

18. The Minister seeks also to distinguish the *BUPA* case upon which the plaintiffs rely, on the basis of the very specialised actuarial and other non-legal technical reports that the High Court had considered. It is submitted that the present case presents no such complexity requiring regard to be had to specialist reports, and that by contrast to BUPA the issue is a very straightforward one, for which discovery is not necessary.

19. My overall conclusion is that the trial judge was correct to refuse to order discovery in this case. Her reasons are necessarily somewhat briefly stated according to the agreed note of what she stated *ex tempore*. But I am satisfied that it is not an appropriate case in which to order the discovery of the categories of documents sought.

20. Counsel for the Minister is correct in my view to seek to distinguish the *BUPA* case from the present case. As he has submitted, the issues were very technical and specialised, and clearly the actuarial reports and other material of a technical nature were of assistance to the resolution of the issues arising for determination. This is not such a case. The question of whether or not the Directive has been correctly transposed into Irish law is a relatively straightforward issue to resolve, which does not require an examination of the type of materials sought to be obtained by discovery of the categories of documents sought by the plaintiffs herein. I do not consider the categories sought as being relevant to the determination of that first issue. Whether in the light of *Glegola* it is necessary at all for that question to be decided again is not a matter upon which I should make any comment.

21. As for the necessity for the discovery of the categories of documents sought for the purposes of establishing the claim for damages, and satisfying the requirements of *Francovich* and *Brasserie du Pecheur*, it seems to me that the only possible category of documents identified in the request for discovery which could be relevant to the damages claim is category C, namely "All documents comprising notification to the State or its agencies that Directive 2008/94/EEC has not been fully and properly implemented". Clearly if the State had been in receipt of any such notifications from, for example, the Commission, it could have a bearing on whether or not the State had ignored same, and therefore might be considered to be in deliberate, serious and manifest breach of its obligations. But nothing has been put forward by the plaintiffs to suggest that any such materials exist. They have not put forward any evidence to

even suggest the possibility, let alone the probability, that such a notification exists. In my view, seeking that category by way of discovery amounts to "fishing" (in the well-known sense in which the word is used in relation to discovery) in the hope rather than any expectation that something might turn up. That is impermissible.

22. For these reasons I would dismiss this appeal.