[2020] IEHC 714

THE HIGH COURT

[2018 No. 210 MCA]

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT 1998

AND

IN THE MATTER OF THE EQUALITY ACT 2004

AND

IN THE MATTER OF THE WORKPLACE RELATIONS ACT 2015

BETWEEN

OLUMIDE SMITH

APPELLANT

AND

CISCO SYSTEMS INTERNETWORKING [IRELAND] LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of November, 2020

Introduction

1. This is an appeal brought by the appellant against a decision of the Labour Court of 26 April 2018. This decision arose out of an appeal by the appellant from a decision of an Adjudication Officer under the Employment Equality Acts 1998-2015 (the Acts). The Adjudication Officer had held that the appellant's former employer, the respondent, had not discriminated against him on grounds of race in relation to pay and other matters including dismissal and promotion. The Adjudication Officer had decided that a number of complaints of discrimination on the race ground had not been made within the time period specified in the Acts and, thus, were out of time.

2. The appellant was employed by the respondent at its Galway Office in January, 2008. The respondent is a multinational technology company which designs, builds and manufactures networking systems. The appellant was dismissed on 5 July 2013 and paid in lieu of notice.

3. The appellant appeared in person before this Court, the Adjudication Officer and the Labour Court.

4. Section 90(1) of the Acts provides: -

> "Where a determination is made by the Labour Court on an appeal under this Part, either of the parties may appeal to the High Court on a point of law."

The first matter which I will address is the jurisdiction of the Court in hearing an appeal on a point of law.

Appeal on a Point of Law

5. The limitation on this Court's jurisdiction in hearing an appeal on a point of law has been considered in a number of authorities, which I will now refer to. Firstly, in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] I.L.R.M. 421, Kenny J. in the Supreme Court stated: -

"…findings on primary facts should not be set aside by the Courts unless there was no evidence whatever to support them. The Commissioner then goes on in the Case Stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the Court should approach these in a different way. If they are based on the interpretation of documents, the Court should reverse them if they are incorrect, for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the Court should set aside its findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If, however, they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw."

6. More recently, McKechnie J., in the High Court decision in *Deely v. Information Commissioner* [2001] 3 I.R. 439 which concerned an appeal under s. 42 of the Freedom of Information Act, which also limited an appeal to a point of law only, summarised the principles which apply on such an appeal as follows: -

"… There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or *via* a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following :-

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can, however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision…"

7. It is entirely clear from the authorities that an appeal on a point of law is not a *de novo* appeal. The circumstances under which the court, on an appeal limited to a point of law, may interfere with findings of fact is clearly limited.

The Appellant's Case

8. As mentioned, the appellant represented himself and was the author of his own supporting documentation. A consideration of this documentation indicated that the appellant was not confining his appeal to a point of law. The originating Notice of Motion set out, at considerable length, numerous references to various statutory provisions without stating the relevance of such, or in what way the Labour Court was in breach of

same in reaching its determination. Unfortunately, the appellant's grounding affidavit did not advance matters.

9. When the appeal first came on for hearing before this Court on 19 November 2019, having considered the voluminous documentation and the submissions of the appellant, I directed that the appellant identify, in precise summary form, the points of law which he was relying upon for the purposes of his appeal. The appellant complied with this direction and furnished a document dated 3 December 2019. I will refer to this document in the course of the judgment.

10. The appellant's claim was that he was discriminated against and victimised on grounds of race in matters of remuneration and promotion. Further, the appellant maintains that he was dismissed on grounds of race. These claims were dismissed by the Adjudicating Officer and the appellant appealed to the Labour Court.

11. The hearing before the Labour Court took place on two days: 16 January 2018 and 27 February 2018. Prior to the hearing, there was a preliminary case management conference for the purposes of assisting the Labour Court in ensuring that the hearing of the case was conducted fairly and that it was focused on the matters in contention between the parties. This case management conference took place on 22 July 2016.

Hearing before the Labour Court

12. The first issue that had to be considered was whether the appellant's complaint was made within the time allowed, the "*preliminary issue*". Section 77(5) of the Acts provides as follows: -

> "(5) (a) Subject to paragraph (b), a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.
>
> (b) On application by a complainant… may, for reasonable cause, direct that in relation to the complainant paragraph (a) shall have effect as if for the reference to a period of 6 months there were substituted a reference to such period not exceeding 12 months as is specified in the direction; and, where such a direction is given, this Part shall have effect accordingly. …"

Thus, time may be extending from six months to twelve months where "reasonable cause" is shown.

