[2020] IEHC 56

THE HIGH COURT

[2019/169 MCA]

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

BETWEEN

TIBOR BARANYA

APPELLANT

AND

ROSDERRA IRISH MEATS GROUP LIMITED

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 13th day of February, 2020

Issues

1. This is the appellant's appeal pursuant to s.10A of the Unfair Dismissals Acts 1977, as amended. Section 10A was inserted on the 1st of October, 2015, by the Work Place Relations Act, 2015 and provides:

> *"A party to proceedings before the Labour Court under this Act may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive".*

2. The originating notice of motion is dated the 16th of May, 2019, and relates to a determination of the 8th of April, 2019. The appellant is seeking to set aside that determination insofar as it found that the appellant had not made a protected disclosure (therefore, his claim that his dismissal for having made a protected disclosure must fail). He also claimed that the decision was *ultra vires* the Protected Disclosures Act, 2014 (the 2014 Act).

3. There are six enumerated grounds within the notice of motion, namely:

   (1) There was an error of law by the Labour Court, reading into s.5 of the 2014 Act a requirement that a protected disclosure state an allegation of a relevant wrongdoing on the part of the employer.

   (2) The Labour Court erred by determining that the appellant's communication was a grievance rather than a protected disclosure.

   (3) The Labour Court erred in interpreting Statutory Instrument 464/2015 (the SI) by determining that the SI prevented the subject matter (presumably communication) from being a protected disclosure, thereby reading an ability of the SI to amend the 2014 Act.

   (4) The Labour Court failed to consider the full facts of the evidence given.

   (5) The Labour Court erred in its failure to consider the full remit of s.5(3) of the 2014 Act.

(6) The Labour Court erred in law by its failure to have any due regard to the fact that the appellant sought out the Health and Safety Officer of the respondent to raise his concerns for his own health and safety.

The notice of motion is grounded on a brief affidavit of the appellant of the 16th of May, 2019.

4. The respondent's statement of opposition is dated the 14th of January, 2020, wherein the asserted errors are denied on the basis that:

(1) The Labour Court was correct to the effect that the relevant statement must contain words which amount to a disclosure of relevant information, and it correctly identified the relevant wrongdoing identified by the appellant, who did not disclose any wrongdoing, but rather his communication was an expression of grievance.

(2) The Labour Court was correct in determining that the words spoken by the appellant did not qualify as a protected disclosure. It is not accepted that the Labour Court determined that the SI prevents the subject matter from being a protected disclosure or that it read into the SI an ability to amend the 2014 Act.

(3) The Labour Court correctly applied and interpreted s.5(3) of the 2014 Act.

(4) The Labour Court based its determination on all the evidence and materials properly before it and the appellant's complaint is effectively an appeal on the merits.

5. The statement of opposition is grounded upon a replying affidavit of Tony Delaney of the 21st of June, 2019. He is the Human Resources Manager of the respondent. At para. 7 he states that the Labour Court questioned the appellant carefully, and on several occasions clarified exactly what he had stated. The deponent stated that at p.6 of the determination the Labour Court succinctly and correctly recorded its finding and it held that the communication by the appellant related to "*the fact that he wanted to change roles as he was in pain"* and did not disclose any wrongdoing on the part of the respondent.

6. At para. 8 it is stated that the only date on which it is alleged that a protected disclosure was made was on the 15th of September, 2016 (presumably a typographical error as the disclosure was on the 15th of September, 2015). The appellant has not challenged any of the foregoing statements within the affidavit of Mr. Delaney.

7.

(a) In s.3 of the 2014 Act, disclosure is defined as *inter alia*, information brought to the person's attention.

(b) In s.5(1) protected disclosure means a disclosure of relevant information made by a worker.

(c) Relevant information is defined as information in the reasonable belief of the worker that tends to show one or more of the relevant wrongdoings, and it came to the attention of the worker in connection with their employment.

(d) Section 5(3) identifies relevant wrongdoings including inter alia:

"(d) that the health or safety of any individual has been, is being or is likely to be endangered."

8. The parties agreed that there is no relevant jurisprudence within this jurisdiction on the interpretation of the 2014 Act, therefore, the UK authorities are of assistance in this regard.

9. The appellant asserts, and I did not understand the respondent to refute, that the test of a protected disclosure in the circumstances is, the disclosure of relevant information which the appellant reasonably believes shows one or more of the relevant wrongdoings identified in para. 5(3).

10. The appellant argues that engagement of a public interest element to demonstrate that the relevant disclosure is a protected disclosure is not prescribed by the legislation, notwithstanding that the long title of the Act does refer to protected disclosures in the public interest and for connected purposes. In the alternative it is argued by the appellant that even if a public interest element is required that the endangerment of an employee gives rise to such a public interest element as there is a criminal sanction attached to such endangerment by an employer.

