Neutral Citation [2015] IEHC 347

THE HIGH COURT

[2014 No.108 MCA]

IN THE MATTTER OF AN APPEAL PURSUANT TO SECTION 7(4)(B) OF THE PAYMENT OF WAGES ACT 1991

BETWEEN:

EARAGAIL EISC TEORANTA

APPELLANT

AND

ANN MARIE DOHERTY, BRENDAN McGINLEY, EVELYN BOYLE, GAVIN McGINLEY, GERARD HARDY, JOHN McGINLEY, JONATHAN BYRNE, JOESPH BYRNE, JOSEPH DOHERTY, KEVIN BRESLIN, LIAM GALLAGHER, MARTIN GILLESPIE, MARY GAZLEY, MARY TUBRIDY, MICHAEL J. KENNEDY, MICHAEL O'DONNELL, NIGEL O'ROURKE, ROGER McSHANE, SEAMUS DOHERTY, SINEAD HAMILTON, THOMAS McGINLEY, TIGHEARNAN CLANCY, UNA DIVER, WILLIAM J. HEEKIN

RESPONDENTS

JUDGMENT of Kearns P. delivered on 5th day of June, 2015

This is an appeal on a point of law pursuant to section 7(3)(b) of the Payment of Wages Act 1991 ('the 1991 Act'). By notice of motion the appellant seeks a number of orders pursuant to Order 84C of the Rules of the Superior Courts and pursuant to section 7(4)(b) of the 1991 Act directing that the Employment Appeals Tribunal erred in law in a number of respects in arriving at its determinations of the 4th February, 2014, which issued on the 25th February, 2014.

BACKGROUND

The appellant is a limited liability company established under the Companies Acts since 1962. Its primary business is the supply of premium seafood to a global market of retailers, wholesalers and food service businesses. The company's food processing plant at Min an Aoire in Donegal employs approximately two hundred people.

In 2006 the company was experiencing financial difficulties and in or around June 2006 a restructuring programme was introduced whereby the company introduced new procedures relating an 'Annualised Hours Framework' and 'Performance Related Pay'. Ultimately, the company was subject to a financial rescue in 2007. For many years up until 2011 the appellant company was funded by Anglo Irish Bank. However, on 10th March, 2011 Anglo gave notice to the company that the bank would be withdrawing all loan facilities and invoice discounting services. All such facilities were withdrawn by the bank on the 31st March, 2011. The company sought funding from a range of alternative sources and ultimately Bank of Ireland agreed to provide funding for the ongoing operations subject to various conditions and covenants.

Subsequently, as part of a process of cutting costs, the company decided to implement a 10% reduction in payroll costs. The reduction made to the level of wages distributed to staff came into effect on the 9th May, 2011. While the nature of and reasons for the acceptance of this reduction by the majority of staff by the time this matter came before the Tribunal is disputed between the parties, the respondent's herein did not agree with the proposals and initiated complaints under the provisions of the 1991 Act seeking to argue that the appellant's actions were unlawful.

The matter came before the Rights Commissioner on various dates in 2011 and 2012. The parties produced written submissions and the employees were represented by Mr. Vernon Hegarty of SIPTU. The decisions of the Rights Commissioners in respect of the numerous complainants issued between December 2011 and February 2013. In each case, the Rights Commissioners upheld the complaints.

The appellant appealed the decisions of the Rights Commissioners and the matter came before the Employment Appeals Tribunal on the 15th July, 2013 and the 27th November, 2013. Both sides were represented before the Tribunal and detailed written submissions were produced. A number of witnesses were called to give evidence on the second hearing date before the Tribunal. The appellant submitted at the hearing that the Tribunal lacked the jurisdiction to hear the matter at all on the basis that the provisions of the 1991 Act were not designed to address the situation which arose in the present case.

The appellant further contended before the Tribunal that the reduction in pay implemented by the company in the instant case was not a 'deduction' within the meaning of s.5 of the Act. In this regard, the High Court (Edwards J.) decision in *McKenzie & Anor. v. the Minister for Finance & Anor* [2010] IEHC 461 was relied upon. Detailed submissions were also made by the appellant in relation to the correct construction of the relevant contractual terms and why, in the circumstances, even if the Tribunal acceded to the employees' claims, the Tribunal should exercise its discretion not to award compensation under section 6 of the 1991 Act.

