THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 178

Record Number: 2016/590

Peart J.
Edwards J.
Whelan J.

BETWEEN:

JADE BRADY AND CATHAL O'REILLY

APPLICANTS/APPELLANTS

- AND -

MINISTER FOR SOCIAL PROTECTION

RESPONDENT/DEFENDANT

- AND -

STEPHEN TENNANT (RECEIVER OF WHITE SANDS HOTEL LIMITED)

NOTICE PARTY

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 3RD DAY OF JULY 2019

1. This is an appeal from the order of the High Court (Baker J.) dated 15th November 2016 refusing, for reasons stated in her judgment delivered on the 13th October 2016 ([2016] IEHC 553) the appellants' application for certain reliefs by way of judicial review, including an order of *certiorari* to quash the decision of the Minister for Social Protection ("the Minister") dated 24th November 2014 determining that an award made to each of the appellants by the Circuit Court on the 18th October 2013 under the Unfair Dismissals Acts 1977 to 2007 was a wage-related payment for the purposes of the Insolvency Payment Scheme provided for under the Protection of Employees (Employers Insolvency) Act, 1984 ("the 1984 Act") and accordingly was subject to a maximum of €600 per week for a period of no more than 104 weeks.

2. In the High Court there was a third applicant, Keith Ramsey, but he has not lodged any appeal to this Court against the said order, hence I have not named him in the title hereof.

3. The determination of this appeal turns on the proper construction of certain provisions of s. 6 of the 1984 Act which sets out certain rights of employees under the Insolvency Payments Scheme ("the Scheme") where the employer has become insolvent. In the present case it is not in dispute that the appellant's employer ("the company") was insolvent and that the provisions of s. 6 of the 1984 Act apply.

4. Before setting out the relevant provisions, I will respectfully adopt the helpful concise summary of relevant background facts appearing in the judgment of the trial judge at paras 2–10 of her judgment, as follows:

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

5. It is important to note at the outset that the appellants' claims were first brought to the Rights Commissioner pursuant to the provisions of the Unfair Dismissals Acts 1977–2011, and thence on appeal to the Employment Appeals Tribunal ("EAT"), and that on further appeal to the Circuit Court the awards made by the EAT were increased significantly though, as the trial judge noted, the President of the Circuit Court did not make express reference to the basis of calculation of the increased awards which were stated in round figures to be €20,000 in respect of Ms. Brady and €70,000 in respect of Mr O'Reilly. He made no reference to the gross weekly wage of the appellants nor to any particular number of weeks for which compensation for financial loss was being awarded.

6. The relevant provisions of the Act of 1984:

Section 6, subs. (1) provides:

(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 becomes 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*". [Emphasis provided]

Section 6, subs. (2) provides, as relevant:

(2) (a) Subject to paragraph (b) of this subsection, *the following are debts* to which this section applies –
(i)–(iv) …

(v) any amount which an employer is required to pay by virtue of –

(I) a determination under section 8 (1) or 9 (1) or an order under section 10 (2) of the [Unfair Dismissals Act 1977] or …". [Emphasis provided]

As noted by the trial judge at para. 16 of her judgement, section 10 (2) of the 1977 Act was repealed and replaced by s. 11 of the Unfair Dismissals (Amendment) Act, 1993, and also that it is accepted by the Minister that the award is made by the Circuit Court to the appellants in this case under the Unfair Dismissals Acts are debts that come within the ambit of the Scheme.

Section 6, subs. (4) (a) provides:

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 provided]

7. The awards made by the Circuit Court are "debts" for the purposes of s.6(1) of the Act, as they come within s. 6 (2)(a)(v) above. The question that has arisen is whether the Minister has properly construed and applied s. 6 (4) of the Act in deciding to pay only a reduced amount on foot of each award, and whether she was entitled to adopt the formula or mechanism which she has informed the appellants was the basis of her calculation of the amounts payable to each appellant out of the Fund in order to determine the amount to be paid from the Fund.

8. It will be noted that s. 6 (1) of the Act gives the Minister a discretion as to how much less than the full amount of any "debt" coming within s. 6 (2)(a) of the Act shall be paid. It provides for payment of "the amount which, in the opinion of the Minister, is or was due to the applicant". The appellants claim that the Minister has misapplied the statutory provisions, and further that the

methodology applied by the Minister in order to calculate an amount which in her opinion is payable to the appellants under the Scheme finds no proper basis at law, and is irrational.

