

THE HIGH COURT
STATE SIDE

1986 No. 262 S.S.

BETWEEN:

THE STATE (AT THE PROSECUTION OF
THE DUBLIN CORPORATION)

Prosecutor

and

THE EMPLOYMENT APPEALS TRIBUNAL
AND LAURENCE MOONEY

Respondents

Judgment of Gannon J. delivered the 20th of October, 1986.

On the 14th of April, 1986, upon the application of the prosecutor the Dublin Corporation MacKenzie J. granted an Order of Prohibition unless cause to the contrary be shown within the prescribed time restraining the Employment Appeals Tribunal from proceeding with the hearing of a claim by Laurence Mooney for relief under the Unfair Dismissals Act 1977. The grounds for such Order are stated therein to be those set out in paragraph eighteen of an affidavit of William Soffe an officer of the Dublin Corporation which was sworn on the 9th of April, 1986. That paragraph reads as follows:

"18. I say and believe that in coming to the conclusion which it did to the effect that it was entitled to proceed to determine the claim brought by the second named respondent, the first named respondent misdirected itself in law and acted in excess of jurisdiction in holding

(a) that the second named respondent had not debarred himself from relief under the

Unfair Dismissals Act 1977 by the institution of the High Court proceedings of 5th December, 1985.

- (b) In ruling that it was entitled to in effect disregard the relief sought at paragraph th of the Plenary Summons of the 5th December, 1985 notwithstanding the admissions made by the second named respondent that nothing contained in the proceedings in any way conflicted with or breached the instruction which he gave to his legal advisers."

It should be noted that in paragraph nineteen of that affidavit the deponent on behalf of the Dublin Corporation further says:

"I say and believe that by deciding to continue to hear the substantive claim of the second named respondent against the prosecutors the first named respondent is acting in excess of jurisdiction having regard to the terms of Section 15 (3) of the Unfair Dismissals Act 1977"

Section 15 of the Unfair Dismissals Act 1977 provides at subsection (1) that nothing in the Act apart from that section should prejudice the right of a person to recover damages at common law for wrongful dismissal. At subsection (3) of Section 15 it is enacted as follows:-

"When proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee, the employee shall not be entitled to redress under this Act in respect of the dismissal to which the proceedings relate."

By affidavit of Teresa Regan, Secretary of the Employment Appeals Tribunal, and an affidavit of Laurence Mooney both

respondents show cause, and the Dublin Corporation now moves this Court to make absolute the Conditional Order notwithstanding cause shown.

Such differences as may appear from the several affidavits grounding the Conditional Order and showing cause are not of any significance, and no material dispute of fact arises. The respondent Laurence Mooney is a fireman who was employed by the Dublin Corporation and was dismissed from his employment on the grounds of alleged misconduct. His Trade Union engaged a solicitor on his behalf and on behalf of some fellow employees A Plenary Summons was issued by the solicitor having a general endorsement settled by counsel in the following terms:

"The plaintiff's claim is for:

- (a) a declaration that the plaintiffs and each of them have not validly been removed or dismissed from their offices or employments as firemen under the defendants a local fire authority;
- (b) an injunction restraining the defendants by themselves their officers servants or agents or otherwise howsoever from dismissing the plaintiffs or either of them from their offices or employments as firemen pursuant to an Order of the Dublin City Manager dated the 5th day of November, 1985.
- (c) Damages for breach of contract.
- (d) Further or other relief.
- (e) Costs."

The date of issue on the Plenary Summons is the 5th December, 1985. On the same date an unsuccessful application was made to the High Court for an Interim Order pending the service of a motion for an Interlocutory Order for relief as claimed in paragraph (b)

of the Plenary Summons. A claim made on the 14th of December, 1985, for an Interlocutory Order for such relief pending the trial of the action was refused by the High Court. On the 29th of January, 1986, a Statement of Claim was delivered in the action with reference to which a request for particulars was furnished by notice of the 19th of February, 1986 and the Dublin Corporation served their defence to the claim on the 10th of March, 1986. I have not seen these pleadings.