The respondent also provided lengthy written submissions to the Tribunal which set out the chronology of events and described the pressure exerted on employees to accept the pay reduction or else risk losing their jobs. Submissions were also made in relation to the applicability and interpretation of the 1991 Act.

STATUTORY PROVISIONS

Section 5 of the 1991 Act relates to the regulation of deductions made by employers and states as follows:–

> *"5.—(1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—*
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> *(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,*

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it."

Section 5(6) goes on to state that:–

"(6) Where—

(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or

(b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee,

then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

Section 6 sets out the procedure for the making of complaints by employees in relation to contraventions of s.5 by their employer:–

"6.—(1) An employee may present a complaint to a rights commissioner that his employer has contravened section 5 in relation to him and, if he does so, the commissioner shall give the parties an opportunity to be heard by him and to present to him any evidence relevant to the complaint, shall give a decision in writing in relation to it and shall communicate the decision to the parties.

(2) Where a rights commissioner decides, as respects a complaint under this section in relation to a deduction made by an employer from the wages of an employee or the receipt from an employee by an employer of a payment, that the complaint is well-founded in regard to the whole or a part of the deduction or payment, the commissioner shall order the employer to pay to the employee compensation of such amount (if any) as he thinks reasonable in the circumstances not exceeding—

(a) the net amount of the wages (after the making of any lawful deduction therefrom) that—

(i) in case the complaint related to a deduction, would have been paid to the employee in respect of the week immediately preceding the date of the deduction if the deduction had not been made, or

(ii) in case the complaint related to a payment, were paid to the employee in respect of the week immediately preceding the date of payment,

or

(b) if the amount of the deduction or payment is greater than the amount referred to in paragraph (a), twice the former amount."

THE DECISION OF THE EMPLOYMENT APPEALS TRIBUNAL

The determination of the Tribunal states that the net issues in the appeal from the Rights Commissioners related to section 5 of the Payment of Wages Act 1991 and paragraph 8.2 of the contract of employment between the appellant and the respondents. It is appropriate to set out the material part of the Tribunal's determination in full –

"…the Tribunal does not accept the appellant's contention that it could unilaterally deduct the wages of its employees based only on the provision of management's requirements. Such a deduction would be contrary to the wording of section 5(1) (b) of the Act. In this case the appellant did not advance its own case for a deduction as it opted not to fully engage with the respondents as to the reported serious financial situation it was facing at the relevant time.

Section 8.2 of the contract of employment states From time to time these terms and conditions of employment may need to be revised, to take account of new circumstances. Such revisions may be brought about by legislation, employee request, or management's requirements, and will be discussed with employees as necessary. Section 5(1) of the Act states: An employer shall not make a deduction from the wages of an employee unless – Section 5(c) reads in the case of a deduction, the employee has given his prior consent in writing to it. The above clearly means that an employer must receive the explicit written permission of its workforce to allow it to deduct its remuneration. In all of the circumstances of this case the Tribunal cannot accede to the appellant's request that the Tribunal exercise its discretion not to award compensation." [sic.]

The Tribunal upheld and reaffirmed the recommendations of the Rights Commissioner. The appellant now challenges this decision and the manner in which it was arrived at.

SUBMISSIONS OF THE APPELLANT

The appellant provided detailed submissions to the Tribunal in relation to the jurisdiction of the Tribunal to adjudicate on the issues which arose between the parties and this position is maintained in the present appeal. It is submitted that the purpose of the 1991 Act was to provide protection for employees who, at the time, were largely in unregulated employment. The long title of the 1991 Act sets out three basic rights as follows:–

i) the right of every employee to a readily negotiable mode of wage payment;

ii) the right of every employee to protection against unlawful deductions; and

iii) the right of every employee to a written statement of wages and any deductions therefrom.

It is submitted that in the present case there is a contract of employment and a company handbook in existence which sets out the associated terms and conditions governing the employer-employee relationship. In such circumstances, the appellant contends that the matter is not suitable for adjudication by the Tribunal but rather amounts to a contractual dispute between the parties.

