THE HIGH COURT

AN ARD-CHÚIRT

[2014 No. 304 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 7 (4)(B) OF THE PAYMENT OF WAGES ACT, 1991

BETWEEN

SANDRA CLEARY, ELLEN BRADLEY, JOYCE DONOVAN, ANGELA CARMODY, JOAN THOMPSON, ANITA MALONE, YVONNE MASTERS, MAUREEN ANDRES, BRIAN MCCARTHY AND JAMES DOWDALL

Appellants

AND

B & Q IRELAND LIMITED

Respondent

JUDGMENT of Mr. Justice McDermott delivered on the 8th day of January, 2016.

Introduction/background

1. The appellants are ten employees of the respondent who commenced their employment on different dates between the years 2001 and 2008 respectively in different retail premises operated by the respondent. The first, second, third, fourth, fifth, sixth and tenth appellants claim an entitlement to be paid a Winter/Summer bonus under their respective contracts of employment. The bonus was normally paid twice annually and amounted to 6% per annum of gross salary: the first payment, amounting to 3% of gross salary, was paid in June of each year (the Summer bonus) for the work period August to January and the second, a further 3%, was payable in November for the work period of February to July (the Christmas bonus). Those commencing employment in 2009 did not benefit from this bonus scheme. The employer discontinued the bonus scheme applicable to the appellants in January 2012 but later indicated that it would take effect from 1st April 2012. The Appellants claim that the Summer bonus, payable in 2012, should nevertheless have been paid since it was earned and/or accrued during the previous August to January. It was also claimed that the withdrawal of the bonus was in itself unlawful and in breach of the provisions of the Payment of Wages Act, 1991 ('the 1991 Act').

2. The second element of the claim concerned the withdrawal of a "zone allowance" payable to staff at three Dublin outlets owned by the respondents at Liffey Valley, Tallaght and Swords, which is also said to be a breach of the Appellants' entitlements under the 1991 Act.

3. The appeal is pursuant to s. 7 (4) (b) of the 1991 Act from a number of determinations made by the Employment Appeals Tribunal ('the Tribunal') on 14th May, 2014 in respect of appeals against decisions of the Rights Commissioner ('the Commissioner') dated 5th and 20th November, 2013 following complaints brought by the appellants. It is made by way of Notice of Motion dated 25th June, 2014 grounded upon affidavits sworn by Mr. Jonathon Hogan, an industrial officer with the Mandate trade union. A replying affidavit of Louise Harrison, solicitor, verifying the Statement of Opposition was submitted on behalf of the respondent.

Reliefs sought

4. The appellants seek orders pursuant to Order 84C of the Rules of the Superior Courts and s.7(4)(b) of the 1991 Act :-

a. that the Tribunal erred in law in determining that the removal of a winter/summer bonus by the respondent was not in breach of s. 5 of the Act;

b. that the Tribunal erred in law in determining that the removal of a 'zone allowance' by the respondent was not in breach of s. 5;

c. that the Tribunal had erred in law in failing to award compensation to the appellants pursuant to s. 6;

d. that the Tribunal erred in law in determining that the removal of the winter/summer bonus constituted a deduction in compliance with s. 5 (1)(b) of the Act;

e. that the Tribunal erred in law in determining that the zone allowance was paid as an expense/compensation for working in a particular geographic area as defined and contemplated by s. 1 (1)(i) of the Act;

f. that the Tribunal erred in law in classifying the non-payment of the zone allowance as a 'reduction' rather than a deduction for the purposes of s. 5, and, if required;

g. an Order remitting the matter back to the Tribunal for hearing.

5. Three related declarations are also sought by the appellants that:-

a. the respondent made unlawful deductions from the appellant's wages contrary to s. 5;

b. the winter/summer bonus and/or zone allowance are properly payable to the appellants within the meaning of the 1991 Act; and

c. the appellants are entitled to compensation pursuant to s. 6 for the unlawful deductions.

Procedural background
6. The appellants challenged the decisions of the respondent not to pay the zone allowance (where applicable) and the winter/summer bonus payment as unlawful deductions of wages properly payable to them under the appropriate provisions of the Act of 1991. The claims were first brought to the Commissioner and were heard over four days in June, July and October, 2013. The claims were upheld.

7. The Commissioner's decisions were subsequently appealed by the respondent to the Tribunal. By determinations dated 14th May, 2014, the Tribunal overturned the decisions reached by the Commissioner in respect of both points.

Preliminary Points of Objection
8. The respondent submits that the originating Notice of Motion dated 25th June, 2014 does not, as required under Order 84C, Rule 2 (3), set out the "points of law on which the appeal is made."