13. The appellant submitted that the Labour Court ought to extend the time available to him to make a complaint. He submitted that he had made strenuous efforts to gather documentation to support his complaint following his dismissal on 5 July 2013. The respondent submitted that much of the documentation was supplied to the appellant and the Labour Court concluded that no great degree of documentation was required in order for the appellant to make his complaint. There was no extension of time and the Labour

Court determined that the "*cognisable period*" for the complaint was 29 May 2013 to 28 November 2013.

14. The appellant submitted to the Labour Court that he was the subject of discriminatory treatment, was victimised and was discriminatorily dismissed on grounds of race. He also submitted that he had been the subject of a series of discriminatory acts in the period from 2008 until the termination of his employment on 5 July 2013. He thus submitted that events prior to the "*cognisable period*" should be viewed as "*a continuum"* of discriminatory events which culminated in his dismissal on 5 July 2013. The respondent submitted that events outside the "cognisable period" were out of time.

15. The approach which the Labour Court took was to first consider whether the alleged acts of discrimination had occurred within the "*cognisable period*" before it could consider whether events outside of that period could be considered to be part of "*a continuum"* or regime of discrimination which would bring it within the jurisdiction of the Labour Court.

16. The Labour Court then considered the events complained of by the appellant during the period between 29 May 2013 and 28 November 2013. The alleged events were that the respondent: -

    (i) Discriminatorily dismissed the appellant on grounds of race, having regard to s. 8 of the Acts;

    (ii) Victimised the appellant within the meaning of the Acts;

    (iii) Discriminated against the appellant on the race ground in that he was not promoted; and

    (iv) Discriminated against the appellant as regards his remuneration on grounds of his race, the appellant having identified three comparators of a different race for the purposes of substantiating this complaint.

17. In considering these various allegations, the Labour Court heard testimony on behalf of the appellant. Mr. Ted Curran, the disciplinary decision-maker, gave evidence on behalf of the respondent. Mr. Curran explained the background to the procedure and the efforts made to ensure procedural fairness. He was examined and cross-examined regarding the allegation that his behaviour during the disciplinary hearing and his decision upon its conclusion were motivated by discrimination on grounds of race. Mr. Curran gave evidence to the effect that he had not been influenced to any extent by the appellant's race.

18. The Labour Court gave its determination on 26 April 2018 and found that the appellant was not discriminated against on grounds of race. Thus, the decision of the Adjudication Officer was affirmed.

Determination of Labour Court and the Appellant's Challenge

19. On the "*preliminary issue*", the appellant submitted, *inter alia*: -

"(a) The Labour Court disproportionately failed to apply fair procedures and consequently erred in the determination of the preliminary issue pursuant to s. 77(5)(a) and s. 77(5)(b) of the Acts 1998 to 2011. *North Thames Regional Health Authority v. Noone* West [1988] ICR 813 at 822.

(b) The Labour Court disproportionately failed to apply a fair procedure and in this regard failed or refused to consider the precise fact or law in relation to the reasonable cause requirement which I submitted and in this regard, the Labour Court disproportionately erred on its failure to document the precise reason I submitted in relation to my application for extension of time…"

The appellant also sought to rely on the provisions of the Statute of Limitations (Amendment) Act 1991 and s. 71 of the Statute of Limitations Act 1957.

20. In its determination on the preliminary issue, the Labour Court referred to the relevant sections of the Act and an earlier decision of that Court which set out the appropriate test. In his submission, the appellant identified no point of law where the Labour Court fell into error. Further, the provisions of the Statute of Limitation Acts, and any authorities in respect of same, have no relevance here.

21. The next matter which the Labour Court determined was the submission by the appellant that the alleged discriminatory events prior to the "*cognisable period*" should be viewed as a continuum. In support of this, the appellant stated: -

> "The Labour Court disproportionately erred and misdirected itself in what it called cognisable period which the Labour Court erroneously established as 29 May 2013 to 28 November 2013 instead of 3 January 2013 to 2 July 2013…"

and: -

> "The Labour Court failed to apply fair procedures and in this regard erred in the interpretation of the law and consequently failed to extend its so called cognisable period to the prior 12 months, say 12 months, from the date of the last incident i.e. the Labour Court failed to use the period 03 July 2012 to 02 July 2013 as its said cognisable period…"

22. The decision of the Labour Court clearly considered an extension from six months to twelve months as sought by the appellant. In refusing such an extension, the Labour Court did not accept the reason put forward by the appellant: lack of documentation. The Labour Court concluded "*that no great degree of documentation is required in order for the appellant to have made a complaint to the Workplace Relations Commission as regards any event or occurrence which he believed to constitute discrimination*". Again, the appellant has identified no error of law as would lead this Court to overturn the ruling of the Labour Court.

