[2020] IEHC 138

THE HIGH COURT

[2019 No. 130 MCA]

BETWEEN

PASCAL HOSFORD

APPELLANT

AND

DEPARTMENT OF EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 25th day of February, 2020

Background

1. The appellant is employed by the respondent, and has a key role in the finance section of the facilities management unit. He is a Higher Executive Officer and a manager of the finance section, a role which has held since in or around June, 2014.

2. The appellant has made a number of "*protected disclosures*" under the provisions of the Protected Disclosures Act, 2014 (the Act of 2014). The respondent has a policy document and written procedures, as required by the Act of 2014.

3. The appellant was the subject of a disciplinary procedure as a result of alleged misconduct in the workplace. The particulars of this misconduct were set out in a letter, dated 26 June 2017, signed by Ms. Elaine Quinn, of the Principal Facilities Management Unit of the respondent. This letter stated, *inter alia*: -

> *"I would consider your behaviour at work to be disruptive. In addition, I would also consider your ongoing failure to comply with reasonable management instructions and your failure to comply with civil service policies and procedures to be misconduct. Examples of what I would regard as misconduct are as follows: …"*

Three headings were set out: -

1. "*Disruptive behaviour*." This referred to a practise by the appellant of sending emails inappropriately to people who had no direct responsibility for the content of the issues raised. A selection of emails were referred to;

2. "*Refusing to comply with reasonable management instructions*." Under this heading, reference was made to a number of occasions on which the appellant was given a specific instruction not to continue with a particular course of action. These instructions were not followed; and

3. "*Failure to comply with civil service policies, codes of practice and circulars."* Under this heading, complaint was made of the appellant's behaviour towards other colleagues as being inappropriate in the workplace. It was stated that on several occasions the appellant had referred to statements and opinions of colleagues as "*nonsense", "waffle",* etc. Examples were given.

4. The letter stated that these matters would be raised in accordance with the Civil Service Disciplinary Code, and the appellant was asked to attend a disciplinary meeting some days later. It was stated that the purpose of this meeting was to discuss the various matters in the letter and to give the appellant an opportunity to respond and to answer appropriate questions.

5. The result of these disciplinary proceedings was that the appellant was to receive a final written warning in the following terms: -

> *"You should behave appropriately at work and treat all co-workers with dignity and respect at all times. You should avoid disruptive behaviour at work and comply with reasonable instructions of management. Any recurrence of the behaviours outlined above may result in further disciplinary action being considered."*

6. The appellant appealed this decision under an internal appeal procedure. The appeal was refused. Subsequently, the appellant further appealed the matter to an "*external appeals officer*". This appeal was unsuccessful, and the following was the finding: -

> *"Taking the totality of the disciplinary issues and the expressed intention of (the appellant) going forward to continue with similar behaviours/conduct in the future, the sanction of final written warning is proportionate in these circumstances."*

7. It is common case that the appellant made a number of "*protected disclosures*" pursuant to the Act of 2014. The appellant made a complaint to the WRC under the Act of 2014 maintaining that the disciplinary process which he had undergone was him being penalised for having made a "*protected disclosure*". He relied on the provisions of s. 12 of the Act of 2014, which are set out later in this judgment. This complaint was decided by an Adjudication Officer, who found against the appellant. The appellant appealed the matter to the Labour Court. As no application had been made that the time limits set out in the Workplace Relations Act, 2015 at s. 41(8) should be extended then the cognisable period for the appeal was the period between 21 April 2017 and 20 October 2017. Further, the appeal before the Labour Court was a hearing "*de novo*".

8. The Labour Court in its determination held that the complaints advanced by the appellant under the Act of 2014 were not well founded, and affirmed the decision of the Adjudication Officer.

Grounds of appeal

9. In his Notice of Motion, the appellant sets out some ten grounds of appeal on points of law: -

    1. That the Labour Court erred in law by not making findings nor any "*treatise*", with regard to fair procedures and natural justice;

    2. That the Labour Court erred in *"law by not making findings, as to two matters that are fully within the disciplinary case papers, being in/of themselves protected*

disclosures … that the 'appellant' had proven his case with regard to being penalised and/or threatened with penalisation for making protected disclosures";

3. *"That the Labour Court erred in law by misconstruing the 'but for test' concerning making protected disclosure(s) and by interpreting this test too narrowly and too restrictively";*

4. *"That the Labour Court erred in law, when, here, reviewing an administrative decisions of the respondent employer … by failing to apply the 'hard look/anxious scrutiny principles' as set down by the Supreme Court (Meadows 2010) regarding the background and underlying matters, their seriousness and their potential consequences";*

5. *"That the Labour Court erred in law by not recognising, especially regarding whistle blowers, the concept of cognisable continuum time and of rolling events";*

6. *"That the Labour Court erred in law by not recognising that a certain and considerable amount of dissent and of raising a critical voice … goes hand in hand with whistle blowing and which does not represent disloyalty to employer or colleagues or of meriting discipline …";*

7. *"That the Labour Court erred in law by not making findings that the employer, (the respondent) breached many elements of the wide 'duties of care' owed to employees";*

8. *"That the Labour Court erred in law by its failure to make a finding that the IESBA code of conduct did have applicability to civil service disciplinary process";*

9. *"That the Labour Court erred in law, and in fact, by accepting many contentions (sic) made by the respondent employer";* and

10. *"That the Labour Court erred in law by failing to report, in findings, that senior civil servants of the respondent employer wholly abandoned and wholly recanted at that the hearings themselves as to them unlawfully making findings that matters that patently were protected disclosures were not such … ."*

Clearly, having made a "*protected disclosure*", a fact accepted by the respondent, the appellant was entitled to the protections afforded by the Act of 2014. However, what is in question here is the extent of these protections. This was the issue which the Labour Court had to consider.

