Neutral Citation: [2014] IEHC 39

The High Court

Record Number 2013/291SP

In the Matter of the Social Welfare Consolidation Act 2005

Between

Philip Meagher

applicant

and

The Minister for Social Protection

respondent

Judgment of Mr Justice Peter Charleton delivered on the 7th day of February 2014

1. This is an appeal against a ruling of a review of the Social Welfare Appeals Officer by the Chief Appeals Officer. Essentially, it is a matter of construction of the labyrinthine and specialised language of the social welfare code. The applicant Philip Meagher seeks a declaration that he is entitled to a special half-rate old age pension.

2. The applicant was born on 4th July 1926 and lives with his wife in Portlaoise. Now 87 years of age, he worked throughout his life as a solicitor and later pursued that profession together with a post as a coroner. His earnings as coroner for County Laois were nominal for the first 10 years of employment and social insurance contributions fell into category 'M', which does not count towards the contributory old-age pension. While working, simultaneously, as a solicitor, he was a self-employed person and was thus not required to make social insurance contributions. This changed on 6th April 1988 when it became compulsory for all self-employed persons to pay social insurance. These were treated under category 'S' and counted towards various benefits but not for full benefits. In 1989, the salary of coroners was reviewed and in consequence of a marked increase the obligation arose for the applicant to pay social insurance at the highest rate, or 'A' category. Thus, on that the applicant did not become an insured employee until 6th April 1991. Retirement age for social welfare purposes is 66 years. The applicant reached his 66th birthday on 4th July 1992. To become eligible for the contributory old-age pension a certain number of weekly payments at the relevant rate have to be made. The applicant continued to pay social insurance as an employed person until he reached that age and continued as a salaried coroner until he reached his 70th birthday in 1996.

3. The decision on the applicant's case was made on 16th April 2012 and is as follows:

> It is noted that the appellant… entered insurance as a self-employed contributor on 6th April 1988, and that from that date on words until his 66th birthday on for July 1992, he recorded a total of 221 class S (self employed) social insurance contributions. The total of 2 to one class S contributions derives from the following annual totals:-52 class S contributions for each of the four contribution years from 6th April 1998 to 5th April 1992, and 13 class S contributions for the period from 6th of April 1992 to 4th July 1992 when [the appellant] attained the age of 66 years. The total number of class S contributions is therefore to 221. Mr Meagher has appealed on the grounds that he paid an additional 50 contributions at class A in respect of the contribution year 1991/1992 (to 5th April 1992), and a further 13 class A contributions in respect of the period from 6th of April 1992 to 4th of July 1992 when he attained the age of 66 years. The additional class A contributions paid by Mr Meagher do not, however, serve to increase above 221 the total number of qualifying social insurance contributions paid by him for the following reason: Under the governing legislation, employment contributions (in this case class A contributions) paid in any contribution year replace any self-employment contributions paid within the same contribution year, with the effective results that a person may not record any more than 52 qualifying contributions in any one contribution year. The legislation governing this matter is Article 23 (1) of the Social Welfare (Consolidated Contributions and Ensure Ability) Regulations, 1996 (Statutory Instrument Number 312 of 1996)… [quoted below in the judgment].
>
> In light of the above legislative provisions, the situation is that class A contributions paid by Mr Meagher take precedence over and replace any class S self-employment contributions paid by him in respect of any contribution year were both classes of contributions were paid concurrently. Accordingly, this results in no increase to the total number of 221 qualifying contributions paid in this case between 6th of April 1998 and 4th July 1992.

4. Under section 318 of the Social Welfare Consolidation Act 2005, the matter was reviewed by the Chief Appeals Officer, who gave her decision on 23rd April 2013. The operative part follows:

> The review is sought on the basis that Mr Meagher disputes this interpretation of the legislation. In particular, the appellant considers that article 23 of the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 (which deals with concurrent employment and self-employment) is merely giving effect to section 21(1)(e) of the Social Welfare Consolidation Act 2005 and is designed to preclude a situation where both employment and self-employment contributions can be aggregated for the purposes of benefits available only to employed contributors. However, section 21 of the Act contains no regulatory power and indeed its intent is quite clear from the section itself, that is that self-employment contributions shall be disregarded in determining entitlement to benefits other than those listed. It is section 21(1)(e) itself which precludes a situation where both employment and self-employment contributions can be aggregated for the purposes of benefits available only to employed contributors. Section 22 of the Social Welfare Consolidation Act provides that "Regulations may provide for the determination of the contributions payable, the amount or rates of those contributions, and the contribution weeks in respect of which those contributions shall be regarded as having been paid, in the case of a person who is – (c) is both unemployed contributor and a self-employed contributors whether concurrently or not,". This is the power under which article 23 is made. The purpose of article 23(1) is to provide that in cases where a person is concurrently unemployed contributor and self-employed contributor in a contribution year, the