9. It is also claimed that the appellants have failed to exhibit the transcript of the hearing as contemplated by Order 84C, Rule 3 (1) (e).

10. These issues were raised as preliminary points of objection in the Statement of Opposition dated 21st July, 2014. During the course of the hearing both sides sought to rely upon elements of the transcript in support of their respective arguments and I do not consider that this challenge to the admissibility of the transcript in evidence was seriously pursued.

11. I am also satisfied that the grounds upon which the appeal is brought as set out in the Notice of Motion are sufficient to raise a number of points of law, as required under the Rules and section 7 of the 1991 Act, which clearly arise from the pleadings, the affidavits submitted and the substance of the claims brought by the appellants under the relevant legislation.

The Tribunal's determination
12. The Tribunal's decisions of 14th May, 2014 dealt separately with the winter/summer bonus and the zone allowance payments.

Winter/Summer Bonus
13. With regard to the winter/summer bonus payment, the Tribunal found that although the terms of the appellants' contracts of employment differed in a number of respects, each contained a common clause which was set out in the employee's handbook and provided that "all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time."

14. The Tribunal found as follows:

> "On the 1st April 2012 the respondents were notified that "*with effect from the 1st April, 2012 you will no longer receive the Summer/Winter Bonus traditionally paid in June and November of each year"*. Each employee was asked to sign a letter "*to confirm receipt of the notification of the amendment"*. It is clear from the letter that it does not seek an amendment of the contract as was argued by the appellant(s). It merely seeks acknowledgement of receipt of the amendment to the terms and conditions of employment. From the evidence adduced it would seem that the contracts of employment differed slightly in relation to the point at issue. One set of contracts stated "*… may amend or vary your terms of employment from time to time and these variations or amendments will be posted on their staff notice board if the change is minor or in writing if the change is more substantial*" The other set of contracts stated "*Details of the other terms and conditions (of) employment are given in the Employee Handbook. Any changes to the above details will be notified to you directly"*. There is one consistency between those two contracts and it is set out in the Employee handbook, wherein it states in bold "*all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time"*. That clause is clear unequivocal and incapable of any other interpretation".

The Tribunal concluded that the non-payment of the winter/summer bonus complied with the provisions of s. 5 (1) (b) of the Act of 1991 and, reversed the Commissioner's decision. It stated that:

> "If the respondents (the employees) were not content with the appellant (the employer) retaining the power to unilaterally review or withdraw the allowance, they should not have entered into such a contract."

Winter/Summer bonus payment - factual background
15. All employees of the respondents who had served for at least six months with the respondent company received a winter/summer bonus payment on the basis of pay earned during certain periods of trade. The winter bonus was based on the basic pay earned in the previous February-July period of trade, with the summer bonus payment being derived from the basic pay earned in the previous August-January trading period. The employee handbook, provided by the respondent to its employees, states that the "scheme guarantees 6% of your basic pay earned salary (excluding commission and overtime) per annum subject to qualifying and accrual times being satisfied." In January 2012 the respondent announced the withdrawal of these two seasonal bonus payments with effect from 1st April, 2012. In a letter dated 29th February, 2012, the respondent informed its employees that even though they had an expectation that the summer bonus would be paid, this would not be forthcoming due to cost cutting measures by the respondent. It was accepted by the respondent, in meetings held in January, 2012 between the respondent and employees, that the latter were eligible to receive a summer bonus, but that there was no prospect of payment due to the implementation of cost reducing policies. The decision was taken in the context of rapidly deteriorating trading conditions for the employer.

Winter/Summer bonus payment - appellants' submissions
16. The appellants' submit that the Tribunal's finding that the withdrawal of the winter/summer bonus was not contrary to the provisions of s. 5 (1)(b) of the 1991 Act was wrong in law. They claim that s. 5 (1)(b) only allows a financial deduction to be made when authorised by the contract of employment. The appellants argue that the Tribunal failed to consider the fact that their summer bonus— which was payable in June, 2012— was referable to a period which the appellants had already worked, i.e. August, 2011 to January, 2012 and could not be the subject of a retrospective withdrawal under the "bonus" clause. It failed to consider the fact that the respondent had accepted that the appellants had accrued the summer bonus payable in June, 2012 at the time when the decision was made by the respondent to withdraw it. The employees had already provided consideration by their work over that period and had therefore earned the bonus which could not be retrospectively and unilaterally withdrawn.

17. The appellants also submit that the Tribunal failed to examine whether their contracts of employment contained an express provision which permitted the withdrawal of the winter/summer bonus and if so, whether their consent was required before the bonus could be withdrawn.

18. In addition, the appellants contend that the withdrawal of a "declared" bonus could not occur on the exercise of the employer's discretion.

