Neutral Citation: [2016] IEHC 553

THE HIGH COURT

[2015 No. 66 JR]

BETWEEN

JADE BRADY

KEITH RAMSEY

CATHAL O'REILLY

APPLICANTS

AND

MINISTER FOR SOCIAL PROTECTION

RESPONDENT

AND

STEPHEN TENNANT (RECEIVER OF WHITE SANDS HOTEL LIMITED)

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 13th day of October, 2016.

1. These proceedings relate to the operation of a mechanism established to offer limited financial redress to employees who suffer loss owing to the insolvency of their employer. The Insolvency Payments Scheme ("the Scheme") was established under the Protection of Employees (Employers' Insolvency) Act, 1984 – 2006 ("The Acts"). Under the Scheme the Minister may, if certain conditions are met, direct that payments be made out of the Social Insurance Fund to employees who qualify. Expressly included under the Scheme are awards made by the Employment Appeals Tribunal (the "EAT"), or by order of the Circuit Court on appeal, under the Unfair Dismissals Acts.

2. The applicants were all employed by the White Sands Hotel Limited in Portmarnock, Co. Dublin and in each case their employment was terminated on or about 21st February, 2010 on the grounds of a purported redundancy. These three applicants, together with other persons not relevant to this judgment, brought proceedings under the Unfair Dismissals Acts 1977 – 2011 to the Rights Commissioner Service, and subsequently appealed the decision of the Rights Commissioner dismissing their claim. The EAT, on appeal, made a determination on 29th May, 2013 that the applicants had been unfairly dismissed, and financial awards were made in respect of each of them.

3. Each of these three applicants appealed the determination of the EAT to the Circuit Court with regard to the *quantum* of the award.

4. Before the appeals to the Circuit Court came on for hearing, the notice party had been appointed receiver of the Company on 5th July, 2013. Neither he, nor the former employer of the applicants, took any part in the proceedings before the Circuit Court.

5. The President of the Circuit Court delivered his decision on 18th October, 2013, and increased the awards substantially. In each case, the President of the Circuit Court made his award in round figures, €20,000 to the first applicant, €60,000 to the second applicant, and €70,000 to the third applicant. In each case the amounts directed to be paid were less than the maximum jurisdiction of the Circuit Court under the Unfair Dismissals Acts. The decision of the Circuit Court made no express reference to the basis of the calculation and the awards were not expressly calculated by reference to the remuneration of the applicants.

6. Oral evidence had been offered by the applicants to the Circuit Court of their actual financial loss and future prospective loss, and each of them also gave evidence of the effect of the dismissal on their personal and professional lives.

7. The perfected order of the Circuit Court was then transmitted to the receiver who submitted an application under s. 6 of the Protection of Employees (Employers' Insolvency) Act, 1984, doing so on the relevant statutory form called an IP2. Each of the applicants signed the form as a declaration.

8. On or about 30th April, 2014, the Minister for Social Protection made a determination that the applicants were entitled to payments under the Scheme in amounts less than the amounts directed to be paid by the Circuit Court. It was accepted that the applicants were entitled to the benefit of the Scheme, but the Minister reduced the amounts payable to them by reference to a calculation linked to the then relevant statutory limit of €600 per week on entitlement to redress under the Scheme.

9. The Minister was requested to, and did, engage in a review of her decision which was duly made on 25th November, 2014, but did not alter her view.

10. No provision exists in the legislation for an appeal from the decision of the Minister, and the applicants have brought application for an order of *certiorari* quashing that decision, primarily on the ground that the Minister misdirected herself in law in the means by which she calculated the maximum amounts to be paid to each of the applicants.

11. Leave to bring judicial review was granted by Noonan J. on 16th February, 2015.

The statutory scheme

12. Section 6 of the Act of 1984, as amended, provides for the payment to employees of certain debts owed by that person's employer on the happening of an insolvency. The legislation applies to cases where the employer became insolvent on a day not later than 22nd October, 1983 and an employee may apply for payment in respect of any debt to which the section applied. Section 6(1) provides as follows:

> "(1) If, on an application made to him in the prescribed form by or on behalf of an individual, the Minister is satisfied that —

(a) the person by or on whose behalf the application is made (which person is in this section subsequently referred to as "*the applicant*") is a person to whom this Act applies, and that he was employed by an employer who has become insolvent, and

(b) the date on which the employer became insolvent is a day not earlier than the 22nd day of October, 1983, and

(c) on the relevant date the applicant was entitled to be paid the whole or part of any debt to which this section applies,

the Minister shall, subject to this section, pay to or in respect of the applicant out of the Redundancy and Employers' Insolvency Fund the amount which, in the opinion of the Minister, is or was due to the applicant in respect of that debt."