number of weeks in respect of which self-employment will be treated as paid will be calculated by subtracting the number of employment contributions paid or credited from 52 treating the remainder as the number of contribution weeks in respect of which self-employment contributions have been paid. This is subject to article 23(2) [which] provides that the purpose of the contribution conditions requiring a minimum number of qualifying contributions to have been paid (but not for the yearly average test) for State pension (contributory), widow's (contributory) pension, widower's (contributory) pension, surviving civil partner's (contributory) pension and orphan's (contributory) allowance, any employment week from which and employment contribution has been credited may be treated as if a self-employment contribution has been paid. In this case, the appellant was concurrently employed and self-employed in the contribution year 1991/1992. It would appear he had 50 paid class A contributions in this period, in which case he would be regarded as having paid only 2 class S contributions. The appellant has also queried the fact that contributions paid by him after his 66th birthday have not been taken into account. In this matter, the Social Welfare Consolidation Act provides that to be an employed or a self-employed contributor; a person must be over the age of 16 and under pensionable age. Pensionable age is defined as the age of 66 years.

5. Difficulties arose with those who are aged 56 over in 1988 when they discovered that they were not eligible for a contributory old-age pension. It would have meant that before notional retirement at age 66, they would have only been contributing to social insurance for a maximum of nine years and some months. Thereafter, as I understand it, once there is eligibility, a person who had attained the age of 66 was entitled to be paid the contributory old-age pension and not liable to contribute, therefore. Those who were not eligible lobbied the legislature. The result was the Social Welfare Act 1999. Section 21 of that Act is now reproduced at sections 109(1)(e)(18) and (19) of the Social Welfare Consolidation Act 2005. The provision applies to those persons who "on or before 6 April 1988 had attained the age of 56 years but had not attained the age of 62 years." On the passing of the Act, the applicant was already 61 years old. He therefore came in the category of the persons to whom the legislation ostensibly applied. The difficulty that arises is that a person who is entitled to receive a contributory old-age pension at the new entitlement, which was half of the full rate, had to have paid 260 weekly contributions. To make that number of contributions, a person would have to contribute for five full years. This would only be possible in respect of someone who was less than 62 in the first week of April 1988 and could make 52 weekly contributions in that year. The applicant was 61 years of age. Did the legislature intend this? A six-year timespan is indicated by the wording of the section.

6. Section 5 of the Interpretation Act 2005 gives a wider protection against absurd results in legislation. Whereas under the common law approach to statutory construction, courts will seek to avoid any interpretation that produces an absurd result, this is because it is unlikely to have been intended by the legislature. Hence, enactments can be construed so as to avoid absurdity or which are unworkable or impracticable or which are illogical or pointless or which set out in express terms the opposite of the mischief the legislation was set up to avoid. The sections of legislation are not to be read in isolation from one another but are to be construed within the context of the statute as a whole. At common law, however, notwithstanding these canons, the literal meaning of legislation may be so strong as to be required to stand. Section 5 of the Act of 2005, allows the court to effectively avoid a literal interpretation that would be "absurd would fail to reflect the plain intention of the Oireachtas" and to replace it with "a construction that reflects the plain intention" of the legislature. What the courts cannot do, however, is legislate by adding to a statute, or subtracting from a statute, something which the Oireachtas never intended. I cannot apply section 5 here. Even though the situation of the applicant is unfortunate and unfair, the choosing of a maximum possible span of six years seems to indicate that the Oireachtas thought through the category of persons who were to be eligible for the half pension and expressly provided that they had to be young enough to make contributions over 260 weeks before they attained their 66th birthday. That would apply to everyone aged 56, 57, 58, 59 and 60 and some people aged 61. But this is a matter for Government. Social welfare legislation is always set up so as to target those who are regarded as appropriate to benefit from a provision. This particular enactment does not cover, regrettably, all of those up to the age of 62 whose birthdays occurred in 1988. To be eligible you had not to have attained the age of 62 on the 6th of April. That is the qualification. The Oireachtas did not want those who were paying any less than 260 weekly stamps to qualify. The matter might have been put as clearly as that but it wasn't and hence this litigation. As that position is not entirely illogical, I regret that the Court cannot interfere.