Winter/Summer bonus payment - respondent's submissions
19. The respondent submits that the bonus was not 'declared' by the respondent to the appellants for the period commencing August, 2011 and ending in January, 2012 or any other period. The Tribunal reached the same conclusion on the evidence before it.

20. The respondent pleads in their Statement of Opposition that it was open to the Tribunal, on the evidence, to make the findings set out in its determination dated 14th May, 2014 in relation to the winter/summer bonus payment and that there is no basis for impugning such findings.

21. The respondent submits that none of the material put before the court provides any basis for overturning Tribunal's findings. The contracts of employment were clear and unambiguous in respect of the discretionary nature of the bonus payment. In arguing that these terms ought to be construed within the context of their factual background, the appellants fail to provide an adequate rebuttal to the clear meaning of the words used in the clause that "all bonus schemes are discretionary…[and] may be reviewed or withdrawn at any time."

22. Further, the respondent argues that the appellants' submission that the power to withdraw the winter/summer bonus should be subject to specific limitations, has no legal or factual basis and is unfounded as the Tribunal's determination of 14th May, 2014, clearly states that it considered the evidence proffered in relation to the terms of the contract. The Tribunal found that there was a clear and unambiguous term in the contracts that gave the employer the right to "review or withdraw" the bonus scheme. Furthermore, such a review or withdrawal could be undertaken "at any time". This clause also clearly states that the bonus scheme is discretionary in nature.

23. The respondent rejects the appellants' contention that the employer's discretion to withdraw the bonus is qualified in any respect. In that regard, the appellants contend that the discretionary nature of the bonus payment was removed because the period of time to which the bonus was referable had passed. Secondly, it is argued by the appellants that the contract falls to be interpreted in light of the "factual matrix" under which it was made and intended to operate. The respondent highlights that neither of these points were made before the Tribunal, and that being so, the court would be acting *ultra vires* if these arguments were allowed to be advanced on this appeal.

24. The respondent claims that it is not clear what the appellants mean by describing the bonus as 'declared', that there is no provision for the declaration of a bonus under the contract and that no announcement or process was identified by which the bonus was ever 'declared' to its employees. On the contrary, it is submitted that the evidence before the Tribunal clearly stated that the bonus was under review as of January, 2012.

25. The respondent further argues that the Tribunal did not consider that the existence of the bonus scheme coupled with the passing of time was sufficient to give rise to the conclusion that the bonus was payable. Furthermore, the respondent contends that there is no legal precedent for such a finding.

26. The respondent contends that the Notice of Motion, dated 25th June, 2014, discloses no error of law by the Tribunal in reaching its determination on this issue.

Zone Allowance
27. With respect to the zone allowance, the Tribunal considered the definition of wages and expenses under section 1(1)(i) of the 1991 Act that payments will not be regarded as wages for the purposes of the Act if they include: - "Any payment in respect of expenses incurred by the employee in carrying out his employment."

28. The Tribunal's determination further states:-

> "There can be no doubt that the allowance paid was a separate and distinct payment from that of the salary and had a separate and distinct purpose. Wages are paid in consideration of work carried out. Zone allowances were paid as a form of compensation for working in a particular area and therefore come under the umbrella of section 1 (1)(i) [of the Act of 1991]."

29. The Tribunal also considered a letter of the 29th January, 2003 concerning the allowance which indicated that employees would receive "a 5% increase in the hourly earnings in the form of a Zone Allowance (41 cents per hour)". It concluded that this letter must have been amended and that there was no evidence that the 5% increase was ever maintained. The Tribunal was satisfied that the content of the letter did not form part of the contract of employment.

30. The Tribunal also noted in its determination of 14th May, 2014 that the removal of the zone allowance payment was made in good faith by the respondent in an attempt to save money. The Tribunal further highlighted that the respondent company was experiencing severe financial losses and an examiner had been appointed in May, 2013.

31. It concluded that the case bore striking similarities to the facts of *McKenzie & Anor –v- Minister for Finance & Ors* [2011] 22 ELR 109. It found that the provisions of the 1991 Act had no application to the circumstances of this case. It held that "The removal of the allowance amounts to a reduction in the allowance, albeit a 100% reduction, and is not a deduction from the wages payable."

Zone allowance payment - factual background
32. Prior to April, 2012, those appellants who worked at the respondent's stores based in the 'Dublin region' (i.e. stores at Swords, Tallaght and Liffey Valley) received a 'zone allowance' of €0.41 per hour which was payable to those appellants who were eligible for such an allowance. The respondent introduced this zone allowance payment in January, 2003. The zone allowance was conceived as a compensatory payment to those who worked in the Dublin stores, because the cost of living in Dublin was deemed to be higher than other regions of the country. The allowance was clearly calculated to attract candidates for employment and to offer terms of employment whereby they would be paid the allowance in consideration of their working for the employer in a "zone" in which it was recognised additional living expenses would be incurred.