13. The section vests in the Minister a power to determine the amount due to an applicant in respect of a debt, and an employee has no automatic entitlement as to the amount of any payment to be made.

14. The applicants claim, and this was not a matter of controversy at the hearing of the application, that while the Minister has a discretion to determine the amount due to an applicant under the Scheme, her decision must be based on a correct interpretation of the statutory scheme, and must be rational and proportionate.

15. Certain classes of debts may be recovered under the Scheme and the relevant class is found in s. 6 (2)(a)(v):

"Subject to paragraph (b) of this subsection, the following are debts to which this section applies—

...

(v) any amount which an employer is required to pay by virtue of a determination under section 8 (1) or 9 (1) or an order under section 10 (2) of the Act of 1977 and made, in any case, not earlier than the commencement of the relevant period"

16. Section 10(2) of the Act of 1977 has been repealed and replaced by s.11 of the Unfair Dismissals (Amendment) Act, 1993. It is accepted by the respondent that the awards made by the Circuit Court to the applicants under the Unfair Dismissals Acts are debts that come within the ambit of the Scheme.

17. The Scheme imposes a monetary limit on the amount payable in certain circumstances and s. 6(4)(a), as amended, provides as follows:

"(4) (a) The amount payable to an employee in respect of any debt mentioned in subsection (2) or award mentioned in subsection (3) of this section shall, where the amount of that debt *is or may be calculated by reference to the employee's remuneration*, not exceed €600 in respect of any one week or, in respect of any period of less than a week, an amount bearing the same proportion to €600 as that period bears to the normal weekly working hours of the employee at the relevant date." (Emphasis added)

18. No mechanism is provided in the legislation for the operation of the discretion of the Minister. What is clear however, is that under s. 6(4)(a), when redress is payable in respect of an award made *inter alia* by the Circuit Court under the Unfair Dismissals Acts 1977 – 2011, that a statutory limit does exist but only when the "amount of that debt is or may be calculated by reference to the employee's remuneration".

The grounds of review

19. The applicants claim that the Minister misapplied the statutory provisions in the operation of the Scheme and misdirected herself in law in the way in which she characterised the awards made by the Circuit Court. It is claimed that the Minister erred in the mechanism adopted to calculate the redress available under the Scheme, that she wrongly reduced or amended the amounts found to be due to the applicants by the order of the Circuit Court, and made an error in her calculation. It is also argued that the Minister failed to give reasons for, or explain her decision, until after the proceedings issued. I will deal with each ground in turn.

Incorrect application of the statutory scheme

20. It is necessary to first examine the scheme of the Unfair Dismissals Acts, and the nature of the jurisdiction exercised by the Circuit Court in making the awards in favour of these applicants.

21. The Unfair Dismissals Acts *inter alia* enable an employee who has been dismissed to seek redress in the form of compensation for financial loss if it can be shown that the dismissal was unfair in one of the ways identified in the legislation. These applicants succeeded in their claim that the decision to make them redundant was in effect an unfair dismissal, and they were therefore entitled to compensation for such financial loss as they could show had arisen from the unfair dismissal. Section 7 of the Act permits the making of redress to an employee *inter alia* under s. 7(1) (c) (i) in respect of financial loss attributable to the dismissal. The relevant part of the subsection provides as follows:

"(1) (c) (i) if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances, or…"

22. The monetary jurisdiction is limited to such amount as represents 104 weeks remuneration of the employee. "Financial loss" is expressly defined in subs. 7(3) as actual loss and any estimated prospective loss of income and the value of any loss or diminution attributable to the dismissal of the rights of the employee under the Redundancy Payment Acts, 1967 – 2014 or in relation to superannuation.

23. The legislation does not envisage the deciding body being required to always, or perhaps ever, engage in a calculation or mathematical formula by which it determines the extent of the financial loss exclusively by reference to the weekly remuneration of an employee. Compensation is payable in respect of "any financial loss" as is "just and equitable having regard to all the circumstances".

24. However, an award to an employee on account of a dismissal which is found to be unfair can be made even without the employee being in a position to show that there was financial loss, i.e. an employee may immediately obtain new employment at the same or at an increased salary under s. 7(1)(c)(ii), albeit such compensation has a statutory maximum of four weeks' remuneration.