Whatever dissatisfaction the Corporation had with Laurence Mooney as an employee resulted in the dismissal of Laurence Mooney and others. A notice of appeal to the Employment Appeals Tribunal under the Unfair Dismissals Act 1977 was signed by Laurence Mooney on the 6th of February, 1986 at panel eleven thereon. The copy of that notice exhibited shows that Laurence Mooney received a dismissal notice on the 4th of December, 1985, and his employment ended on the 6th of December, 1985 (panel six). The redress sought by him is reinstatement (panel ten) and the grounds upon which he bases his application is stated in panel nine as "Misconduct does not justify dismissal". Panel one in which the statute invoked is indicated by Mr. Mooney on this form has a note "(see overleaf after the words "Unfair Dismissals Act 1977" being the statute indicated by Laurence Mooney. Overleaf under a heading referring to the Unfair Dismissals Act the person submitting the form is required to reply yes or no to the enquiry:

"Have you sued your employer under common law procedures in the matter of your claim on unfair dismissal?"

Laurence Mooney left this panel for reply blank.

Notification dated the 17th of February, 1985, of the appeal

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Laurence Mooney to the Employment Appeals Tribunal was given to the Dublin Corporation on the 19th of February 1985.

In compliance with the prescribed procedures Dublin Corporation furnished to the Employment Appeals Tribunal notice of appearance setting out matters in issue. They are stated as follows:

- "1. The appellant is not entitled to pursue this appeal having regard to the High Court proceedings bearing reference number 1985 No. 10203p which he initiated against Dublin Corporation on the 5th December, 1985.
2. Without prejudice to (1) supra the appellant's dismissal was not unfair because it resulted from grave and serious misconduct on his part. Full compliance was had with the rules of natural and constitutional justice in relation to procedures adopted and the appellant was at all material times represented by his Trade Union officials at hearings prior to dismissal.
3. There were good and substantial reasons for the appellant's dismissal."

When the appeal came before the Employment Appeals Tribunal on the 4th of April, 1986, Counsel for the Dublin Corporation addressed the Tribunal on the preliminary point as to their jurisdiction under the Unfair Dismissals Act having regard to Section 15 (3) of that Act which I have already quoted. The pleadings in the High Court action were opened to the Tribunal w. had before them the notice of appeal by Laurence Mooney which initiated the proceedings before them. In support of this preliminary objection on the issue of the jurisdiction of the Employment Appeals Tribunal to embark on a hearing of the appeal by Laurence Mooney the relevant dates were demonstrated

from the documents. It was argued that as the only breach of contract for which damages was claimed was the dismissal such relief could be obtained only if it was proved that the dismissal was wrongful and consequently proceedings for damages at common law for wrongful dismissal had been instituted before the notice of appeal to the Tribunal under the 1977 Act. The judgments of the Supreme Court in the State (Ferris) .v. Employment Appeals Tribunal 10th December 1977 were opened and discussed. The submission made to the Employment Appeals Tribunal on behalf of Laurence Mooney at that stage, according to the affidavit of the Secretary to the Tribunal was:

"That the sole purpose of initiating the High Court proceedings was to prevent the dismissal of Mr. Mooney and did not include a claim for wrongful dismissal and that therefore Mr. Mooney was not precluded from bringing a claim under the terms of the Unfair Dismissals Act of 1977."

Mr. Soffe for the Dublin Corporation put it thus in his affidavit at paragraph eleven:

"For the second named respondent it was alleged on his behalf that the High Court proceedings had been initiated on his behalf only with a view to seeking an injunction to restrain his dismissal taking effect and that once that had not been successful, he had no further interest in the High Court action. It was contended on his behalf that he knew nothing of the later developments in the High Court proceedings and felt that they were over."

Up to this point the Tribunal had heard no oral evidence, and the submissions as to the application of Section 15 (3) of the 1977 Act were founded upon the evidence afforded by inspection of the documents by which the proceedings before the Tribunal and in the High Court had been initiated.