9. The Circuit Court awarded the first appellant, Jade Brady, an amount of €20,000, and the second appellant, Cathal O'Reilly, the amount of €70,000. The appellants sought these payments from the receiver who had by that time been appointed to the employer company. The receiver duly completed the necessary forms (IP2 Form) to enable the appellants to make their claim to the Minister under the Scheme. That form was also signed by each appellant. The form included details of the gross weekly wage for each appellant.

10. In an email dated 26th May 2014 the Minister explained the methodology used by her to calculate the reduced amounts which she considered to be payable under the Scheme. That methodology is described by the trial judge as follows:

> "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 email 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:
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> > (a) The Minister divides the award by the stated grossly weekly income of applicant found on the IP2 form.
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> > (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.
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> > (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 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."

11. It is accepted by the Minister that she determined the appellants' entitlements under the Scheme by reference to this methodology, and that the learned Circuit Court President had not made his awards by express reference to any particular number of weeks' remuneration.

12. The appellant argued in the court below and on this appeal that the methodology adopted by the Minister has no statutory or other lawful basis, and that on a proper interpretation of the statutory provisions the Minister is obliged to pay the entire amount awarded to the appellants by the order of the Circuit Court, since on the facts of these cases the award is a "debt" within the meaning of s. 6(2)(a)(v) of the Act, but is not one "where the amount of that debt is or may be calculated by reference to the employee's remuneration" and therefore not coming within the limiting provision of s. 6(4) of the Act.

13. An award made by the Circuit Court under the Unfair Dismissals Acts on appeal from the EAT is one of the categories of payment which is a "debt" for the purposes of s. 6 (1) of the Act, and therefore is one in respect of which, "subject to this section" the Minister shall pay out of the Fund "the amount which [in her opinion] is or was *due* to the appellants in respect of that debt" [emphasis provided]. The default position is therefore that the amount that the Minister considers is due to each applicant under the awards made by the Circuit Court is payable in full from the Fund. However, if the award is one which comes within s. 6 (4) of the Act, then the amount payable cannot exceed the figure that represents €600 per week for the period being compensated. It is noticeable that there is no reference in the section to a maximum period of 104 weeks referred to in the Minister's explanatory email. That period of 104 weeks finds expression in s. 7 (1) (c) of the Unfair Dismissals Act 1977-2014 where a limit of that number of weeks' "remuneration" is put on the amount which an employer may be ordered to pay to an employee by way of compensation in respect of financial loss claimed by him or her to be attributable to an unfair dismissal. The appellants submit that unless these awards by the Circuit Court are properly seen as coming within s. 6 (4) of the Act, there is no lawful basis to reduce the amount of the award payable under the Scheme, and that the entire of each award is therefore payable by the Minister under s. 6 (1) of the Act.

14. At paras. 37-49 the trial judge summarised the parties' arguments, and reached a conclusion that the award or "debt" was one which came within s. 6 (4) of the Act. It is useful to quote those paragraphs in full:

> "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 argued 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.
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> 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.
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> 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".

15. Having reached that conclusion, the trial judge went on to consider the question whether it was lawful for the Minister to devise a formula as already described. She noted that no mechanism or formula is mandated by the legislation but stated "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". She continued:

> "The Minister 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".

16. On this question the trial judge concluded as follows at paras. 44–45:

> 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.
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> 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."

17. The trial judge drew support for this conclusion from the judgment of Fennelly J. in *McCarron & 0rs. V. Kearney & ors* [2010] IESC 3 I.R. 302 who in turn approved the test in *Attorney General v. Great Eastern Railway* [1880] 5 App. Cas. 473 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*."

18. The trial judge concluded that the adoption by the Minister of a formula or methodology is not ultra vires. In that regard she stated at para. 47 of her judgment:

> "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 case."

19. In considering whether the adoption by the Minister of the formula or methodology referred to was arbitrary and irrational in its application,, and yielding a result where some employees who applied under the Scheme were awarded the full amount of their claim, whereas others received less than the full amount, the trial judge found no irrationality in that situation "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".