25. MacMenamin J. in *Stephens v. Archaeological Development Services Ltd*. [2010] IEHC 540, at para. 41, explained that the parameters within which an award is made must be "*strictly within the realm of financial loss and still do not encompass any scope for a claim under any heading in the law of torts, nor for the awarding of punitive or exemplary damages*". However, the power of the awarding bodies was described by the Supreme Court in *Carney v. Balkan Tours* [1997] 1 I.R. 153 as having a "very wide discretion" to award such amount as was just and equitable in all the circumstances.

26. Financial loss, therefore, is the determining factor in the amount of the award that may be made, not remuneration as such. An applicant may claim compensation for financial loss in respect of any period in the future, and the statutory maximum of 104 weeks' remuneration is a limit in the amount that will be awarded, and not in respect of the time for which loss may be claimed. This is apparent from the fact that an employee may claim for financial loss in the form of a loss of pension rights or loss of superannuation entitlements, and the quantitative limit imposed by the Act of 104 weeks' remuneration is a limit on the *quantum* of the award and not on the *nature* of the loss which may be compensated.

27. That the Circuit Court has determined the claims of these applicants by the exercise of a broad jurisdiction is clear from the fact that the President of the Circuit Court did not make his awards by way of a calculation of the number of weeks' loss of income that was to be awarded, and in each case the awards were made in round figures and not by reference to any multiplier of the weekly remuneration of the applicants.

The application by the Minister of a formula or mechanism

28. The Minister in her written determination gave no reason for the calculation of the amounts of redress directed to be paid. However, in an e-mail of 26th May, 2014 in response to a letter from the solicitors for the applicants seeking an explanation, she said that she formed the view that the correct approach for her to adopt in an application for redress following the determination by the Circuit Court under the Unfair Dismissals Acts was to engage in a notional calculation, bearing in mind the statutory cap of €600 per week mandated by the legislation. The formula was further and more fully explained in the statement of opposition and in the replying affidavit of Ann Riordan, Assistant Principal of the Department of Social Protection as follows:

> a. The Minister divides the award by the stated gross weekly income of an applicant found on the IP2 form
>
> b. This results in a notional calculation of the number of weeks for which compensation was awarded by the EAT or the Circuit Court as the case may be
>
> c. The weekly €600 per week cap is then applied, and is multiplied by the amount of weeks in respect of which the award is deemed or calculated to have been made under (a) and (b).
>
> d. The maximum number of weeks for which redress may be paid is treated as being 104 weeks.

29. The Minister determined the entitlement of these applicants under the Scheme by reference to the formula and directed payment to the applicants be reduced as follows: In respect of the first applicant, €6,480.00; in respect of the second applicant, €6,701.04; and in respect of the third applicant €16,804.00. The judicial review seeks an order of mandamus that these amounts be paid.

30. The Minister has accepted that she did apply this formula in calculating the amounts which she considered to be payable to the applicants out of the Social Insurance Fund, and that her calculation resulted in the award to the applicants under the redress scheme of an amount less than the amount of the Circuit Court decrees. It is clear that the Minister engaged in an exercise of extrapolating the basis on which the President of the Circuit Judge had made his decision, as the decision had not expressly made reference to the number of weeks in respect of which compensation was awarded.

The awards of the Circuit Court

31. The Circuit Court did not award compensation under the legislation to the applicants by reference to a multiplier of wages. It is argued that there is accordingly no statutory basis on which the Minister could have made the calculation she did, and that she wrongly attempted to fit the Circuit Court figures into the notional formula she considered appropriate for the purposes of the application of the Scheme.

32. The question of statutory interpretation that arises in this judicial review is whether the Minister was required to pay the entire of the Circuit Court awards or whether she was entitled to adopt a formula which resulted in the payment from the Fund of less than the amount of the awards.

Discussion

33. The legislation does not expressly provide that the entire of an award under the Unfair Dismissals Act was payable to a claimant, but equally no means is provided under the Scheme by which a "relevant debt" may be calculated if that debt arises from an award by the Circuit Court or the EAT, unless the award "is or may be calculated by reference to the employee's remuneration". Once the threshold requirements are met under s. 6(1), the Minister has discretion to form an "opinion" under section 6(1). The statutory limitation of €600 per week is one that does not apply in all cases where redress is sought under the Act but only when the relevant "debt" is one to which the statutory definition applies.

34. The Minister fashioned a formula for the purpose of forming an opinion in the present case.

35. It is correct that the Scheme does not fit neatly with the broader jurisdiction of the Circuit Court to award round figures, to compensate for financial loss including the loss of future employment prospects, or with the broad discretionary nature of the jurisdiction of the Circuit Court to determine the amount of an award. There is no mechanism provided, either under the Scheme or under the employment appeals legislation, by which an applicant could ask the Circuit Court to reformulate its award. It is difficult to that extent to characterise an award under the Unfair Dismissals Acts by reference to a mathematical formula.