It is further submitted that while there is no definition contained in the 1991 Act as to what amounts to a 'deduction', the purpose of the Act is widely accepted as being to ensure that employees are paid wages on a regulated and regular basis and that an employer cannot deduct amounts from an employee's wages for any acts or omissions on the part of the employee or any goods and services supplied to the employee, unless certain criteria have been established under section 5 of the Act. Counsel submits that the reduction in pay in this case is not a 'deduction' which brings it within the scope of the 1991 Act. It was submitted to the Tribunal that what occurred in this case was a general, across the board 'reduction' to salary and not a 'deduction' under the 1991 Act.

In this regard, the appellant relies on the decision of Edwards J. in *McKenzie and the Permanent Defence Forces Other Ranks Representative Association v. The Minister for Finance and Others* [2010] IEHC 462. That case concerned a challenge to the implementation of a Department of Finance Circular to the 'RDF Allowance' which provided for reduced rates for motor and travel allowances. It was argued on behalf of the applicants that the proposed reduction in the allowance amounted to a deduction of wages under the Act. The respondents contended that the reduction was not a 'deduction' in wages and the 1991 Act was therefore not applicable. Edwards J. held that:–

> *"…the reduction in the PDF allowance is not a 'deduction' from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions as distinct from 'deductions'."*

While submissions were presented to the Tribunal on this point and the issue of jurisdiction, counsel for the appellant submits that the determination of the Tribunal contains no finding in relation to these submissions or any reference which suggests that the Tribunal considered the submissions at all.

In any event, it is submitted that even if the Tribunal was entitled to adjudicate on the issues, it is evident from the determination of the 4th February that the Tribunal made numerous fundamental errors in applying section 5 of the 1991 Act which go to the heart of its findings. Counsel on behalf of the appellant contends that the Tribunal erroneously interpreted section 5(1) and proceeded on the basis that the provisions at sub-sections (a)-(c) were to be taken conjunctively. However, the appellant submits that the provisions are disjunctive and deal with separate situations where deductions in wages are legally permissible. In section 5(1)(b) the word 'or' is expressly used before moving on to sub-section (c) and it is submitted that the finding by the Tribunal that the employees consent in writing is a mandatory requirement under section 5(1)(c) in all cases is a fundamental error in law. It is submitted that one obvious example of where sub-section (c) is not applicable is where an employer is obliged to deduct tax at the applicable rate from an employee's wages.

In relation to the finding of the Tribunal that it "*does not accept the appellant's contention that it could unilaterally deduct the wages of its employees based only on the provision of management's requirements. Such a deduction would be contrary to the wording of section 5(1)(b) of the Act*" counsel for the appellant submits that not only has the Tribunal treated sub-sections (b) and (c) conjunctively, but it also failed to apply well settled principles of construction when considering the provisions of the company handbook alongside the relevant statutory provisions. Paragraph 8.2 of the company handbook states:–

> *"From time to time these terms and conditions of employment may need to be revised, to take account of new circumstances. Such revisions may be brought about by legislation, employee request, or management's requirements, and will be discussed with employees as necessary"*

Aside from simply stating that allowing this section of the handbook to operate in the manner contended for by the appellant would be contrary to section 5(1) (b), the Tribunal offers no reasons or discussion as to why this is the case, how the relevant paragraph was interpreted, or how this finding was arrived at.

It is further submitted that even if the Tribunal had correctly applied section 5, which is strenuously denied, it failed to effectively engage with and correctly apply the provisions of section 6 of the 1991 Act, which confers a discretion on the Tribunal not to award compensation in certain cases even where a breach of the Act by the employer has been established. In relation to this, the decision of the Tribunal states that "*in all the circumstances of this case the Tribunal cannot accede to the appellant's request that the Tribunal exercise its discretion not to award compensation*".

It is submitted that the appellant provided detailed reasons and explanations as to why the reduction in employees pay was necessary and urged the Tribunal to exercise its discretion not to award compensation. It is submitted that the decision of the company to reduce salaries needs to be set in the context of the economic crash and the financial situation of the company at the relevant time. During the economic recession companies all over the country were forced to undertake significant structural reforms and implement cost cutting measures in order to secure their business and maintain employment. Public sector salaries were also reduced. It is submitted that the decision of the company was made out of economic necessity and the Tribunal failed to have regard to this and to all of the relevant circumstances which prevailed at the time.

Counsel for the appellant submits that it is also of relevance that an overwhelming number of other staff members, some 82%, had accepted the reduction by the time the matter came before the Tribunal. A profit-share scheme was also introduced which, while it did not replace the reduction in salary, significantly ameliorated the position and resulted in large sums being redistributed amongst staff. It is submitted that none of these submissions were considered by the Tribunal and there is no reference to them in the determination.