20. The trial judge acknowledged that some anomalies arose but stated:

> "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.
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> 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 … 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."

21. The appellants submit that the trial judge has erred in a number of respects. These are best described by reference to the grounds of appeal contained in the appellants' notice of appeal:

> (a) the trial judge erred in law and in fact in finding that the award is made by the Circuit Court to the appellants were ones to which s. 6(4)(a) of the Act applied when they were not debts that were calculated or may be calculated by reference to wage;
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> (b) the trial judge erred in law and in fact in holding that the respondent was entitled to fashion a formula of her own design, and in finding that while it could not readily be said that the awards were made by reference to the remuneration of the employees, that the awards may be so understood or reformulated;
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> (c) the trial judge erred in law and in fact in holding that the Minister had power to devise her own formula or adopt her own methodology to guide her in the exercise of statutory discretion, and by reference to which she could make her decision and that the Oireachtas must have intended such an implied power, as absent such an implied power the legislative scheme could often be incapable of being applied in a particular case;
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> (d) the trial judge erred in law and in fact in holding that the formula which was devised was reasonable and that it was applied in a reasonable and consistent manner;
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> (e) the trial judge erred in law and in fact in holding that the reason that the appellants' co-employees who applied under the Insolvency Payments Scheme where awarded the full amount of their claims, was 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;

(f) the trial judge erred in law and in fact in holding that, had the Minister included additional sums, which the appellant claimed ought to have correctly been included in the respondent's IP2 Form, the calculation would have resulted in a smaller award for fewer weeks than those which resulted from the division of the Circuit Court award by the identified gross figures. The trial judge further erred in fact in holding that it appeared to her that the appellants benefited from the approach taken by the respondent; and

(g) the trial judge erred in law in finding that the awards of the Circuit Court (under the Unfair Dismissals Acts) must relate to a loss of remuneration by the employee and that the awards were capable of being understood by the Minister as arising from loss of remuneration.

22. Arising from these grounds of appeal, the first question is whether the awards made by the Circuit Court constitute a debt within the meaning of the exception provided for in s. 6 (4) of the Act in circumstances where the order of the Circuit Court is silent as to how the amount of the award in each case was arrived at. How in such circumstances is the Minister to decide whether the award is one "which is or may be calculated by reference to the employees' remuneration", as provided in s. 6 (4) of the Act, even where she has been made aware of the amount of applicant's gross weekly wage? Quite apart from the fact that the number of weeks for which compensation for financial loss has been awarded, the number of weeks being compensated for is not stated anywhere in the decision. In addition, the appellants point to the fact that an award such as that in the appellants' cases may comprise elements above and beyond the mere weekly wage, such as additional allowances, payment of tuition fees, and as provided for in s. 7 (3) of the Unfair Dismissals Acts "any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts 1967 to 2014, or in relation to superannuation". All these elements comprise "financial loss" which, as stated by MacMenamin J. in *Stephens v. Archaeological Development Services Ltd* [2010] IEHC 540, is the basis for an award under that legislation, and excludes the possibility of including an award under the law of tort, or for exemplary/punitive damages.

23. It is submitted that the absence of any reasoning or explanation in the Circuit Court decision as to the basis on which the round figures of €20,000 and €70,000 were arrived at, precludes the Minister from deciding that these amounts either are or may be calculated by reference to the employee's remuneration, as provided in s. 6(4) of the Act, and therefore cannot be seen as being subject to the "cap" of €600 per week and the limit of 104 weeks. Even if she was permitted to perform that exercise, it is emphasised that having only details of the appellants' gross weekly wage as opposed to their "remuneration" referred to in the section would in any event prevent her from making a proper calculation. In the appellants' submission it follows that since the awards are outside what is provided for in s. 6 (4) of the Act the Minister is simply not required to devise and deploy some formula or method by which to work out what amount per week the total award represents, and then to apply the maximum period of 104 weeks in order to determine how much of the award she should pay from the Fund. In their submission it follows that where the award is not a "debt" for the purpose of s. 6 (4) of the Act, the Minister is mandated by s. 6 (1) of the Act to pay the entire amount of the award, since the only basis provided for in the legislation for paying a lesser sum is what is provided for in s. 6 (4) of the Act.