36. I turn now to a consideration of the provisions of s. 6 of the Act, and whether the Minister is correct that the awards of the Circuit Court come within the definition of a debt in s. 6(4)(a).

Is the award a relevant debt under s. 6(4)?

37. The applicants argue that the compensation awarded by the Circuit Court to these applicants was not one to which s. 6(4)(a)

applied, that is the awards are not a debt that "is or may be calculated by reference to wages". This is because there is no basis on which the Circuit Court order can be deconstructed to identify any relationship between the award and the number of weeks and/or the relevant wages which were taken into account in the calculation of the award. The applicants argue that the respondent has artificially and wrongly presumed that the awards of the Circuit Court were based on remuneration and that she could accordingly apply the formula to arrive at the number of weeks in respect of which compensation was awarded by the Circuit Court.

38. The respondent argues that the awards made by the Circuit Court are ones to which s. 6(4) applies, and may be calculated by reference to the remuneration of an employee. The award made by the Circuit Court pursuant to the Acts, must, it is argued, be characterised as one by which compensation was awarded in respect of loss of remuneration, and because the jurisdiction of the EAT or the Circuit Court can be only in respect of financial loss, the deciding body must have regard to an employee's remuneration before making an award, and indeed is restrained in the extent of its monetary jurisdiction by that remuneration. Accordingly, while the Circuit Court did not specify any particular number of weeks in respect of which the calculation was made, it is argued the awards were ones which "may be" calculated by reference to remuneration.

39. I accept the argument of the Minister that she may determine under s. 6 of the Act the amount due to the applicants in respect of the debt. The legislation does not require that the debt be one which *has been* calculated by reference to remuneration, and once the award *may be* calculated or understood by reference to remuneration the debt is a relevant debt under that section. The awards were in respect of financial loss, and could not under the jurisdiction of the Circuit Court or the EAT have been otherwise, and were capable for that reason of being understood by the Minister as arising from a loss of remuneration. The section does not require that the awards had already been calculated by the awarding body by reference to remuneration. Provided the Minister may understand or treat the awards as being referable to remuneration she may direct that they be paid in such amount as may result from the application of the formula. This interpretation recognises that the section defines a relevant debt as one that "may be" calculated by reference to remuneration.

40. But this analysis assumes that it was lawful for the Minister to fashion a formula and I turn now to consider that question.

Discretion of the Minister: was she entitled to adopt a formula?
41. Section 6(1) permits the Minister to direct payment to an applicant out of the Fund of "the amount which, in the opinion of the Minister, is or was due to the applicant" in respect of the debt. No mechanism or formula is mandated, but I consider it relevant that there is no direct correlation between the debt due from an employer to an employee and the amount which the Minister may consider ought to be paid from the Fund. The Minster does not become the debtor for the entire of an award, which is not extinguished by an award under the Scheme. The function of the Scheme is not to compensate the employee arising from all unpaid debts owed by an insolvent employer, but to relieve the employee from the worst effect of non-payment by making available limited redress.

42. The legislation moreover does not provide an automatic entitlement to a person whose employer has become insolvent, such that that person may claim the entire of the arrears of remuneration or other payment that would not fall to be paid because of the insolvency. The Minister cannot therefore be said by virtue of the Act to become the person legally responsible to discharge the debt of an insolvent employer to an employee.

43. This is apparent also from the fact that payment under the Scheme does not extinguish the rights an employee may have against his or her employer and the balance of any monies not paid under the Scheme may be pursued against a liquidator, albeit in the ordinary course an employee may be unlikely to succeed in recouping much or any of such loss.

44. The role of the Minister is not therefore to make an award of damages, but to determine to discharge all or part of a debt in respect of financial loss arising in an employee from insolvency. The jurisdiction of the Minister includes a power to calculate the amount in respect of redress, as the awards of the Circuit Court must be a loss of remuneration by the employee.

45. I consider that the Minister was entitled to fashion a formula, and that while it cannot readily be said that the awards were made by reference to the remuneration of the employees the awards may be so understood or reformulated.

46. That a statutory body may fashion a remedy or mechanism when none is expressly provided was considered by Fennelly J. in *McCarron & Ors. v. Kearney &* Ors. [2010] IESC 28, [2010] 3 I.R. 302, where he approved the test set out in the old English case, *Attorney General v. Great Eastern Railway* (1880) 5 App. Cas. 473 from which he quoted as follows:

> *"Whatever may fairly be regarded as incidental to or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited, be held by judicial construction, to be ultra vires."*

47. The Minister has power to devise a formula or adopt a methodology to guide her in the exercise of her statutory discretion, and by reference to which she can make her decision. The Oireachtas must have intended such an implied power, as absent such the legislative scheme could often be incapable of being applied in a particular case.