11. The respondent argues that a public interest element is required, although the respondent does not dispute that the appellant need only show one or more of the sub-paragraphs in s.5(3) to potentially qualify, however, states that with regard to s.5(3)(d) a *de minimis* requirement in relation to possible injury is raised by reference to the word "endangered", as used in that particular sub-section.

12. The appellant belatedly in oral submissions, made the argument that on the basis that the Court might find that the Labour Court's decision at p.6 when it stated: "*In this case the communication by the worker related to the fact that he wanted to change roles as he was in pain*", is a finding of fact, nevertheless, the Labour Court failed to go on and consider the fact that the appellant had attended with the Health and Safety Officer of the respondent employer for the purposes of showing his concerns for his own health and safety, and this should have been considered in the context of showing or tending to show the reasonable belief of the worker of one or more of the relevant wrongdoings.

13. This is not an argument raised in the written submissions of the appellant and neither has the appellant shown that it was an argument raised before the Labour Court.

14. Furthermore, the attendance of the appellant with the Health and Safety Officer cannot in and of itself, or, coupled with the statement that the appellant wanted to change roles as he was in pain, amount to information brought to the employer's attention of any form of

complaint against the employer, or otherwise communicate any reasonable belief held by the appellant other than he wanted to change roles as he was in pain.

15. Therefore, I am not satisfied that it is an argument that can properly be ventilated before this Court to secure an order setting aside the Labour Court determination.

16. The appellant relies on the decision of *Nano Nagle School v. Marie Daly* [2019] IESC 63, a decision of the Supreme Court of the 31st of July, 2019, which suggests that the Supreme Court have been trenchant in their condemnation of the Labour Court omitting to take account of evidence before it. It is suggested a similar complaint is now being made by the within appellant as against the Labour Court.

17. In this regard, the evidence which apparently the Labour Court failed to take account of was the fact that the appellant, when he complained of a sore arm and wishing to change stations, also indicated that the pain he was experiencing was due to the work that he had to perform.

Labour Court decision

18. The decision of the Labour Court concerned two issues, the first of which is not before this Court. The issue before this Court is the second issue and reference thereto commences on p.4 of the determination. It is clear from both the determination itself and the affidavit of Mr. Delaney aforesaid that oral evidence was heard by the Labour Court. This second issue arose because the appellant was claiming he was unfairly dismissed from his post on the 18th of September, 2015, due to a protected disclosure. Therefore, the fact that he was not in his then current employment for the requisite period of time identified by the unfair dismissals legislation was irrelevant because of the disclosure being categorised as a protected disclosure. In this regard, there is an exception to the rule that dismissed employees are precluded from bringing a claim if they have less than one year's continuous service with the employer who dismissed them if such a dismissal was made on the basis of a protected disclosure (S.6(2)(ba)).

19. At p.4 of the decision the complainant's case was set out briefly and thereafter the respondent's case was set out briefly. In effect, the complainant was stating that he had made a protected disclosure, whereas the respondent was saying that his communication solely related to a matter that was specific to himself and should be properly classified as a grievance and in this regard made reference to SI 464/2015 being a Code of Practice on Protected Disclosures Act, 2014.

20. Thereafter, at p.5 the decision set out the full text of s.5 of the 2014 Act and then set out ss. 30 and 31 of SI 464/2015, although omitting that portion of s.31 that gave examples of what was a grievance and what was a protected disclosure.

21. During the course of submissions the Court indicated that it was of the opinion that there was an effective spectrum. One of the examples of s.31 of SI 464/2005 identified on the one hand matters that clearly comprised a grievance only. The other example showed the other end of the spectrum where matters were clearly categorised as a protected

disclosure. Between these two extremes there was the possibility that a grievance and a protected disclosure would overlap. Both parties indicated agreement with this concept although the appellant argued that the respondent in submissions before the Labour Court suggested that a grievance and a protected disclosure were mutually exclusive communications.

22. In the paragraph heading "*Discussion and Decision*" at p.6, being the final page of the decision of the Labour Court, it was indicated that:

> *"The issue for the Court to consider is whether the communication made by the complainant was a protected disclosure or a grievance."*

In this regard, the appellant interprets the Labour Courts view as stating that a protected disclosure and a grievance cannot overlap.

23. It appears to me that in fact that sentence should be read having regard to the content of the preceding pages of the decision, to the effect that, the appellant asserted that his communication was a protected disclosure whereas the respondent asserted that the communication was a grievance. In the circumstances therefore, this Court cannot read into the sentence that the Labour Court was of the opinion that a grievance can never amount to a protected disclosure.