24. I will come to the appellants' arguments as to the appropriateness of the formula that the Minister has devised for use in these cases. That is a separate question, which arises for decision only if the awards are, contrary to the appellants' submissions, correctly to be regarded as "debts" coming within s. 6 (4) of the Act.

25. In response to the appellants' submissions in relation to s. 6 (4) of the Act, and whether these awards constitute "debts" under that subsection, the Minister submits that there was no error made by the trial judge. She points to the discretionary nature of the Scheme as provided for in s. 6 (1) of the Act whereby the Minister shall, and subject to the remainder of the section, pay only such amount as *in her opinion* is or was due to the applicant in respect of the awards in question. This, it is submitted, indicates clearly, and as stated by the trial judge at para. 13 of her judgment, that there is no automatic entitlement to payment under the Scheme, and that any amount to be paid is only such amount as the Minister in her discretion considers appropriate.

26. The Minister has submitted that given the wide discretion conferred by the section there is no automatic correlation between the amount of the award or "debt", and the amount which must be paid out of the Fund upon application by a claimant under the scheme. In particular, it is submitted that there is no question of the Minister assuming responsibility for the debt, which remains a debt owed by the employer, and that in the event that only a part of the debt is paid by the Minister under the Scheme the employer remains liable for the balance and can be pursued in that regard by the employee.

27. The Minister places emphasis also on the fact that the Fund is not an unlimited fund, and that there are many demands made upon it, and submits that the Oireachtas clearly intended that the Scheme should be administered by the Minister in accordance with the criteria and restrictions provided for in the Act.

28. The Minister points also to the limited categories of claims that are considered to be debts covered by the Scheme and therefore payable out of the Fund, as provided for in s. 6 (2) of the Act. It is accepted by the Minister that an award made by the Circuit Court is one of those categories, but that the amount payable from the Fund is limited by the provisions of s. 6 (4) of the Act.

29. The Minister submits that these awards "may be calculated by reference to the employee's remuneration", as has been explained by the Minister by reference to the formula used. She has submitted also that the distinction between the weekly wage stated by the appellants and the concept of "remuneration" referred to by them in submissions is a distinction without a difference in these cases, and that it was perfectly in order for the trial judge to agree that the Minister was correct to use the weekly wage as the divisor for the purpose of calculating the number of weeks' remuneration the award represents, and therefore to conclude that the "debts" came within the provisions of s. 6 (4) (a) of the Act

30. Clearly if the award made by the Circuit Court is stated in the decision to be a multiple of the weekly remuneration of the employee, or indeed if the amount of the award while not specifically stated to be a multiple of the weekly remuneration of the employee, may by mathematical calculation, be clearly seen to be a multiple thereof there is no difficulty in concluding that the debt is one that is subject to the limitation of €600 per week as provided. Equally in either of these scenarios the number of weeks for which compensation has been awarded is clear also, and no formula needs to be applied other than to divide the amount of the award by the known weekly wage in order to see whether the award represents an amount above or below the cap of €600 per week. In those circumstances it is unnecessary to see whether the award exceeds the limit of the Employment Appeals Tribunal's or the Circuit Court's jurisdiction in relation to awards under the Unfair Dismissals Acts, namely 104 weeks. There is no mention of a 104-week limit in s. 6 of the 1984 Act, arguably because it was unnecessary to do so.

31. However, the trial judge found that the awards were debts *"the amount of [which] is or may be calculated by reference to the employee's remuneration"*, and therefore that they were subject to a weekly limit of €600 in respect of any one week. The trial judge went on to conclude that it was correct to then apply the 104-week limit for the purpose of the calculation since that is the maximum

amount payable under s. 7 (1) (c) (i) of the Unfair Dismissals Act s 1977 where financial loss attributable to the dismissal has been incurred by the employee. But, as the appellants point out, that 104-week remuneration limit is a jurisdictional limit only, and does not preclude an employee from making a claim for financial loss covering a period that exceeds that 104 weeks. In other words, an employee could have a claim for financial loss incurred over a longer period but which in total does not exceed in amount 104 weeks' remuneration. The appellants submit that this supports their argument that the awards in issue in this appeal are not "debts" which come within s. 6 (4) (2) (a) of the Act.