33. By letter dated 29th January, 2003, the respondent informed its employees that the said zone allowance "will be reviewed but not removed or reduced". Nine years later, in January, 2012, the respondent announced that the zone allowance would be removed from 1st April, 2012 onwards. The affected employees consulted with the Mandate trade union expressing their concerns with the respondent's decision in relation to the removal of the allowance.

34. At the time of the announcement in relation to the zone allowance payment, the respondent company was in a poor financial situation. These difficulties necessitated cost-saving measures which, as argued by the respondent, were required to safeguard the future of the business and to protect jobs. It was accepted by the Tribunal that this factor does not alter the employer's contractual obligations to its employees.

35. On 31st January, 2013 the respondent was forced to petition the High Court for the appointment of an examiner under the provisions of the Companies (Amendment) Act, 1990. That application was successful and on 23rd May, 2013, the High Court approved the scheme of arrangement proposed by the examiner.

36. Though it engaged in correspondence with the Mandate trade union, the respondent reaffirmed its decision by letter dated 29th February, 2012 to remove the zone allowance payment. In this letter the respondent offered an explanation for the decision to remove the said allowance as "there is no longer a valid reason to pay a higher rate of pay in the three Dublin stores".

37. The respondent offered to 'buy-out' the zone allowance. The appellants refused to accept this offer and the proposed "cushion payment" offered by the respondent. The zone allowance payment has not been paid to the appellants since 1st April, 2012.

Zone allowance payment - appellants' submissions
38. The appellants submit that the Tribunal failed to have proper regard to the contents of the letter of 29th January, 2003, erred in law in concluding that the allowance did not fall within the meaning of 'wages' and failed to engage in any appropriate analysis of the term 'expenses' for the purposes of s. 1 (1)(i) of the Act of 1991. The appellant submits, in this regard, that there was no evidence before the Tribunal from which it could be inferred that the zone allowance was an expense under section 1(1)(i) of the Act of 1991. However, it is not submitted that an expense under the sub-section only applies to vouched or vouchable items; rather, it is submitted that in these cases the zone allowance was an intrinsic part of the wages payable to employees contracted to work at the Dublin outlets.

39. It is also argued that the Tribunal erred in law in holding that the contents of the letter dated 29th January, 2003 did not form part of the contractual terms on which the appellants could rely.

40. The appellants allege that the Tribunal's finding that the appellants' case mirrored that of the decision reached by Edwards J. in *McKenzie*, was a misinterpretation of that case, upon which the finding that the Act of 1991 did not apply to the circumstances of the appellants' case, was incorrectly based, .

Zone allowance payment - respondent's submissions
41. The respondent submits that the appellants must show that they had a contractual entitlement to be paid the zone allowance.

42. The respondent states that it is accepted between the parties that the Tribunal's finding that the zone allowance was an "expense" within the meaning of s. 1 (1)(i) of the Act of 1991 cannot be disturbed unless there was an absence of evidence before the Tribunal upon which such a finding could reasonably be made.

43. The respondent notes that the grounds of appeal identified in the originating Notice of Motion do not identify any error of law in the definition of an expense. The respondent submits that this argument is new and that the appellants should not be permitted to advance it in this appeal for the first time. The respondent argues that the appellants seek a fresh determination of fact on evidence adduced before the Tribunal which it was for the Tribunal to assess and is not a proper basis for an appeal on a point of law.

44. The respondent also notes that the submission that the Tribunal erred in law in its interpretation of the decision of Edwards J. in *McKenzie* was not relevant to the issues on this appeal because the appellants implicitly accept that if there was evidence before the Tribunal that the zone allowance was a payment in respect of expenses; then it automatically fell outside the scope of the Act of 1991.

The law
45. The relevant statutory provisions are set out in the Act of 1991 and the Payment of Wages (Appeals) Regulations 1991 (S.I. No.351 of 1991) (hereinafter 'the 1991 regulations'), and the provisions of Order 84C of the Rules of the Superior Courts, 1986 (as amended).