The appellant also contends that the Tribunal has failed to provide any basis for its decision, despite having the benefit of detailed written and oral submissions and reserving its decision for a period of four months. Counsel refers the Court to the recent Court of Appeal decision in *Bank of Ireland v. Heron* [2015] IECA 66 wherein Kelly J. summarised the law surrounding the obligations on decision makers to give reasons as follows (at paras. 16-23):–

> *"For many years the Superior Courts have held that administrative bodies making judicial or quasi judicial decisions must give reasons for so doing. Such bodies must satisfy the criteria identified by Murphy J. in O'Donoghue v. An Bord Pleanála [1991] ILRM 750 where he said in the context of a decision given by the Planning Board that it:*
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> > *'. . . must be sufficient first to enable the courts to review it and secondly, to satisfy the person having recourse*

to the Tribunal that it has directed its mind adequately to the issues before it.'

That line has been followed in many subsequent decisions including Grealish v. An Bord Pleanála [2006] IEHC 310, Mulholland v. An Bord Pleanála [2006] ILRM 287, and Deerland Construction Limited v. Aquaculture Licences Appeals Board [2008] IEHC 289. Given that administrative bodies are required to give reasons for their decisions, no lesser standard can be required of courts exercising judicial functions.

That such is the case cannot be doubted having regard to the decision of McCarthy J. in Foley v. Murphy[2008] 1 I.R. 619.

In that case McCarthy J. considered a number of Irish and English authorities in favour of the proposition that reasons must be given for judicial decisions. In Foley's case, Her Honour Judge Murphy, a Circuit Court judge, had failed to give reasons for refusing an award of the applicant's costs. On judicial review McCarthy J. granted certiorari to quash her decision because of the failure to give reasons for it. He remitted the matter back so that the question could be determined in accordance with law.

In the course of his judgment he cited with approval the judgment of the Court of Appeal in England in English v. Emery Reimbold and Strick Limited [2002] WLR 2409. In the course of that judgment the Court of Appeal quoted with approval from the judgment of Henry L.J. in Flannery v. Halifax Estate Agencies Limited [2000] 1 WLR 377. There that judge said in respect of the duty to give reasons as follows:-

'(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know . . . whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.'

In English's case Lord Phillips M.R. put it succinctly when he said:-

'The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision.'

The majority of judgments in the High Court are delivered ex tempore. Such judgments cannot be expected to include anything like the same degree of detail as might be expected in a reserved judgment. They do not have to be discursive. But even an ex tempore judgment must comply with the essential requirement identified by Lord Phillips namely, that it should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision.

The court is sympathetic to the predicament of a High Court judge faced with a lengthy motion list on every Monday of the legal term. The present case was just such a motion listed on Monday the 1st December, 2014. But a judge cannot be relieved of the obligation to set out briefly the principal reasons underlying a decision on that account. If a judge is unable to deliver a judgment ex tempore because of the complexity of the facts or legal issues, then judgment should be reserved. But it is never sufficient to do as was done in the present case and merely announce a decision without giving any reasons for it."

It is submitted that in the present case the Tribunal took four months before issuing a written decision which contains no adequate reasons for its findings and contains no reference to the detailed submissions advanced before it on behalf of the appellant. It is submitted that in *Walsh v. Revington & Ors*. (Unreported, Supreme Court, 23rd April, 2015) Laffoy J., giving judgment on behalf of five judges of the Supreme Court, confirmed that the obligation to provide adequate reasons for decisions applies to judicial and quasi-judicial bodies alike.

It is submitted therefore that the Tribunal did not have jurisdiction to adjudicate on this complaint. In the event of the Court finding that it did, it is submitted that the Tribunal made a number of errors in law which warrant the quashing of the determination and the remittal of the matter to the Tribunal for fresh adjudication in light of the decision of the Court.

SUBMISSIONS OF THE RESPONDENTS

Counsel for the respondents submits by way of background that by correspondence dated 20th April, 2011 the company nominally sought the express written agreement of all employees to the proposed wage cuts, although it was clear that the company's intention

was to proceed to implement the cuts from 2nd May, 2011. It is submitted that despite correspondence to the company from SIPTU and the establishment of a works committee by the employees, the company failed to make available to employees any verifiable data substantiating the necessity for the pay cuts. The respondents contend that the company then proceeded to unilaterally impose the pay cuts on 9th May, 2011, when only a minority of employees had agreed by that stage, resulting in a number of complaints being made under the 1991 Act.