Conclusions

32. At paras. 14 and again in para. 18 of her judgment the trial judge referred to what she described as the Minister's "discretion" under s. 6(1) of the Act. At para. 13 she stated that "… an employee has no automatic entitlement as to the amount of any payment to be made". At para. 33 she stated: "once the threshold requirements are met under s. 6(1), the Minister has discretion to form an "opinion" under s. 6(1)". I think some clarification as to the extent of that "discretion" would be of assistance before moving to other conclusions.

33. Section 6(1) is mandatory in its terms, even though the Minister must form an opinion as to the amount which "is or was due to the applicant …". The Minister does not enjoy a discretion as to whether or not to pay what "is or was due". Once there is a sum properly considered to be "due" in respect of the debt it must be paid (subject to the maximum or limit referred to in s. 6 (4) of the Act). Under s. 6 (1) (c) of the Act the Minister must be satisfied that "on the relevant date the applicant was entitled to be paid the whole or part of any debt to which the section applies". This seems to be the context in which the Minister must arrive at an opinion as to "the amount which is or was due to the applicant in respect of that debt"; but having done so, that amount must, subject to subs. (4), be paid from the Fund to the applicant. The Minister could not for instance decide that, even though the amount she considers is or was due in respect of the debt is €10,000, there are so many calls upon the Fund that she will pay only €5000.

34. In her written submissions to the Court the Minister has stated that under s. 6 the Minister has two tasks namely (1) "she must satisfy herself that certain conditions have been met", and (2) "she must determine what amount, in her opinion, shall be paid to the applicant out of the Fund". The first task so described is uncontroversial. But it is not for the reasons just stated correct to say that the Minister must determine what amount shall be paid out of the Fund. It is rather to determine what amount "is or was due in respect of [the debt]", but having done so the payment thereof is mandated. There is no residual discretion as to how much of that amount shall be paid, except by reference to the limit provided for in s. 6 (4) where, but only where, that applies. The Minister's submissions proceeded to state that "it is clear that there is *no automatic correlation* between the debt which is due to the employee from the employer and the amount which is ultimately paid out of the [Fund]". [emphasis in original]. I disagree with that submission for the reasons I have stated. The amount which the Minister opines is "due" must be paid out to the applicant from the Fund, and the two are directly correlated under the express provisions of the section by reference to the words used.

35. It is accepted by all parties that each award made by the Circuit Court in these cases is a "debt" within the categories of such payable debts from the Fund set forth in s. 6 (2) of the Act, namely under s. 6 (2) (v). Being an award made by the Circuit Court it is clearly an amount that is "due". No further consideration of that question arises unlike some of the other categories. The Minister would have to conclude for the purposes of s. 6 (1) (c) that the whole of that debt is due, and that she is obliged to pay just part of it only if it is a debt that comes within s. 6 (4) of the Act it is payable, and even in that situation a part of the debt not so payable is the part that exceeds the limit of €600 per week, where the amount of the award (the debt) either was or may be calculated by reference to the applicants' respective "remuneration".

36. The next issue for determination is whether or not these debts come within s. 6 (4) of the Act or not. If not, they are in my view payable in full from the Fund.

37. To be subject to the limit payable by virtue of s. 6 (4) the debt – in the present cases, the amounts of €20,000 and €70,000 respectively awarded by the Circuit Court - must be an amount which, in the words of the section, "is or may be calculated by reference to the employee's remuneration". The Minister's submission is that where the gross weekly wage of the employee is known, the amount of the award can be simply divided by that gross weekly wage, which will reveal the number of weeks' loss of remuneration awarded to the employee. This, it is submitted by the Minister, demonstrates that the debt is one which "is or may be calculated by reference to the employee's remuneration". I consider this process of reasoning to be flawed.