46. Section 1 of the Act of 1991 provides the definition of wages :-

> "wages", in relation to an employee, means any sums payable to the employee by the employer in connection with his employment, including—
>
> (a) any fee, bonus or commission, or any holiday, sick or maternity pay, or any other emolument, referable to his employment, whether payable under his contract of employment or otherwise, and
>
> (b) any sum payable to the employee upon the termination by the employer of his contract of employment without his having given to the employee the appropriate prior notice of the termination, being a sum paid in lieu of the giving of such notice:
>
> Provided however that the following payments shall not be regarded as wages for the purposes of this definition:
>
> (i) any payment in respect of expenses incurred by the employee in carrying out his employment,
>
> (ii) any payment by way of a pension, allowance or gratuity in connection with the death, or the retirement or resignation from his employment, of the employee or as compensation for loss of office,
>
> (iii) any payment referable to the employee's redundancy,
>
> (iv) any payment to the employee otherwise than in his capacity as an employee,

(v) any payment in kind or benefit in kind."

47. Section 5 is entitled the 'Regulation of certain deductions made and payments received by employers'. Sub-section 1 of s. 5 is most relevant, and states:-

> "(1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—
>
> (a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,
>
> (b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or
>
> (c) in the case of a deduction, the employee has given his prior consent in writing to it;"
>
> Sub- section 5 of s. 5 provides:
>
> "(5) Nothing in this section applies to-
>
> (d) a deduction made by an employer from the wages of an employee in pursuance of any arrangements—
>
> (i) which are in accordance with a term of a contract made between the employer and the employee to whose inclusion in the contract the employee has given his prior consent in writing, or
>
> (ii) to which the employee has otherwise given his prior consent in writing, and under which the employer deducts and pays to a third person amounts, being amounts in relation to which he has received a notice in writing from that person stating that they are amounts due to him from the employee, if the deduction is made in accordance with the notice and the amount thereof is paid to the third person not later than the date on which it is required by the notice to be so paid…"

48. Section 5(6) of the Act of 1991 provides that:

> "Where-
>
> (a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or
>
> (b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee, then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

49. This appeal is brought by way of s. 7 (4)(b) of the Act of 1991 which states that:-

> "(b) A party to proceedings before the Tribunal may appeal to the High Court from a determination of the Tribunal on a point of law and the determination of the High Court shall be final and conclusive."

50. In *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 I.R. 34 the Supreme Court dealt with the circumstances in which the High Court will overturn a decision of a specialist tribunal such as the Employment Appeals Tribunal. Hamilton C.J. commented, at pp. 37-38 of the report, that:-

> "…I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

51. As was noted in the appellants' submissions, the High Court, in considering whether to overturn the Tribunal's determination, must first scrutinise whether the Tribunal based its determination upon an identifiable error of law or upon an unsustainable finding of fact. The Supreme Court in *National University of Ireland, Cork v Ahern & Ors* [2005] 2 I.R. 577, held that although findings of fact must be accepted by the High Court on appeal, that court could still examine the basis upon which those facts were found. The relevance or admissibility of the matters relied on by the Tribunal in determining the facts in the manner that it did may give rise to a matter of law.

The Format of the Appeal

52. Regulation 3 of the 1991 regulations, upon which the respondent relies in respect of the format and grounds of this appeal, states that:-

> "A notice under section 7(2) in relation to an appeal shall contain—
>
> (a) the names, addresses and descriptions of the parties to the proceedings to which the appeal relates,
>
> (b) the date of the decision to which the appeal relates, and the name of the rights commissioner who made the decision, and
>
> (c) a brief outline of the grounds of the appeal."

Rules of court

53. Order 84C, Rule 2 (3) of the Rules of the Superior Courts) as inserted by Rule 1 of the Rules of the Superior Courts (Statutory Applications and Appeals) 2007 (S.I. No. 14 of 2007) states:-

> "(3) Where the relevant enactment provides only for appeal to the High Court on a point of law, the notice of motion shall state concisely the point of law on which the appeal is made."

54. The correct format of an appeal on a point of law was considered by Hedigan J. in *Blackrock College v Browne* [2013] IEHC 607 (Unreported High Court, 20th December, 2013) in which the Labour Court made a determination, which, the appellant argued, was based on an error of law. Section 17(6) of the Protection of Employees (Part-Time Work) Act, 2001 provided specifically for an appeal on a point of law. It was held that where the Oireachtas provides for a particular and limited form of statutory appeal, the appellant is obliged to proceed in accordance with those provisions and adhere to the rules prescribed therein.

Decision on the Winter/Summer Bonus

55. The court is satisfied that the bonus at issue in this case was not declared by the employer at any stage and the Tribunal was not invited to and did not make any finding that a bonus had been declared. There was no announcement that a particular bonus was payable. The bonus scheme clearly operated on a basis that did not require such an announcement. It was payable at the rate of 3% in June 2012 for the period worked between August 2011 and January 2012. The attempt to categorise the bonus payable in respect of the period from August 2011 to January 20012 as a form of declared bonus is therefore misconceived.

