Neutral Citation: [2014] IEHC 682

THE HIGH COURT

[2013 No. 200 S.P.]

IN THE MATTER OF THE REDUNDANCY PAYMENTS ACTS 1967- 2007 AND IN THE MATTER OF THE MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACT 1973 TO 2005

BETWEEN

BRIDIE O'MAHONY

RESPONDENT

AND

CORNELIUS MCCARTHY

APPELLANT

JUDGMENT of Mr. Justice Michael White delivered on the 14th of October 2014

1. Cornelius McCarthy (hereinafter called the Appellant), issued a special summons on 27th March 2013, seeking to have a determination of the Employment Appeals Tribunal of 6th February 2013 overturned pursuant to the provisions of s. 39(14) of the Redundancy Payments Act 1967 (as amended).

2. Section 39(14) states:

> "(14) The decision of the Tribunal on any question referred to it under this section shall be final and conclusive, save that any person dissatisfied with the decision may appeal therefrom to the High Court on a question of law."

3. The undisputed facts are that Bridie O'Mahony (hereinafter called the Respondent) was employed by the appellant in his retail TV and repair shop in Tralee, County Kerry. She commenced employment there on 15th December 1971, and her employment was terminated on 23rd February 2011. The respondent was born on 23rd February 1945, and was thus 26 years of age when she commenced employment and 66 years of age when she ceased employment.

4. The appellant on her 66th birthday visited the respondent and left her a retirement card with a cheque for €2,500. He stated it was custom and practice to retire on reaching the State pension age and that the respondent was not replaced in her employment.

5. The respondent believed the card to be a 'Get Well' card and stated there had never been any agreement to retire on her 66th birthday.

6. The Employment Appeals Tribunal held in her favour, finding there was no written contract of employment or any written or verbal agreement between the parties as to the retirement age of the respondent, and that the Tribunal was accordingly satisfied that a redundancy situation existed in the appellant's business in February 2011, and thus the respondent was dismissed by reason of redundancy. The Tribunal also allowed a claim pursuant to the Minimum Notice and Terms of Employment Act 1973 to 2005.

7. In his submissions to this Court, the appellant who appeared in person relied on a decision of *McCarthy v. HSE* [2010] IEHC 74, Hedigan J. of 19th March 2010, in particular paras. 23 and 24, which states

> "23. In addressing the substantive issues raised, the crux of the application lies in whether the retirement age of 65 could be viewed as having been implied into the contract as submitted by the respondent. Two alternative approaches were suggested utilising the 'officious bystander test' on the one hand and implication by custom on the other. It is my opinion that in the circumstances of the case, the former provides a more suitable formula to determine whether such a term has been implied, although there is necessarily a large degree of overlap.
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> 24. The court is of the opinion that such a term should indeed be implied into the applicant's conditions of employment. The applicant is a highly intelligent woman who is legally qualified. It is difficult to accept that she had no knowledge of the retirement age applicable in that part of the public service in which she worked. Furthermore, irrespective of any actual knowledge of this fact, I would consider the dicta of Maguire P. in *O'Reilly* that anyone concerned 'should have known of it or could easily have become aware of it' to be particularly apt in this case. Moreover in addition to the broad awareness of the retirement age among most working adults, the applicant may be deemed as 'on notice' that there was an applicable retirement age by virtue of the superannuation scheme. The superannuation scheme, of which she was a member, made reference to the existence of a retirement age, and more specifically, a cut off for contributions at age 65. I therefore find that such a term can be implied into the terms and conditions of employment."

8. Counsel for the respondent submitted to this Court that the appellant had raised no point of law which would allow this Court to overturn the decision of the Tribunal pursuant to the provisions of s. 39(14) of the Act.

9. Counsel submitted that the Tribunal had decided as a matter of fact that there was no agreement that the respondent would retire from her employment on her 66th birthday, and the Tribunal, having considered the *McCarthy v. HSE* case, distinguished that case from the facts before the Tribunal, stating:

> "In the instant case, the appellant is employed in the private sector. The respondent did not adduce any evidence of" the ubiquity of a (specific and definite) retirement age" in employment such as that of the claimant. Thus, it is not open to the Tribunal to imply a term on the basis of the officious bystander test."

10. Counsel also relied on the Supreme Court judgment *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R.

34. Hamilton CJ at p37 stated

> "The Courts should be slow to interfere with the decisions of expert administrative Tribunals. Where conclusions are based upon an identifiable error or 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."

Keane J at p44 stated,

"In her judgment, the learned High Court Judge (Unreported, High Court, Carroll J., 18th October,1995), having pointed out that the appeal was on a question of law only, observed:-

> "In an appeal on a question of law, the Court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law), the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law."

11. This Court finds that the Employment Appeals Tribunal concluded, primarily as a matter of fact, that there was no agreement between the respondent and the appellant that in the course of her employment, she would retire on reaching normal State pension age at 66 years of age. The Tribunal declined to imply that term to the contract.

12. There is no identifiable point of law where this Court could come to the conclusion that the findings of the Tribunal were based upon an identifiable error of law or an unsustainable finding of fact.

13. In the circumstances, the appellant's appeal must fail.