23. The appellant submitted to the Labour Court that he was the subject of discriminatory treatment, was victimised and was discriminatorily dismissed on the race ground. He

submitted that he had been the subject of discrimination in the period from 2008 until the termination of his employment on 5 July 2013. He contended that the events prior to the "*cognisable period*" of his complaint should be viewed as a "*continuum*" of discriminatory events that culminated in his dismissal.

24. The Labour Court had regard to the relevant statutory provisions, namely: -

Section 77(5)(a) of the Acts provide:-

"(a) Subject to paragraph (b), a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence."

Section 77 (6)(a) provides: -

"For the purposes of this section –

(a) discrimination or victimisation occurs–

(i) if the act constituting it extends over a period, at the end of the period,…"

In considering this submission of the appellant, the Labour Court had regard to an earlier decision in which it had decided: -

> "That if these occurrences were found to be acts of victimisation the court would hear evidence in relation to all of the occurrences relied upon. If, however, these occurrences were found not to have involved victimisation, a complaint relating to the earlier occurrences could not be entertained having regard to s. 75(5) of the Act as the most recent occurrences would have been outside the time limit."

The Labour Court decided that it must first consider whether an act or acts of discrimination occurred within the cognisable period for the complaint before it can consider whether events outside of that period can be considered to be part of a "*continuum*" or regime of discrimination and within the jurisdiction of the court. It is only if the court forms such a conclusion that it can consider events which occurred prior to the cognisable period. This was the approach adopted by the Labour Court and, it seems to me, that it was in accordance with the relevant statutory provisions, and also consistent with its earlier decisions. The appellant has identified no point of law indicating an error on the part of the Labour Court.

25. Having decided its approach to the complaints of the appellant, the Labour Court then proceeded to consider the events which the appellant complained of, namely: -

(1) That he was discriminatorily dismissed by the respondent on grounds of race, having regard to s. 8 of the Acts;

(2) That he was victimised within the meaning of the Acts;

(3) That he was discriminated against on the race ground in that the respondent failed to promote him; and

(4) That he was discriminated against as regards his remuneration on grounds of his race. He identified three comparators of a different race for the purposes of advancing this complaint.

In his submission to this Court, the appellant, other than disagreeing with the determination of the Labour Court, has identified no basis upon which this Court could interfere with the findings of the Labour Court on the various complaints made. Both the appellant and the respondent adduced evidence and the appellant was afforded an opportunity to cross-examine the witness called on behalf of the respondent.

26. The Labour Court correctly identified the relevant provision of the Acts that defines "*discrimination*" (s. 6). In its determination, the Labour Court stated: -

> "It is well settled law that mere assertion cannot be elevated to the status of evidence. In this case, the appellant offered no more than mere assertion in support of his contention that the decision to dismiss him was related to his race or ethnic origin and that the respondent did or would have treated other workers of a different race or ethnic origin in a different manner. The appellant is clearly dissatisfied with the conduct by the respondent of the procedures used to arrive at the decision to dismiss him. The court cannot find however that the appellant has identified any causal connection between his race and any alleged failings of process."

In his submissions to this Court, the appellant has identified no facts as would suggest that the findings of the Labour Court were irrational or unreasonable. On the issue of equal pay, the appellant identified three comparators to support his contention that he was not paid equally with persons of a different race or ethnic origin. In fact, as found by the Labour Court, the three named comparators were, at all material times, in receipt of lesser remuneration than him. The appellant put before this Court no facts concerning these three comparators to suggest that the finding of the Labour Court was irrational or unreasonable.

27. By reason of the foregoing, I am satisfied that the appellant has identified no points of law as would permit this Court to uphold his appeal. I, therefore, dismiss his appeal. Further, in a submission to this Court, the appellant requested that a question be referred to the European Court of Justice concerning the interpretation "*of European Union (EU) Treaty Articles and interpretation and validity of EU Regulations and Directive (Article 267, TFEU) in relation to the acts and omissions of*:

- *The Labour Court…"*

I am satisfied that there exists no basis for such a request.

Conclusion

28. By reason of the foregoing, I dismiss the appellant's appeal. As this judgment is being delivered electronically, the parties have fourteen days within which to make written submissions on any consequential orders.