Neutral Citation Number: [2007] IEHC 437

**THE HIGH COURT**

**[2006 No. 458 SP]**

**IN RE THE PAYMENT OF AGES ACT, 1991**

**BETWEEN**

**B-LEX LIMITED**

**PLAINTIFF**

**AND**
**JAMES FIELDS**

**DEFENDANT**

**Judgment of Miss Justice Laffoy delivered on 3rd December, 2007.**

1. This is an appeal by the plaintiff, which was the defendant's employer, from a determination of the Employment Appeals Tribunal (the Tribunal) dated 1st September, 2006 on a claim by the defendant against the plaintiff pursuant to the Payment of Wages Act, 1991 (the Act of 1991).

2. In outline, the circumstances which give rise to the appeal are as follows:

> Following determination of the defendant's employment with the plaintiff the defendant brought a complaint under the Act of 1991 against the defendant claiming the sum of €13,115 on the basis that the plaintiff, as his employer, had wrongfully deducted sums aggregating that amount from his final wage, which he contended was due on 31st July, 2005, contrary to s. 5 of the Act of 1991. The defendant's claim was made up of three components: €1,730.76 in respect of minimum notice of termination; €1,385.00 in respect of holiday pay; and the balance representing a bonus payment which the defendant contended was payable to him.
>
> The decision of the Rights Commissioner on the claim was dated 16th February, 2006. The Rights Commissioner found as follows:
>
> > That because of his service the defendant would have had a statutory entitlement to a minimum of two weeks' notice and, accordingly, he was entitled to compensation in the sum of €1,486 (net).
> >
> > That the defendant was entitled to the sum of €595 (net) in lieu of leave untaken at the termination of his employment.
> >
> > That the defendant was entitled to payment of the bonus as provided in his contract in the sum of €7,800 (net).

3. Accordingly, the Rights Commissioner ordered the plaintiff to pay total compensation in the sum of €9,881 (net) to the defendant within six weeks of the date of the decision.

> The plaintiff appealed against the decision of the Rights Commissioner to the Tribunal. The appeal was against the entirety of that decision. The Tribunal gave its determination on the appeal on 1st September, 2006. In relation to the holiday pay and bonus components, the Tribunal affirmed the recommendation of the Rights Commissioner and the amounts awarded. In relation to the minimum notice component, the Tribunal varied the recommendation of the Rights Commissioner. It did so on the basis that it was a contractual term of the defendant's employment that he had the right to a payment of three months where his employment was terminated by the plaintiff. On that basis Tribunal found that the defendant was entitled to the sum of €11,250 in respect of the minimum notice component.
>
> The plaintiff appealed against the entirety of the determination of the Tribunal. However, at the hearing of the appeal, counsel for the plaintiff indicated that the appeal was being pursued in respect of the minimum notice component only and that the plaintiff will pay to the defendant the sums of €595 and €7,800 to which the Rights Commissioner and the Tribunal found the plaintiff to be entitled in respect of the holiday pay and the bonus components respectively.

4. The defendant appeared in person on the hearing of the appeal.

5. Section 7(3)(b) of the Act of 1991 provides that a party to proceedings before the Tribunal may apply 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. Counsel for the plaintiff referred the court to the decision of the Supreme Court on a similar type of appeal from the Tribunal to the High Court on a question of law in *Bates v. Model Bakery Limited* [1993] 1 I.R. 359. In that case, the Supreme Court (per Finlay C.J. at p. 365) held that on such an appeal there does not appear to be any room for repeating and, in particular, for adding to or supplementing evidence which was given before the Tribunal concerning the circumstances of the dispute which had been referred to the Tribunal. The position, accordingly, is that this appeal must be determined in accordance with the evidence which was before the Tribunal.

6. The facts relevant to the minimum notice component of the defendant's claim are that the defendant was employed as director of business development by the plaintiff from February, 2003 to July, 2005. The terms of his employment were set out in a letter dated 14th December, 2002 from the plaintiff to the defendant. That letter was before both the Rights Commissioner and the Tribunal. In relation to termination, the letter provided:

> "Payment of three months salary in the event of B-Lex wishing to terminate the contract/offer"

7. As the Rights Commissioner pointed out, the letter was silent on the length of notice of termination which the defendant was obliged to give. It was the defendant who initiated the termination of the contract of employment. He did so on Monday, 11th July, 2005, when he told Mr. Seamus Boland, the Managing Director of the plaintiff, that he was leaving his employment with the plaintiff but that he would work until the end of July, 2005. On the following day, 12th July, 2005, Mr. Boland directed him to leave forthwith.

8. The plaintiff's case before the Rights Commissioner, before the Tribunal and in this Court was that the defendant had repudiated his contract of employment and the plaintiff was entitled to treat it as having terminated forthwith having regard to the following facts. During the previous week and for some time prior to that, the plaintiff, through Mr. Boland, was negotiating for the acquisition of a holding of shares in a company, which was a customer of the plaintiff and which I will refer to as "the Company". The defendant was aware of this, although he denied that Mr. Boland had instructed him to look after the acquisition on behalf of the plaintiff. On 7th July, 2005 the defendant had discussions with one of the shareholders of the Company in relation to the acquisition of the shares

which the plaintiff intended purchasing and on the following day the defendant was given financial information in relation to the Company. On 11th July, 2005 the defendant told the plaintiff that he had decided to buy the shares in question himself when giving notice of the termination of his employment.