56. There is no doubt that the relevant appellants provided their labour during this period and had an expectation, having done so, that the 3% bonus would be paid. That expectation was based upon the terms of the bonus scheme which provided that an employee was entitled to the payment of the 3% if he/she had the requisite period of service to enable him/her to benefit from the scheme and had worked the relevant accrual period i.e. the six months to which it applied. It was unilaterally withdrawn from them. However, the employer contends that this was in accordance with the terms of the contract of employment and bonus scheme which provides that the bonus "may be reviewed or withdrawn at any time". The employer accepts that their employees' expectations were understandable, if not legally warranted, but submit that whether post or pre the summer or winter period covered in any particular year, it is entitled to withdraw the bonus. In the case of a period of the relevant year not yet worked, the withdrawal of the bonus simply means that the balance of the 3% cannot be earned because it cannot accrue. Therefore, it is not payable. Similarly, it is said that the bonus scheme, once withdrawn, means that it is no longer applicable to the first part of the year which has been worked and in respect of which the 3% bonus would otherwise have accrued: it simply need not and will not be paid. It is submitted that the clear and unambiguous terms of the bonus clause and scheme allow for this result and that the Tribunal was correct in so finding. I respectfully disagree.

57. I am satisfied that the terms of the contract and bonus scheme must be interpreted in the overall context of the contract. The bonus scheme applied to each eligible employee during the course of his/her employment. To be eligible for the bonus payment employees had to have at least six months service. The bonus was calculated at the rate of 6% per annum of the gross basic pay of the employee and was payable twice annually. The scheme provided that an eligible employee was to be paid a 3% bonus on the completion of the six month Winter or Summer period regardless of whether he/she remained in employment for the full year. The bonus was not contingent at that stage upon a satisfactory performance by the employee or any other specified conditions. It was not specifically linked to the profitability of the company. The withdrawal of the bonus was announced in January, 2012, after the relevant six month period, to take effect from 1st April 2012. The worked six month period bonus was payable in June, 2012. The respondent submits that notwithstanding these important elements of the contract and bonus scheme, the employer retained an absolute discretion to withdraw payment at any time.

58. The financial reality with which the employer was faced led to a review of the bonus scheme. I accept that the employer had a wide discretion under the terms of the contract and scheme to withdraw the scheme which must be exercised reasonably. If the discretion is exercised unreasonably the employer will be in breach of contract if no reasonable employer would have exercised the discretion in that way. This imposes a very high onus on an employee who claims that the discretion was unreasonably exercised (per Hedigan J., in *Lichters & Hass –v- Depfa Bank plc* [2012] IEHC 10). Having regard to the fact that the respondent was obliged to seek examinership and that it was clearly in a very difficult financial situation, the decision to withdraw the bonus could not be regarded as unreasonable. The respondent submits that this ground was not advanced to, or considered by, the Tribunal and should not be entertained. I am satisfied that this is so, but even if it had been advanced, it is clear that it could not have succeeded.

59. If the employer had grounds upon which to exercise its discretion to withdraw the scheme, a further question arises; under the terms of the bonus scheme, was the employer, on a proper construction of the contract and scheme, entitled to withdraw it both prospectively and retrospectively? It seems to me that the employer was entitled to withdraw the bonus scheme prospectively. However, it is claimed that though the contract states it may be withdrawn "at any time" this should not be interpreted literally and applied retrospectively in the circumstances of this case. The phrase must be understood in the context of the other terms of the scheme as operated by the employer as set out above. In that regard, the Tribunal noted that a letter from the employer to each of the appellants on the 1st April, 2012 sought an acknowledgement of receipt of notice of its intention to discontinue the bonus as of that date, as an amendment to the terms and conditions of employment. The Tribunal's decision is rooted in the finding that the Employee's handbook provides a consistent clause common to each contract to the effect that "all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time".

60. *Finnegan –v- J&E Davy* [2007] IEHC 18 concerned the deferral of a quantified bonus for a period of two years which involved a change in the terms of employment unilaterally imposed upon the plaintiff by his employer. Smyth J., held that the plaintiff had a legitimate and reasonable expectation that if the firm thrived and his efforts were fruitful he would be awarded a bonus. This was discretionary in respect of each year's trading and dependent upon an annual personal assessment by the employer. Smyth J., was satisfied that (p.6):-

> "The plaintiff could reasonably expect as a matter of principle built up from a number of years of consistent conduct in the payment of bonuses and the matter of discretion never having been mentioned to him at any stage that some bonus would be payable – the amount only dependent on the trading activities of the firm and his own performance."