Counsel for the respondent submits that the criteria which the Court ought to consider in determining whether or not to upset a determination or decisions of an expert administrative body have been considered in a number of cases which make clear that an appellant has a formidable burden to discharge. Counsel contends that courts will seldom depart from findings of fact of lower tribunals unless there were no materials upon which the tribunal could make such a finding and that curial deference also extends to appeals based on interpretation of legislative or contractual provisions.

In the case of *Henry Denny & Sons (Ireland) Limited trading as Kerry Foods v. the Minister for Social Welfare* [1988] 1 IR 34 Hamilton C.J. stated that:–

> *"…the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of 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."*

In *Faulkner v. the Minister for Industry and Commerce* (Unreported, High Court, 25th June, 1993) Murphy J. stated that:-

> *"It is well settled law that, where a quasi-judicial function is delegated to an expert administrative tribunal, the decision of such a tribunal cannot be challenged on the grounds of irrationality if there is any relevant material to support it"*

Counsel also refers the Court to decisions in *Brides v. Minister for Agriculture* [1998] 4 I.R. 250 and *Mulcahy v. Minister for Justice and Law Reform and Others* [2002] ELR 12. It is submitted that the decision of Gilligan J. in *ESB v. the Minister for Social, Community and Family Affairs & Ors*. [2006] IEHC 59 succinctly summarises the principles set out in such cases and which are to be applied in appeals of this nature. In that case, Gilligan J. stated:–

> *"I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant.*
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> *The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision."*

Counsel for the respondent refers the Court to the submissions which both parties presented before the Rights Commissioner and the Tribunal in order to appreciate the context of the decision arrived at by the Tribunal. It is submitted that in recent times both bodies have been increasingly called upon to deal with claims under the 1991 Act arising from the economic downturn and as such have built up a considerable amount of experience and expertise in dealing with claims of this nature.

Counsel submits that it is clear from the various exhibits that the Tribunal had before it extensive material supporting the workers' position that numerous requests for verifiable data relating to the company's financial situation at the relevant times were simply not addressed. The company's accounts of 2009 and 2010, which were filed before the Tribunal, confirmed that the company was profitable at the time. It is submitted that further financial information which was eventually made available shows that retained profits were up 50% from the previous year in 2011 and that director emoluments in 2011 increased by 20% on 2010 figures. Furthermore, an examination of the various submissions shows that at the first two hearings before the Rights Commissioner the company did not seek to rely on clause 8.2 of the handbook as a ground for deducting the employees' pay.

It is submitted that the written submissions filed before the Tribunal suggest that three very net issues fell for determination at that stage and can be summarised as follows:–

(a) whether there was an unlawful deduction falling foul of s. 5 of the Act,

(b) section 8.2 of the employee handbook, and

(c) the exercise of discretion not to award compensation.

In relation to the correct interpretation to be applied to the 1991 Act and the question as to whether there was a 'reduction' in pay or a 'deduction' which would bring the complaint within the scope of the 1991 Act, it is submitted by the respondents that such arguments are not unique to this case and the Rights Commissioner and the Tribunal have extensive experience in assessing such claims. In the present case, the Tribunal had the benefit of detailed written submissions regarding the interpretation of the Act and did not fall into error of law in determining that the relevant provisions were applicable in the instant case.

It is submitted that while there is no definition of 'deduction' contained in the Act, the words used in s.5(1) of the Act are clear and unambiguous and have the effect that an employer is precluded from making a deduction in wages, which includes a 'reduction' in wages, unless it falls within one of the specific exceptions at (a), (b), or (c). Even if some ambiguity regarding the section does exist, which is not accepted, counsel submits that it is completely removed when the section is read as a whole. It is argued that section 5(6) is clearly a deeming provision, extending as it does the scope of the expression 'deduction'. The words of s.5(6) are clear and unambiguous and cannot have any other meaning than if on his or her payday an employee receives less wages than he or she should have done, the deficiency is to be regarded as a 'deduction' for the purposes of the 1991 Act.

