[2020] IEHC 403

THE HIGH COURT

[2019 No. 267 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 10A OF THE UNFAIR DISMISSALS ACTS 1977 TO 2015

AND

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS ACT 2015

BETWEEN

TRANSDEV IRELAND LIMITED

APPELLANT

AND

MICHAEL CAPLIS

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of June, 2020

1. In May 2005 the employee in this case entered into a contract of employment as a Luas driver with the predecessor company to the employer. The terms of employment prohibited the employee from engaging in other paid employment without permission. He was classed as a safety-critical worker pursuant to the Railway Safety Act 2005.

2. In 2010 a disciplinary policy was adopted as part of a collective agreement which reiterated the obligation not to engage in other employments without the employer's permission. In 2011 the employee was reminded of this obligation by letter.

3. On 15th April, 2017 the employer received a complaint that the employee had been seen driving a taxi. The employer engaged a private investigator and obtained evidence that the employee had done so on one particular weekend. The employee admitted that this was so and his mitigating explanation was essentially that he did not do so in any structured ongoing way, but only occasionally to assist his wife who was a taxi driver, but who had fallen seriously ill.

4. On 17th August, 2017 he was notified of his dismissal. An internal appeal upheld that result on 23rd November, 2017 and a further internal appeal was rejected on 19th December, 2017. He then brought unfair dismissal and minimum notice complaints before the Workplace Relations Commission on 6th January, 2018 and the matter came before an adjudication officer, who dismissed the claims on 20th August, 2018.

5. He then appealed to the Labour Court on 28th September, 2018. Following an oral hearing on 9th May, 2019 the Labour Court issued two determinations on 1st July, 2019:

   (i). UDD1932 under s. 44 of the Workplace Relations Act 2015 and s. 8A of the Unfair Dismissals Act 1977, which found the employee to have been unfairly dismissed and ordered his re-engagement as a Luas driver, with his absence to be deemed a period of unpaid suspension; and

   (ii). MND198 under s. 44 of the 2015 Act and under the Minimum Notice and Terms of Employment Acts 1973 to 2005, holding that the minimum notice complaint was moot by reason of the particular remedy granted in the unfair dismissals complaint.

6. The employer then filed an originating notice of motion on 8th August, 2019 appealing both determinations.

7. The jurisdiction for the main appeal is s. 10A of the 1977 Act, inserted by s. 80 of the 2015 Act, which allows parties to proceedings before the Labour Court under the 1977 Act to appeal to the High Court, but only *"on a point of law"*. The other appeal is brought under s. 46 of the 2015 Act which provides that a party to proceedings before the Labour Court under Part 4 of that Act may appeal to the High Court, again only *"on a point of law"*. In relation to these statutory appeals I have received helpful submissions from Mr. Marcus Dowling B.L. for the employer/appellant and from Mr. Peter Ward S.C. (with Ms. Mary-Paula Guinness B.L.) for the employee/respondent.

Grounds of appeal

8. Mr. Dowling has presented a somewhat implausible eight pages of grounds of appeal including 45 paragraphs or subparagraphs of alleged errors of law. Lady Hale in *R. (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 A.C. 663 (at para. 47) said *"[i]t is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon … factual conclusions"*, and it is hard to avoid the feeling that such an exercise has been attempted here. Without doing too much violence to the 45 separate alleged errors of law contended for here, it seems to me that the employer's points can be summarised under three headings:

   (i). the Labour Court's alleged failure to engage with or rationally address the law, specifically s. 6 of the 1977 Act;

   (ii). the Labour Court's alleged failure to engage with or rationally address the facts; and

   (iii). the Labour Court's alleged failure to give reasons for the order for re-engagement.

Labour Court's alleged failure to engage with or rationally address the statutory provisions

9. Complaint is made that the definitional provisions of the statute regarding unfair dismissals, the presumption of when a dismissal is fair or unfair, and the particular sequencing of assessing those questions, as set out in s. 6 of the 1977 Act and the caselaw relating to it, is absent from the Labour Court determination. In *Nano Nagle School v. Daly* [2019] IESC 63 (Unreported, Supreme Court, 31st July, 2019), MacMenamin J. (at para. 83) said that *"[j]ustice must be seen to be done. Part of that process must be that a deciding tribunal is seen to engage with the relevant evidence, and, in its decision, address it one way or another within the prism of the applicable law."*

10. The logic of that is that a statutory decision-maker should ideally analyse the matter before it within the explicit terms of the statutory framework. This was not done here, but even proceeding on the basis that that is a reviewable error of law, it is a harmless error on these particular facts. What the Labour Court did in its determination was to cut to the chase and to correctly identify the actual crucial point of difference between the parties in the terms discussed by Noonan J. in *Bank of Ireland v. Reilly* [2015] IEHC 241,

[2015] 26 ELR 229 (Unreported, High Court, 17th April, 2015); essentially whether the employer's action was within the range of responses open to a reasonable employer.

11. Any rights in respect of reasons or articulation of the logic of a decision are not to be asserted in some abstract academic framework, but need to be situated in the context of what is actually in dispute between the parties in any given case. Where many elements of the matter are undisputed (as the Labour Court noted here), the duty to give reasons or to articulate the decision in a particularly detailed manner is satisfied if the decision-maker chooses to focus on the matters that *are* actually in dispute - which may, in a particular case, be quite limited. Caselaw on reasons establishes that the reasons must relate to the principal important controversial issues or the main issues in dispute, not necessarily to every point in the case, see for example *Y.Y. (No. 7) v. Minister for Justice and Equality* [2018] IEHC 459, [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018) at para. 10; and authorities cited in Michael Fordham, *Judicial Review Handbook*, 6th ed. (London, Hart Publishing, 2012) at p. 667, in particular *Westminster City Council v. Great Portland Estates Plc* [1985] A.C. 661.