38. Section 6 clearly envisages that some and not all the categories of "debts" referred to in s. 6 (2) (a) of the Act either have been or may be calculated simply by reference to the employee's weekly wage. In other words, the amount is either stated in the decision to be the gross weekly remuneration multiplied by the particular number of weeks in respect of which the financial loss has been incurred, or alternatively is *in fact* the amount which equates to a multiple of the gross weekly remuneration. For example, where the amount is a debt within the meaning of s. 6 (2) (a) (i), (ii) or (iii) of the Act the amount payable will not exceed an amount of €600 for the number of weeks in question. If all the categories of "debt" were anticipated to be calculable by reference to the gross weekly wage, there would be no need to include s. 6 (4) by way of an exception. It seems to me that any "debt" set forth in s. 6 (2) (a) is capable of being arithmetically divided by the known gross weekly wage of the applicant. However, I do not believe that the fact that such an arithmetical exercise can be carried out is what is intended when the Oireachtas speaks of a debt which "is or may be calculated by reference to the employee's remuneration". Rather, the section refers to what I stated at para. 38 above, namely to debts where the amount is either stated in the decision to be the gross weekly remuneration multiplied by the particular number of weeks in respect of which the financial loss has been incurred, or alternatively is in fact the amount which equates to a particular multiple of the gross weekly remuneration.

39. The awards made to the present appellants were not made by reference to a multiple of the gross weekly remuneration, or even the gross weekly wage, and there is a distinction between the two. The President of the Circuit Court made round figure awards. He did not provide any explanation as to how each award was calculated or made up. The Minister determined that these awards were "wage-related". But it has to be borne in mind that when these appellants brought their claims for unfair dismissal before the Employment Appeals Tribunal, the amounts awarded by way of round figure sums, took into account redundancy payments that were received by them. It was the quantum of the awards that were the subject of the appeals to the Circuit Court. The amounts awarded by the Tribunal were increased by the President of the Circuit, but were still within the maximum jurisdiction of the Circuit Court in respect of compensation for financial loss attributable to the dismissal, namely 104-weeks remuneration – (see s. 7 (1) (c) Unfair Dismissals Act, 1977 "the 1977 Act").

40. The notices of appeal to the Circuit Court stated that the basis of the appeals was that the Tribunal had failed to take into account all the evidence relevant to the issues. The affidavit grounding the application for judicial review in the High Court, which was sworn by the appellants' solicitor who attended the hearing of the appeals in the Circuit Court, deposed that the President of the Circuit Court made no reference to the appellants' remuneration as such when giving his decision, nor as to the basis on which he made these awards. She deposed also that in addition to giving evidence as to actual financial losses incurred, they gave evidence of

prospective losses they expected to incur, as well as the effect on them personally of their unfair dismissals. There had apparently been accusations of dishonesty made against them by the employer. It should be noted that the definition of "financial loss" contained in s. 7 of the 1977 Act "includes any actual loss and any estimated prospective loss of income attributable to the dismissal …".

41. The appellants submit therefore that quite apart from the fact that the President of the Circuit Court made no reference to the basis upon which he calculated the award to each applicant, it is clear that matters other than simple loss of gross weekly wage or remuneration were taken into account, since there was no contrary evidence adduced by the employer or the receiver appointed. It is submitted that therefore as a matter of fact, the award was not one made solely by reference to a gross weekly wage, but took into account other factors, and thus the award in each case is not one which "is or may be calculated by reference to the employee's remuneration" in order to bring in within s. 6 (4) of the Act.

42. I agree with the appellants' submissions in this regard. Neither of these awards comes within s. 6 (4) properly construed and understood. Each is a "debt" which is therefore within the mandatory provision of s. 6 (1) of the Act and therefore payable in full from the Fund. The discretion which the Minister has under that provision in relation to forming an opinion as to the amount "which is or was due to the applicant in respect of that debt" does not extend to deciding on a figure that she considers should be paid to the appellants. It is limited to deciding the amount "due". That "due" amount, in the present cases, can only be the amount awarded by the President of the Circuit Court for the reasons I have outlined above.

43. The construction of the relevant provisions of s. 6 which I have determined leads to the further conclusion that the devising of a formula such as that devised by the Minister for working out the number of weeks represented by the awards in cases such as these, in order to establish whether or not the amount awarded exceeds the limit of €600 per week, is not only an unnecessary exercise, but one that is not contemplated by the statutory scheme when properly construed. Since in my view it is not necessary to have devised or employed such a formula, it is unnecessary to consider its vires in the light of the judgment of Fennelly J. in *McCarron & ors v. Kearney & ors* [2010] 3 I.R. 302, approving the test in *Attorney General v. Great Eastern Railway* [1880] 5 App. Cas. 473, as referred to by the trial judge at para. 46 of her judgment.

44. For these reasons I would allow the appeal, and would await further submissions from the parties as to the reliefs that should follow.