7. Under section 22 of the Act of 2005, regulations can be made "for the determination of the contributions payable, the amount or rate of those contributions, and the contribution weeks in respect of which those contributions shall be regarded as having been paid…" The categories applicable include those who become for the first time a self-employed contributor, who ceases to be a self-employed contributor and those who are both unemployed contributor (meaning working for another person) and a self-employed contributor whether concurrently or not. This brings us to the second substantial point in this appeal. The relevant regulations are the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996. Article 22 provides:

> 22. (1) Where a self-employed contributor ceases insurable self-employment in a contribution year and does not become an employed contributor in that contribution year and is a person to whom paragraph (a) or (c) of section 18 (1) applies, self-employment contributions shall be payable by him at the percentage amount or the amount specified in the said paragraphs, whichever is the greater.
>
> (2) In the case of a person to whom this article applies, the number of contribution weeks in respect of which self-employment contributions shall be regarded as having been paid shall, provided that the total amount of self-employment contributions payable by virtue of sub-article (1) have been paid, be 52 in any contribution year.

8. A strained meaning is sought to be put on this article, which is to increase those who pay 'S' contributions concurrently with 'A' contributions beyond 52. On the wording in the legislation, this could not have been intended. Article 23 provides:

> 23. (1) Subject to sub-article (2), where —
>
> (a) a person is concurrently an employed contributor by virtue of section 9(1) and a self-employed contributor in a contribution year, and
>
> (b) the total number of contribution weeks in respect of which self-employment contributions have been paid and the total number of contribution weeks in respect of which employment contributions, (other than an employment contribution paid by virtue section 9 (1) (b)) have been paid, or treated as paid, or would have been payable but for the provisions of section 10 (1) (c) or (e) or have been credited, is less than or in excess of 52, the number of contribution weeks in respect of which self-employment contributions shall be regarded as having been paid shall be determined by deducting the number of contribution weeks in respect of which employment contributions have been paid or credited from 52 and treating the remainder as the number of contribution weeks in respect of which self-employment contributions have been paid.

(2) In the case of a person to whom sub-article (1) applies, a self-employment contribution may be treated as having been paid in respect of any contribution week for which an employment contribution has been credited for the purposes of the contribution conditions for old age (contributory) pension, widow's (contributory) pension, widower's (contributory) pension and orphan's (contributory) allowance, requiring a minimum number of qualifying contributions to have been paid.

(3) Where a person to whom this article applies has paid employment contributions and self-employment contributions for any contribution year and the aggregate of his earnings, emoluments (if any) and reckonable income has exceeded the sum specified in section 18(1)(d) he shall be entitled, subject to article 71, to a refund of the self-employment contributions paid on that portion of his reckonable income or emoluments (or both) which represents the difference between the aggregate of his reckonable income or emoluments (or both) and his earnings and the sum so specified.

9. Particular focus is on those contributing under two classes. The wording of 23(1)(b) is urged so as to subtract 52 class 'S' contributions with the 13 class 'A' contributions and come up with a figure of 39 and then to add on to that the same figure as deducted and to reapply the 13 so as to net 65 contributions. This is urged by virtue of the reference to the "last complete contribution year" before retirement contained in section 21(1)(d) of the Act, combined with section 108 of the Act and 109 of the Act. It is also urged that the reference to 56 in the legislation being amended so that those who have not attained the age of 62 as mandated in the code demands the interpretation so inventively urged. Plainly, that is not so. In reckoning two classes of contribution, it is the intention of the Oireachtas that while credit is to be given on the higher basis for those contributing in respect of reckonable credits for class 'A' and class 'S', that in adding and subtracting no one can ever reach beyond the number of weeks that there are in the year. Further, it seems to me that an intention to make a weekly contribution worth more than a 52nd of a minimum of 260, plain words would be required. The legislation does not mandate that. Similarly, to make any year one in which contributions beyond the number of weeks in the year are possible due to aggregation, the legislature would have to plainly so state. That interpretation is not possible.

10. So, unfortunately, I cannot allow this appeal.