Jurisdiction of the High Court

10. The jurisdiction of the High Court to deal with appeals from the Labour Court is set out in s. 46 of the Workplace Relations Act, 2015, which provides as follows: -

"A party to proceedings before the Labour Court under this Part 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."

11. This jurisdiction was recently considered by the Supreme Court in *Nano Nagle School v. Marie Daly* [2019] IESC 63, where MacMenamin J. stated: -

"109. But in the Attorney General v. Davis, The Supreme Court, 27th June, 2018 [2018] IESC 27, (O'Donnell J., McKechnie J., MacMenamin J., Dunne J., O'Malley J.), there is to be found a convenient summary of the present law, which is somewhat more nuanced than the judgment in Henry Denny. In a detailed judgment, McKechnie J., speaking for the Court, identified what may be regarded as issues of law which may be considered on a case stated. These included (i) findings of primary fact where there is no evidence to support them; (ii) findings of primary fact which no reasonable decision-making body could make; (iii) inferences or conclusions which are unsustainable by reason of any one or more of the matters listed above; or which could not follow or be deducible from the primary findings as made; or which were based on an incorrect interpretation of documents. (See para. 54). If not included in that category, I would add a determination which is ultra vires, where there is a failure of statutory duty. Undoubtedly, deference is due to an administrative tribunal acting within the scope of its duty. But, when there is a substantial failure of compliance with that statutory duty, a court must intervene. The determination did not comply with the statutory duty laid down in the Act."

12. Thus, the appeal before this Court is only on a point of law. This necessarily limits the jurisdiction of this Court, as it is not a full appeal. Even if it was minded to do so, this Court could not substitute its own decision for that of the Labour Court. However, the court is entitled to look at the procedures and processes followed by the Labour Court in making its findings of fact, and to consider whether its decision is sustainable at law.

Provisions of the 2014 Act

13. As stated in its long title, the Act of 2014 is to "*make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes".*

14. Section 5 of the Act defines what is a "*protected disclosure*". It has to be a disclosure of relevant information "*made by a worker in the manner specified in section 6, 7, 8, 9 or 10*". These sections set out to whom the disclosure may be made. Such persons include: the employer, a prescribed person, a relevant Minister and a legal advisor.

15. Section 10 provides for "*disclosure in other cases*": -

"10. (1) A disclosure is made in the manner specified in this section if it is made otherwise than in the manner specified in sections 6 to 9 and –

(a) …

(b) …

(c) …

(d) in all the circumstances of the case, it is reasonable for the worker to make the disclosure."

16. Section 12 sets out the protection given to employees from penalisation for having made a protected disclosure: -

"12(1) An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure …"

17. In this case, it would appear that though the appellant made a number of protected disclosures, they were made to numerous person who did not come within the ambit of ss. 6, 7, 8, 9 or 10 of the Act of 2014.

Consideration of the determination of the Labour Court

18. In this part of the judgment, I will consider the various findings set out in the determination of the Labour Court (the determination).

19. The determination set out a summary of the position of the appellant. It states: -

> *"The appellant submitted that he had been disciplined for having made protected disclosures. He submitted that at least some of the emails which formed part of the charges grounding the disciplinary procedure were protected disclosures …"*

This is an accurate statement of the appellant's position, as is confirmed by the numerous affidavits filed in this Court for his appeal.

20. The determination states that the disciplinary procedure was entirely related to the matters set out in the letter of 26 June 2017. The author of that letter gave evidence in support of this. It is stated that "*the issue which contributed to the decision to initiate the disciplinary procedure however was not the content of the emails but the applicants practice of widespread mailing of internal colleagues and external parties"*.

21. The Labour Court acted in accordance with the requirements for fair procedures. The appellant was present, heard directly the evidence against him and was afforded an opportunity to challenge it.

22. The determination sets out the relevant provisions of the Act of 2014. Under the heading "*discussion and conclusion*" it is stated: -

> *"the court has heard evidence from the author of that letter, Ms. EQ, to the effect that the content of her letter was the sole basis for the initiation of the disciplinary procedure. The appellant has asserted that the basis was other than that set out in the letter but has provided no evidential basis to support that assertion."*

and

> *"the court finds that the appellant's repeated dissemination of matters, the earlier disclosures of which are protected disclosures within the meaning of the act of 2014, cannot then be regarded as protected disclosures of the same matters.*
>
> *The disclosure of a matter or practice which conforms to the definition of protected disclosure in the Act of 2014 at s. 5(1) is a protected act. In the within matter the appellant appears, having made protected disclosures to relevant personnel and authorities, to have engaged in repeated communication on those matters with a wide range of persons in what the respondent considered an unacceptable manner. The court is persuaded that the initiation of the disciplinary procedure was inter alia founded on the manner of the appellant's repeated widespread communication rather than any matter associated with his having made a protected disclosure."*

23. It is entirely clear from the foregoing that the appellant's submissions were considered, as were the relevant statutory provisions. There was a clear, legally sound basis for the finding in the determination to the effect that the claims advanced by the appellant under the Act of 2014 were not well founded. It followed from this that the appellant was not entitled to the protection afforded by s. 12 of the Act of 2014. In light of this, the various grounds of appeal put forward by the appellant are not sustainable.

Conclusion

24. By reason of the foregoing, I reach the conclusion that, insofar as there were findings of fact made by the Labour Court, these were supported by evidence and that the provisions of the Act of 2014 were correctly interpreted and applied. I therefore dismiss the appeal.