24. The decision goes on:

> *"For the purpose of the Act a protected disclosure is a disclosure of relevant information which the worker reasonably believes shows one or more relevant wrongdoing [sic]".*

It is acknowledged that this is in fact the correct test to be applied.

25. The decision states:

> *"In this case the communication by the worker related to the fact that he wanted to change roles as he was in pain".*

26. The appellant argues that without reason the Labour Court failed to mention that the appellant had stated that the pain he was suffering from was due to his work, therefore, the Labour Court omitted a significant element of the appellant's communication.

27. I am satisfied that the above statement represents a finding of fact by the Labour Court in the context of the dispute between the parties as to what was said. Furthermore, in the affidavit of Mr. Delaney, which has not been disputed, para. 7 states that the Labour Court succinctly and correctly recorded its findings in circumstances where apparently during the course of the hearing the Labour Court questioned the appellant carefully and on several occasions clarified exactly what he had stated.

28. In the next paragraph it is stated:

"The communication did not disclose any wrongdoing on the part of the respondent. It appears to the Court therefore that the complainant's communication was in fact an expression of a grievance and not a protected disclosure".

29. The appellant suggests that the above quotation demonstrates that the Labour Court applied the wrong test, and instead of looking at a disclosure of any wrongdoing, should have looked at whether or not, in the worker's reasonable belief, the disclosure of relevant information showed one or more of the relevant wrongdoings.

30. Although the concept of a protected disclosure is effectively a term of art as defined by the 2014 Act, the word 'disclose' has the ordinary meaning of to 'reveal' or 'make known'. In this context the statement that the communication did not disclose any wrongdoing on the part of the respondent is, in fact, factually correct as the communication by the appellant, as found by the Labour Court, did not reveal or make known any wrongdoing on the part of the respondent. In those events it was not possible to read into the communication any reasonable belief of a relevant wrongdoing on the part of the employer. The sentence follows on from the finding that the appellant's communication merely stated he wanted to change roles as he was in pain.

Decision

31. In dealing with the notice of motion:

(1) The appellant has failed to demonstrate that the Labour Court misread or misinterpreted s.5 of the 2014 Act by requiring the appellant to state an allegation of a relevant wrongdoing. Section 5(2) defines relevant information as information in the reasonable belief of the worker, tends to show one or more of the relevant wrongdoings. That some information in the relevant communication, must attribute some act or omission, on the part of the respondent, that the appellant might reasonably believe tends to show one or more of the relevant wrongdoings is clearly necessary. In the absence of any asserted act or omission the concept of relevant information is not fulfilled in the instant communication as found by the Labour Court.

(2) The Labour Court did not determine that the appellant's communication was a grievance "rather than" a protected disclosure. It stated that the communication was a grievance and not a protected disclosure. I accept that if the words 'rather than' had been included this would possibly demonstrate a view on the part of the Labour Court that a grievance can never be a protected disclosure.

(3) The appellant has failed to demonstrate that the Labour Court in fact determined that the SI had an ability of amending the 2014 Act whether explicitly or implicitly.

(4) It seems to me abundantly clear that the Labour Court did in fact consider the initial asserted communication that the appellant made, however, having heard oral evidence and having regard to the documents before the Labour Court, the Labour Court found that the communication made was more circumspect than asserted by

the appellant and did not reveal any act or omission on the part of the respondent that might be considered any form of wrongdoing.

(5) The Labour Court specifically identified the entirety of s.5 of the 2014 Act including at para. (d), and there is no evidence adduced therefore by the appellant to suggest that the Labour Court failed to consider the full remit of s.5(3).

(6) The nature of the communication found to have been made by the appellant was that he wanted to change roles as he was in pain. The appellant has not demonstrated any error of law on the part of the Labour Court in not placing significance on the fact that the appellant stated that he sought out the Health and Safety Officer of the respondent. If the appellant had been found to state, as was asserted by him, the cause of his pain was due to the work he had to perform, the appellant would not have been confined to making this assertion to the Health and Safety Officer only, but rather it would appear sufficient to make it to some person for the purposes of drawing the assertion to the attention of his employer. Seeking out the Health and Safety Officer, having regard to the factual finding of the Labour Court of what the appellant actually said did not transform the appellant's statement, as found, into a protected disclosure.

32. In all of the circumstances, the appellant has failed to establish any error of law on the part of the Labour Court in arriving at its decision of the 8th of April, 2019, and in the circumstances the appellant's appeal is dismissed.