48. Therefore, it seems to me that the adoption by the Minister of a formula methodology is not *ultra vires*.

49. However, the judgment relied on by Fennelly J. in *McCarron & Ors. v. Kearney & Ors*. deals only with the question of the power of the Minister and not the way in which the power was exercised, and it remains to be considered whether the formula is reasonable and whether it was applied in a reasonable and consistent manner.

Correct exercise of discretion?
50. The applicants argue that if the Minister has a discretion to fashion a formula, that she applied the formula in an arbitrary and irrational manner.

51. The applicants argue that some of their co-employees who applied under the Scheme were awarded the full amount of their claim. This is because in each case, the wages of each of those applicants was less than the statutory maximum of €600 applicable to a claim for a refund under the Scheme. I see no irrationality in that approach, and the task of the Minister was much more straightforward in regard to those employees.

52. I consider that it was permissible for the Minister to adopt a formula, and the formula she adopted was fair and rational. It will in most instances yield a coherent result. It becomes problematic, and yields a result which may mean that an employee does not obtain full redress, only when an employee has a weekly remuneration in excess of €600. That statutory limit is express in the Act, and has been amended from time to time to take account, presumably, of the average industrial wage.

53. The Act must in those circumstances be seen as a legislative response to relieve some but not always all of the remuneration lost when an employer becomes insolvent. The Minister is obliged to make a calculation and her jurisdiction is expressly limited by the monetary limited to €600 a week. She, therefore, has to know the number of weeks in respect of which a claim is made, and she has to give an amount in respect of those weeks or a lesser amount. Therefore, she has to have some means by which a calculation can be made. The means that she employed and the method of calculation she used were both rational and coherent.

Incorrect calculation?
54. The applicants argue that the Minister used an incorrect baseline weekly wage for her calculation.

55. The applicants completed the relevant part of the statutory form, the balance of which had been completed by the receiver, and this identified a figure identified as the "gross weekly wage" of the employee. The applicants say that the figure is incorrect, and that the Circuit Court had before it figures which included the basic gross weekly wage, and not other elements of remuneration, including overtime, superannuation payments and other entitlements, which might be relevant to a claim for compensation under the Unfair Dismissals Acts.

56. A factual difficulty arose in the course of the hearing before me in that it was argued that the Minister did not have available to her of the actual weekly earnings of the various applicants. Part 4 of the application form completed by the receiver and signed by the applicants contains a figure for "gross weekly wage" and there is no space on the form where an employee can include particulars of other allowances in the nature of pay and benefit in addition to, or in lieu of pay, all of which elements are available to be included in the calculation under the unfair dismissal legislation. Thus, the applicants argue that the basis of the exercise engaged by the Minister is incorrect in that she did not have a correct baseline wages figure on foot of which the formula could be applied.

57. Thus, as a matter of fact, the formula applied by the Minister could have been, and the applicants say was, misapplied in the instant case in that the figures on which the calculation was made were not correct.

58. This argument seems to me to be misplaced, and had the Minister included in her calculation additional sums to which the employees may have been entitled by way of benefit from their employment, the calculation would have resulted in a smaller award for fewer weeks than those which resulted from the division of the Circuit Court awards by the identified gross figures. Thus, if anything, it appears to me the applicants benefited from the approach taken by the Minister.

59. The Minister has agreed to review her decision in the light of the further evidence after the proceedings were commenced. In those circumstances, it seems to me that while the applicants are entitled, in my view, to an order that the Minister review her calculations, it may be that that review will not benefit them and will not increase the amount of payment that they are to receive.

60. The fact that the applicants signed the IP2 form does not, it seems to me, preclude them from seeking a recalculation as they were not aware of the formula to be adopted by the Minister at the time they and the receiver completed the forms.

Conclusion
61. In all the circumstances, I consider that the award made by the Circuit Court is one that was capable of being calculated by reference to the remuneration of each of the applicants, and accordingly, was one in respect of which the Minister had a discretion to ascertain the amount which should be paid to them under the Scheme. The formula she applied was permissible and not unfair or arbitrary. The working figure used by the Minister was the weekly wage identified by these employees in their application for relief from the Scheme. They may choose to accept the offer of a recalculation by the Minister. Accordingly, I will hear the applicants with regard to the costs of this application and whether they wish that I would make an order that the matter be returned to the Minister for further review.