The parties did not have the benefit of a written contract. The case was decided on a consideration of the substance and effect of the deferral of the payment of the bonus. The court determined that the unilateral imposition of the deferral constituted a particularly onerous and unusual condition which was not made known to the plaintiff for a period of six years and operated as a restraint of trade (because the bonus would not be paid if the plaintiff took up employment with a rival). This is materially different from the more extensive discretion exercised under the contract in this case, the terms of which are said to be set out in the employee's handbook. In this case the amount of the bonus and the periods for which it would be payable to the appellants were clearly set out in advance and completely unrelated to performance by the employee, however, the bonus scheme could be withdrawn at any time. This case is

therefore of little assistance in the interpretation of the terms of this bonus scheme save insofar as it acknowledges that a legitimate expectation of payment of a bonus may arise under a contract where it has been promised and quantified in respect of a defined work period.

61. The literal interpretation adopted by the Tribunal suggests that if the employees were not content with the terms of the contract and the bonus scheme "they should not have entered the contract" and that the discretion retained by the employer to withdraw the scheme was absolute. However, the use of the word "discretionary" is not always determinative of whether a contractual entitlement arises under a bonus scheme.

62. In *Small & Ors –v- Boots Co plc* [2009] I.R.L.R 328 a number of warehousemen were in receipt of performance-related bonuses which were not given over a three year period. The employees brought an action for unlawful deduction of wages, claiming a contractual entitlement to the bonuses. Slade J., (delivering the judgment of the Employment Appeals Tribunal) considered the interpretation of the word "discretionary" in bonus schemes as follows in a way which I regard as helpful and persuasive:

> "18. In my judgment the extent of an employer's discretion in relation to a bonus scheme is relevant to the determination of the question of whether, and, if so, to what extent the scheme has contractual content. The Employment Judge erred in failing to determine the meaning of the term 'discretionary' in the documentation upon which he relied.
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> 19. As is illustrated by the observation of Potter LJ in *Horkulak*, the use of the term discretionary in a bonus scheme may be attached to the decision whether to pay a bonus at all, its calculation or its amount. No doubt there are other factors to which discretion may be attached. In determining whether the reference to a discretionary bonus conferred any contractual entitlement, the Employment Judge should have decided to what aspect of the scheme the term discretionary was attached. In the context of this case, the possible interpretations include discretion attached to the provision of an overarching bonus scheme, to a decision each year to operate a bonus scheme, to the method of calculation of bonus or to the threshold which triggers a bonus or to whether and if so what percentage of salary will be paid."

Slade J concluded that the employment judge had not engaged with the question of whether the employer's discretion had any contractual content and if so what it was, and by regarding the use of the word "discretionary" in relation to the bonus scheme as determinative, I consider that the Tribunal, in this case, made a similar error.

63. The employees worked the relevant period pursuant to the terms of the contract and scheme, thereby accruing a bonus entitlement under the scheme. I am not satisfied that the terms of the bonus scheme properly interpreted, allow for the unilateral withholding of a bonus payment in respect of a period worked by the employee during which the workers had a legitimate expectation that the bonus was accruing and would be paid. I am satisfied that the bonus for August 2011 to January 2012 was properly payable in June 2012 notwithstanding the withdrawal of the scheme in January 2012. I am satisfied that in the circumstances of this case the overall discretionary nature of the bonus scheme does not extend to a withholding of the bonus due, in respect of that period, in respect of which the bonus was quantified and payable under the scheme, subject to compliance with the eligibility provisions. I am satisfied that the contract of employment and bonus scheme must be interpreted reasonably. The discretion to withdraw the bonus scheme at any time, in my view, was always intended to apply in *futuro* and attached to the conferring of bonuses, as yet unaccrued, under the terms of the scheme. The payment of the bonus crystallised as a contractual obligation once it was "earned" in accordance with the terms of the scheme as operated. I am satisfied that the Tribunal erred in law, in interpreting the discretion vested in the employer to withdraw the bonus scheme at any time as being applicable or attaching to this period.

64. I am therefore satisfied that notwithstanding the employer's difficult financial circumstances in this case, it bore a contractual obligation to pay the 3% bonus accrued to each employee during the relevant six month period and that this was a bonus properly payable as "wages" under section 5(1) of the 1991 Act.

Decision on Zone Allowance

65. Section 1(1)(i) provides that any payment "in respect of expenses incurred by the employee in carrying out his employment" is not to be regarded as "wages" under the 1991 Act. The zone allowance in this case is clearly not a payment in respect of expenditure by an employee in carrying out the duties of his or her employment which is then to be recouped from the employer nor did the employer ever claim that it was. It is claimed by the employer and was so found by the Tribunal, that the zone allowance was paid separately from the amount paid for basic salary for the purpose of "compensation for working in a particular area" and is properly to be regarded as an expense based upon a wider definition than that of the more familiar "vouched" expense.