9. The Tribunal rejected the plaintiff's contention that the defendant had repudiated his contract of employment for a number of reasons. First, the Tribunal attached weight to the fact that the share purchase involved the Company, which was a customer rather than a competitor of the plaintiff. Secondly, there was no "documented agreement" for the acquisition of the shares by the plaintiff. Thirdly, as of 12th July, 2005, the defendant had merely expressed an intent to purchase the shares, rather than having actually purchased them. For those reasons the Tribunal held that the defendant had not by his actions repudiated the contract of employment, but rather it was terminated by the plaintiff, thus giving rise to the defendant's entitlement to payment of three months' salary under the terms of his contract.

10. In this Court, counsel for the plaintiff submitted that the Tribunal should have concluded that the defendant had breached his contract of employment and that the breach was sufficiently serious to justify the plaintiff in treating the contract as having terminated forthwith so that the defendant's wages to the end of July, 2005 were not "properly payable" within the meaning of s. 5 of the Act of 1991. It was submitted that it is an established principle that a person employed under a contract of employment is subject to an implied obligation to act with good faith and fidelity in the course of his employment. As an example of that principle, the court was referred to the decision of the Court of Appeal of England and Wales in *Wessex Dairies Limited v. Smith* [1935] 2 K.B. 80. In that case, which concerned a milk roundsman employed by a dairy who canvassed the dairy's customers while in the employ of the dairy but to take effect after his employment had terminated, Maughan L.J. stated the question to be determined as essentially depending upon the term to be implied in the ordinary case of a contract of employment in the absence of express agreement. He identified the term to be implied by adopting (at p. 86) what he described as the "general implication" stated by A.L. Smith L.J. in *Robb v. Green* [1895] 2 Q.B. 320 as follows:

> "I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity …"

11. Counsel for the plaintiff submitted that, on the issue of repudiation, the question for the Tribunal was whether the defendant breached his duty of good faith and fidelity to the plaintiff in his dealing with the Company and that it should have found on the facts that he did. Further, it was submitted that the Tribunal should have recognised that it is well established law that an employee can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his employer but is also inconsistent with the continuance of confidence between them (per Sachs L.J. in *Sinclair v. Neighbour* [1967] 2 Q.B. 279 at p. 289).

12. In my view, the submissions made on behalf of the plaintiff are correct. The factors which the Tribunal considered distinguished this case from the authorities to which it had been referred, in my view, are immaterial. It is immaterial that the Company in which the plaintiff was interested in acquiring a shareholding was a customer rather than a competitor of the plaintiff, that the plaintiff had not concluded a "documented agreement" in relation to the shareholding, and that the defendant had not a concluded agreement for the acquisition of the shareholding by 11th July, 2005. On that day, the defendant evinced an intention to frustrate the plaintiff's acquisition of the shareholding, thus breaching his duty of good faith and fidelity to the plaintiff and shattering the plaintiff's trust and confidence in him. The Tribunal erred in not finding that the defendant was not entitled as a matter of law to be paid his wages until the end of July, 2005, whether by way of minimum notice or otherwise.

13. An alternative argument was advanced on behalf of the plaintiff. It was submitted that, even if the defendant's conduct was not repudiatory, the Tribunal erred in law in varying the decision of the Rights Commissioner. What the defendant claimed in his application to the Rights Commissioner represented his quantification of the salary which he claimed was due in respect of the period of notice he gave, that is to say, to the end of July, 2005. The decision of the Rights Commissioner was to award a sum representing the equivalent of the two weeks' notice to which the defendant would have been entitled under the Minimum Notice and Terms of Employment Act, 1973, which was less than the amount he claimed. The defendant did not appeal against that decision and in this Court he intimated that he would have accepted the amount awarded by the Rights Commissioner. So the position is that the Tribunal, in awarding the plaintiff a sum equivalent to three months' salary, gave him something which he had not claimed.

14. In support of its submission that the Tribunal erred in law in adopting that course, counsel for the plaintiff relied on the following statement by Charlton J. in *Galway-Mayo Institute of Technology v. Employment Appeals Tribunal* [2007] IEHC 210, at para. 24:

> "… a judicial or quasi-judicial tribunal is not entitled to invoke a statutory remedy which no-one has sought and in respect of which no-one is on notice."

15. The fact that the basis on which the Tribunal decided the minimum notice component of the defendant's claim was a complete departure from what was claimed by him and from the claim of which the plaintiff was on notice violated the principles of natural and constitutional justice. Apart from that, it was patently erroneous in law in that it ignored the fact that it was the defendant who initiated the termination of his contract of employment.

16. There will be an order that the Tribunal erred in law in failing to set aside so much of the decision of the Rights Commissioner as found that the defendant had an entitlement to a minimum of two weeks' notice and as awarded the defendant compensation in the sum of €1,486 (net).