Submissions regarding this point of construction were made before the Tribunal and the respondents relied upon the decision in *Bruce v. Wiggins Teape* [1994] IRLR 536 which involved an analysis of any apparent distinction between reduction and deduction for the purposes of the UK's Wages Act 1986. It was held by the EAT that the Industrial Tribunal had fallen into error in the following

manner:–

> *"It misconstrued the provisions of the Wages Act 1986 and the decisions on it as drawing a distinction between a deduction from wages and reduction in wages. That is a false antithesis. On a proper analysis of the provisions of the 1986 Act and their application to the facts of this case the Tribunal could only have come to one conclusion: deductions were made and were unauthorised."*

In the present case, the respondents contend that the Tribunal was entitled to treat the reduction in wages as a deduction for the purposes of the 1991 Act and no error in law occurred in this regard. It is further submitted that Mr. Hegarty, who represented the workers before the Tribunal, put forward compelling submissions as to why the decision on *McKenzie* as relied upon by the appellant cannot be interpreted as an authority for the proposition that the 1991 Act has no application to a reduction in wages. Counsel submits that the comments of the learned trial judge in *McKenzie* that "*the Act has no application to reductions as distinct from deductions*" cannot be viewed in isolation and are quite clearly obiter and particular to the facts of that case when viewed in context.

In *McKenzie*, the reduction related to an 'RDF Allowance' which covered various expenses incurred by members of the reserve defence forces involved in duties concerning training work. Section 1 of the 1991 Act defines wages and payments in respect of expenses are specifically excluded from this definition. Therefore, it is submitted, that a reduction in expenses or in an allowance that covers expenses could not have formed the basis of a valid claim under the Act in any event. Furthermore, the reduction in the allowance was given effect by way of a statutory regulation, so that even if it did fall within the definition of wages, the reduction would have been permissible pursuant to section 5(1)(a).

Counsel further contends that the 'reduction or deduction' argument did not receive detailed submission or analysis by either party or by the trial judge. No reference was made to the deeming provision of s.5(6) nor to any of the persuasive English authorities. In the circumstances it is submitted that the Tribunal did not fall into error of law in determining that the reduction in wages was a deduction for the purposes of the 1991 Act or otherwise a matter justiciable under the Act.

In relation to the appellant's contention that the Tribunal misinterpreted the company handbook, and section 8.2 thereof in particular, it is submitted that the Tribunal had the benefit of oral and written submissions on this issue and the company's assertion that section 8.2 of the handbook provided a contractual basis to unilaterally cut wages is simply not borne out by the actions of the company surrounding the implementation of the pay cuts. This submission is also inconsistent with the earlier position adopted before the Rights Commissioner.

Counsel on behalf of the respondents submits that it is patently obvious from a perusal of the handbook that the express terms and conditions of employment material to pay are self-contained within section 2 – "*Payment Rules and Procedures*". Two employees gave evidence before the Tribunal that it was their explicit understanding that pay was governed by this section. There is no provision within section 2 of the handbook that permits a reduction or deduction in pay otherwise than in respect of statutory requirements, monies due to the company such as canteen charges, overpayments or loans, or by way of agreed deduction.

It is further submitted that section 8.2 of the handbook is unclear, ambiguous and general in its terms. It is submitted that the provision cannot be said to reserve such a striking power of variation to material contractual terms. It is submitted that the Tribunal had ample material before it to arrive at the interpretation and conclusion it did and this Court should not disturb such a finding.

Counsel for the respondent denies that the Tribunal erred in law in relation to its decision not to award compensation. It is expressly stated in the determination of the Tribunal that the decision not to accede to the appellant's request was made "*in all the circumstances of the case*". The Tribunal found as a matter of fact that the appellant did not advance its own case by opting not to fully engage with the respondents as to the reported serious financial situation it was facing at the relevant time. The Tribunal has considerable expertise and experience in considering the economic necessity for cost saving measures. In the present case, the appellant simply failed to advance its own case for a deduction and the Tribunal was entitled to have regard to this.