66. In *London Borough of Southwark v O'Brien [1996] I.R.L.R* .420 Mummery J., considered the equivalent provision of English law contained in section 7(2)(b) of the Wages Act 1986. At issue was the withdrawal of a mileage allowance payable to an employee which, he claimed, was an unlawful deduction of wages under the Act. The Industrial Tribunal determined that the allowance constituted wages because it provided benefit over and above an expense actually incurred. Mummery J., delivering the judgement of the Employment Appeal Tribunal overturning the decision stated:

> "...when asking "Is the payment in *respect* of expenses incurred by the employee"?, it is not necessary for the payer to show that what he has paid is precisely a reimbursement of the sum expended by the worker. "In respect of " means "referring to" or "relating to" or concerning in a general way, whereas the expression used by the chairman in his decision, "payment of expenses", would appear (wrongly, in our view), to equate the statutory provision with reimbursement of a precise amount".

The EAT concluded that the mileage allowance was an expense under section 7(2)(b). I am satisfied to adopt the same approach to the interpretation of section 1(1)(i).

67. There may be cases in which a payment designated by an employer as an expense may be properly regarded as part of the wage payable to an employee. For example in *Mears Ltd v Salt & Ors* UKEAT/0522/11/LA the English Employment Appeals Tribunal held that a travel allowance paid as a daily allowance to employees, irrespective of whether travel expenses had been incurred, constituted wages rather than expenses because in fact no expense was incurred. It was accepted that at first instance it is open to a decision-maker "as a matter of fact and degree, to conclude that, neither in its original form, for its original purpose, nor in its modern form, could it sensibly be said ... to be a payment in respect of expenses..." However, on this appeal, it is not open to the court to enter upon a hearing *de novo* of the facts of the case. I am satisfied that there was a sufficient evidential basis upon which the Tribunal was entitled to make its findings of fact in respect of whether the payment was an expense or not and it has not been established that these findings are unsustainable. The Tribunal heard extensive evidence on the matter. It adopted the correct interpretation of the nature and extent of expenses covered by section 1(1)(i) which is similar to that applied by Mummery J., in the *O'Brien* case already quoted. I do not consider that the Tribunal erred in law by so doing. I acknowledge that the nature and extent of the types

of payment made to employees vary widely and the decision in this case, on this issue, has very limited value as a precedent: each case will be decided on its own facts. However, disputes of fact which arise in the course of determining whether any particular payment designated by an employer as an expense is in fact part of "wages" payable under the Act will undoubtedly fall to be considered in the future by the Commissioner and the Tribunal who have the expert knowledge in this area, with which the court will be slow to interfere.

68. The court has also been referred to *McKenzie & Ors v Minister for Finance* [2011] 22 ELR 109 in which Edwards J. held, *inter alia*, that a cabinet decision to reduce the rates of expense allowances for motor travel and subsistence payable to public servants was taken in the public and urgent national interest, and that in the exceptional circumstances of the banking crisis, the government was entitled to act as they did. I am not satisfied that this decision is relevant to the issue in this case. If the Zone Allowance was payable as part of the appellants' wages pursuant to contract, the withdrawal of the allowance would clearly be an unlawful deduction under the Act. If it is an expense it may be withdrawn or reduced in accordance with the terms of the contract dealing with expenses, but is not properly the subject of a claim for relief under the 1991 Act as a deduction from wages.

69. Edwards J. also indicated, *obiter dicta*, that the reduction of the motor travel allowances and subsistence payments in that case were not a "deduction" from wages for the purposes of the Payment of Wages Act, 1991, which had no application to those reductions. I am satisfied that the 1991 Act has no application to issues arising from a reduction of an allowance properly classified as an expense because it is clearly not a deduction from "wages" and I do not consider that conclusion to be in conflict with that part of the judgment.

70. I am not satisfied that the appellants are entitled to the relief claimed in respect of the Zone Allowance.

Conclusion

71. I am satisfied that the Tribunal erred in law in holding that the withholding of the bonus payment for the period August 2011 to January 2012 was lawful and did not constitute a deduction from the wages of the relevant appellants. The bonus is payable to the employees up to the conclusion of that period. I am satisfied that the employer was entitled to terminate the bonus scheme from January 2012 and that it was lawfully withdrawn and was no longer payable from the six month work period commencing in February 2012.

72. I am satisfied that in the circumstances of this case the Tribunal did not err in law in treating the Zone Allowance paid to the appellants as an expense under section 1(1)(i) of the 1991 Act. Its withdrawal was therefore not a deduction from wages under the 1991 Act.