The Labour Court's alleged failure to engage with or rationally address relevant evidence

12. The Labour Court decision here is one that the employer might well feel concerned about. In the interest of transparency, I may as well say that I probably would not have found this dismissal to be unfair on the second-hand materials I have here, but that is irrelevant because my function is to address only the legality of the decision, not its correctness (I should also add that my tentative view on the possible merits as disclosed from the affidavit material is also irrelevant because a case can look very different when you see the witnesses, which the Labour Court did and I didn't).

13. The centre of gravity of a decision-maker's evaluation of the evidence normally falls into the zone of fact rather than law. That evaluation may potentially stray into irrationality or other legal error, but one must be on guard not to extend that limited doctrine into a wider re-evaluation of the decision-maker's factual conclusions. It must be remembered that the Labour Court had detailed written and oral submissions, saw and heard the witnesses and had the benefit of searching cross-examination. Having seen the witnesses is important because no review on affidavit can properly do justice to that. A statutory appeal such as the present one cannot really recreate the dynamic of the oral hearing or the weight that a decision-maker that actually saw the witnesses might attach to the exculpatory explanations and excuses offered for humanitarian reasons by the employee in this particular case. It also must be borne in mind that the Labour Court is set up to consist of industrial relations experts, and is entitled to some degree of recognition of that fact in the context of reviewing its decisions.

14. The determination here specifically acknowledges safety issues, the Railway Safety Act 2005 and the key elements of the evidence. One cannot say that something absolutely central was completely ignored as in *Nano Nagle*.

15. The decision-maker's assessment of the evidence here is perhaps open to legitimate disagreement, but one cannot say it is outside the bounds of what was open to the Labour Court. It is *always* possible to pick apart a decision and to say one thing or another has not been mentioned. One could do that just as easily with a High Court decision as with a decision of the Labour Court or indeed of anybody else. But looking in the round, one cannot say that the process of rational decision-making is so lacking as to make the decision unlawful or, perhaps to be more precise, to amount to a point of law which would permit me to allow the appeal.

16. It is also *always* possible to suggest that a decision could have been more detailed or more reasoned, but what a losing party is entitled to is the *gist* of the reasons: see *per* Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 76. The reasons are to be understood in the context of the *"broad issues", per* O'Flaherty J. (Hamilton C. J. and Barrington J. concurring) in *Faulkner v. Minister for Industry and Commerce* (Unreported, Supreme Court, 10th December, 1996), as applied by Birmingham J., as he then was, in *P.N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 215 (Unreported, High Court, 3rd July, 2008). Here the broad gist of the reasons is apparent from the decision. Sure, the Labour Court's point regarding the lack of evidence of breach of the Organisation of Working Time Act 1997 is not a great point, but an administrative decision should be read in a manner that renders it valid rather than invalid, and that comment can be read as simply a statement of fact rather than a central pillar of the substantive outcome.

Lack of articulated rationale for the order for re-engagement

17. The Supreme Court in *Nano Nagle* (*per* MacMenamin J. at para. 82) criticised the manner in which the Labour Court came up with an award of compensation under the Employment Equality Act 1998 because the reasoning for that award was unspecified. However, what was criticised there was an award of compensation akin to general damages which called for some form of reasoning. The Unfair Dismissals Act 1977 deals with the more specific situation; and indeed in one sense reinstatement or re-engagement after an unfair dismissal does not require any particular express justification or reasons because it flows naturally from the finding of an unfair dismissal itself. Mr. Ward submits with some force that the Labour Court could not add very much to what it did decide in terms of remedy other than perhaps by saying that the justice of the case requires the remedy of reengagement. That is essentially what Noonan J. stated as a reason in the slightly different statutory context of a full rehearing in *Bank of Ireland v. Reilly* (at paras. 65 to 67). One cannot, therefore, say that the finding as to remedy here is unreasoned to such an extent as to warrant being set aside. Things might have been different if the employer had made a detailed fight on the remedy point or had sought to put in evidence that re-engagement would have been disruptive or had alternatively requested what might sometimes be the preferable procedure of a separate hearing on the remedy. Indeed, it could be said that it is difficult for an employer at the substantive hearing to make submissions on a remedy predicated on the assumption that the employer is going to lose the substantive question. If in a future unfair dismissals application, an employer wants to have the issue of remedy dealt with separately after the substantive decision

they should simply request that, and I have no doubt that a reasonable decision-maker would facilitate that by way of a later hearing in the event of a finding in favour of the employee.

Determination under the 1973 Act

18. The determination under the 1973 Act essentially stands or falls with the 1977 Act decision, so no particularly separate issue arises for present purposes.

Order

19. The issue is not whether I am minded to agree with the Labour Court, which as it happens, I amn't particularly, not that it matters. My reservations, to the effect that the Labour Court could have given greater weight to public safety considerations, really relate to the sort of distinction Clarke J., as he then was, had in mind in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 (at para. 8.2), where he referred to error within jurisdiction and to matters that go to a decision's *correctness* rather than its *lawfulness*. Rather, the issue for me is whether the present appeals from the Labour Court determinations should be allowed on a point of law. No point of law warranting the allowing of the appeals has been made out so I will dismiss both appeals.