Finally, as to the suggestion that the Tribunal failed to give adequate reasons for its decision, counsel for the respondent submits that it has been established in a number of cases that the duty of administrative tribunals to give reasons in their decisions is not a particularly onerous one and only broad reasons for the decision need to be given. In *Faulkner v. Minister for Industry and Commerce* [1997] 8 E.L.R. 107 O'Flaherty J. stated as follows:–

> *"I would reiterate, what has been said on a number of occasions, that when reasons are required from administrative tribunals they should be required only to give the broad gist of the basis for their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."*

Similarly, in *Byrne v. The Official Censor* (Unreported, High Court, 21st December 2007) O'Higgins J. held that:–

> *"In the case of administrative decisions, it has never been held that the decision maker is bound to provide a '… discursive judgment as a result of its deliberations'; see O'Donoghue v. An Bord Pleanála [1991] I.L.R.M. 750 at p. 757."*

In all of the circumstances, it is submitted that the 10% deduction in the workers' wages amounted to a deduction in wages in contravention of section 5 of the 1991 Act and none of the exceptions at section 5(1)(a)-(c) were applicable. It is submitted that the Tribunal was correct in determining that the express written agreement of the workers was required before any deduction from wages occurred and the Tribunal did not fall into any error of law in arriving at its decision.

DISCUSSION

A preliminary procedural issue was raised by counsel for the respondent in relation to the manner in which an attendance note of the hearings before the Tribunal prepared by a representative of the appellant was brought before the Court. It is stated in the statement of opposition that this note is not an official record or relevant record of the proceedings before the Tribunal within the meaning of Order 84C, rule 3(1)(e)(iii). It is submitted that the attendance is selective, inaccurate, and biased. However, counsel for both sides acknowledged in oral submissions that the information contained in the attendance note is immaterial to the issues of law which this Court is required to consider and should not preclude the Court from doing so. In such circumstances, and having regard to the nature of the role of the High Court in determining appeals of the decisions of administrative tribunals on points of law as has been well established in previous decisions of the court, some of which have been discussed herein, it is not necessary for the Court to reach any determination in relation to this preliminary objection. This Court is required to determine only the question of whether or not the Tribunal erred in law in arriving at its decision.

The first matter for the Court to consider is whether or not this complaint was suitable for adjudication by the Tribunal. Counsel for the appellant has contended that the Tribunal was not the appropriate body to deal with the dispute which arose in this case for two primary reasons. First of all, it was contended that the circumstances of this dispute are very different to what was envisaged by the 1991 Act. There is a written contract of employment and a company handbook which details further terms and conditions. It was suggested by counsel for the appellant that in such circumstances, this dispute is one of contractual construction better suited to resolution elsewhere than by the Tribunal. Secondly, relying primarily on the decision of Edwards J. in *McKenzie*, it is submitted that the reduction in salary in this case is not a 'deduction' under the 1991 Act and the dispute therefore falls outside the scope of the Act and the remit of the Tribunal to consider it.

The Court does not accept the submission of the appellant that the Tribunal was not the appropriate body to hear the complaint simply because there is a contract of employment and company handbook setting out the various terms and conditions. The Tribunal was established as an independent body to provide individuals with a fair and independent means of seeking remedies for infringements of their statutory rights. It has extensive expertise in considering industrial relations disputes and the perusal of contracts, policy documents, and terms and conditions of employment is an essential part of the Tribunal's function. An appeal to this Court remains available to any individual where it is felt that the Tribunal erred in law in performing this function.

The Court is also satisfied that the decision in *McKenzie* is distinguishable from the facts of the present case in a number of respects. The Court accepts the submissions of the respondents that the remarks of Edwards J. in relation to 'reduction v. deduction' issue were obiter. Furthermore, *McKenzie* related to the reduction in an allowance payable in respect of motor travel and subsistence. The definition of 'wages' in the 1991 Act expressly excludes any payment in respect of expenses incurred by the employee in carrying out his employment and so the finding by Edwards J. that the 'RDF Allowance' did not come within the scope of a deduction under the Act relates to an entirely different situation to that the present case where employees salaries were reduced. I am satisfied therefore that the Tribunal was entitled to proceed to consider the complaints on the basis that the reduction to the employees wages in the present case may have constituted a deduction in breach of the 1991 Act.

Having found that the Tribunal was entitled to adjudicate on the matter, the Court must next consider whether or not the decision arrived at is tainted by any error of law. In doing so, the Court is required to have regard to the doctrine of curial deference when considering appeals from the decisions expert administrative Tribunals and quasi-judicial bodies as set out by Hamilton C.J. in *Henry Denny & Sons*. This Court must confine itself to a consideration of a point of law only and may only interfere with a finding of fact when it is entirely unsustainable based on the information before the Tribunal. However, as was made clear in *National University of Ireland Cork v. Ahern and Others* [2005] 2 IR 577, the process by which certain findings of fact were made is often a question of law. McCracken J. stated at paragraph 9:–

> *"…matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by account by it in determining the facts, is clearly a question of law and can be considered on an appeal under [the relevant section]."*

Similarly, in *Dunnes Stores v. Doyle* [2014] 25 E.L.R. 184 Birmingham J. held as follows:–

> *"Identifying the contractual entitlement of an employee of course involves legal determinations. Where such legal determinations are made by a tribunal then there is the option of having the conclusions reviewed in the High Court through the appeal on a point of law route. When that occurs, and the High Court is asked to consider whether the Tribunal correctly applied the law, there is no scope for the doctrine of curial deference."*

I have carefully considered the submissions of both sides and am satisfied that there is a manifest error of law in the Tribunal's interpretation of section 5 of the 1991 Act. The determination of the Tribunal clearly indicates the Tribunal's view that, pursuant to s.5(1)(c) of the 1991 Act, the written consent of the employees was required before the appellant company could bring about any changes to salary levels. However, these exceptions listed at (a), (b), and (c) of section 5(1) are clearly not to be taken conjunctively. The word 'or' is expressly used in the provision and it is clear that each sub-section concerns separate instances which might give rise to an exception to the rule that an employer shall not make a deduction from the wages of an employee. Sub-section (b) states that deductions are allowable where they are authorised by virtue of an employee's contract of employment, which is something the Tribunal should have considered independently of sub-section (c). However, in treating sections (a)-(c) as conjunctive the Tribunal erred in law.

The Court is also satisfied that the Tribunal failed to provide adequate reasons for a number of other findings. The Court accepts that previous decisions of the Court have established that the duty to give reasons does not require extensive analysis of every aspect of a complaint and indeed, as held in *Faulkner*, the 'gist' of the basis for a decision is sufficient. However, in the present case I am satisfied that the brief determination of the Tribunal is wholly inadequate to meet even this low threshold. It is not clear how the Tribunal arrived at the determinations it did and there is not as much as a fleeting reference to vital matters such as the 'reduction or deduction' argument or why section 8.2 of the company handbook is not applicable. The determination states that '*the appellant did not advance its own case for a deduction as it opted not to fully engage with the respondents as to the reported serious financial situation it was facing at the relevant time*.' There is no engagement whatsoever, however minimal, with the detailed submissions of the appellant in relation to its financial circumstances at the time and no consideration of the circumstances relied upon by the appellant for introducing the pay cut.

The Tribunal was also required to interpret the provisions of the contract of employment and terms and conditions as set out in the handbook. However, aside from briefly stating that section 8.2 it was not applicable in light of section 5(1)(b), which, as is apparent from the second paragraph of the determination, the Tribunal erroneously read alongside section 5(1)(c), there is no engagement with the provisions of the handbook. Counsel on behalf of the respondents submits that section 8.2 is not relevant in any event and that section 2.1 of the handbook, entitled 'Payment Rules and Procedures', contains the relevant terms and conditions. I am satisfied that section 2.1 relates only to the procedures and protocols surrounding payment to employees. The deductions in pay referred to in that section do not include a reduction in overall salary, but rather they simply relate to items such as canteen charges, overcharges due to administrative errors, overpayments, loan repayments, and other incidental charges. Submissions relating to the relevant sections of the handbook were made to the Tribunal but there is no finding in relation to them. In this regard, I am satisfied that the Tribunal erred in failing to apply well established principles of construction to the provisions of the handbook and by failing to give reasons for its finding in relation to it. Both sides were in dispute on this point and the decision of the Tribunal fails to indicate which submission was preferred and why.

In relation to the decision of the Tribunal not to exercise its discretion in relation to the payment of compensation in favour of the appellant, the Court accepts that this is a matter for the Tribunal based on the facts of each case. As an expert body with considerable experience in this area, the Tribunal is well placed to make this decision. However, once again, apart from simply stating "*in all of the circumstances of this case*", the decision of the Tribunal is so devoid of explanation as to leave the parties affected by it with no understanding as to how it was arrived at.

CONCLUSION
In light of the foregoing, I would remit the matter to the Tribunal for fresh adjudication in light of the findings of this Court.