The members of the Tribunal retired to consider the judgments of the Supreme Court in The State (Ferris) .v. The Employment Appeals Tribunal with reference to Section 15 (3) of the Unfair Dismissals Act 1977. Before giving a ruling on the application of the Dublin Corporation the Tribunal resumed the hearing for the purpose only of having oral evidence as appeared to them to be required by the judgment of the Supreme Court in The State (Ferris).v. The Employment Appeals Tribunal. The only evidence offered was that of Laurence Moone who in his affidavit on this present motion does not attempt to recall nor to restate the evidence given by him to the Tribunal. The oral evidence heard by the Tribunal on the preliminary issue of jurisdiction as given by Laurence Mooney is recounted in the affidavit of William Soffe as follows:

"...the proceedings of the 5th December, 1985, were issued on his instructions by his solicitor but that his object in so doing was to obtain an injunction to prevent the prosecutors from sacking him. He indicated that that was his objective and that when that proved unsuccessful he did not give any further instructions for action to be taken in the High Court on his behalf and he indicated that he was unaware of the delivery of subsequent pleading in the High Court action. He also indicated that he was not interested in claiming money compensation either in

the High Court or before the Tribunal but wished to get his job back."

In paragraph fourteen of that affidavit William Soffe further states in relation to the evidence of Laurence Mooney as follows:

"He disclosed that he had had a meeting with solicitor and counsel prior to the institution of the High Court proceedings and the applications for the injunctions being sought. He admitted that he swore the affidavit grounding the application for the interim injunction. He said that he did not know very much about the legal technicalities involved in the injunction claim. He admitted under cross-examination that he did not instruct his solicitors that they were not to bring a claim for damages in the High Court and he furthermore admitted that the action as instituted by his legal advisers was done on his instructions. He furthermore admitted that nothing which was contained in the Plenary Summons in any way breached or ran counter to any instructions which he had given his legal advisers. He had left it to them to formulate his claim."

The affidavit of Miss Regan, Secretary to the Employment Appeals Tribunal, on this present motion adopts that statement of Laurence Mooney's evidence to the Tribunal on the preliminary issue.

The ruling of the Employment Appeals Tribunal on this preliminary issue was given after further consideration of the evidence of Laurence Mooney and of the Supreme Court decision in The State (Ferris) .v. Employment Appeals Tribunal. It appears from paragraph sixteen of the affidavit of William Soffe that the Tribunal disclosed in the course of the preliminary

ruling that it had received, after the Corporation had notified their appearance, and considered a letter from the Trade Union representing Laurence Mooney which was not seen by nor opened to the Dublin Corporation. By that letter the Trade Union informed the Employment Appeals Tribunal that Laurence Mooney "was not proceeding with the High Court action".

I accept that in setting out, as he does, in his affidavit his recollection of the ruling delivered by the Chairman of the Employment Appeals Tribunal Mr. Soffe gives in indirect speech to the best of his recollection the content and meaning of what was said. But I do not consider that I am bound to accept that account as so completely and exclusively accurate as to be the subject of construction for its meaning. I have no doubt that the Employment Appeals Tribunal found that the purpose Laurence Mooney had had in instituting the High Court proceedings was to prevent his dismissal, and that it was their view that he wanted action on the spot to prevent his dismissal and so brought proceedings in the High Court for an injunction. But it seems to me from their references to the evidence of Laurence Mooney about his dealings with his solicitors that the Employment Appeals Tribunal found as fact that the words "damages for breach of contract" in the Plenary Summons did not and were not intended to include nor mean a claim for damages for wrongful dismissal. In so doing the Employment Appeals Tribunal endeavoured to, and believed it did, conform to the requirements expressed in the judgments of the Supreme Court in The State (Ferris) .v. Employment Appeals Tribunal.

Upon this application for an absolute Order of Prohibition Mr. Kelly on behalf of the Dublin Corporation submits that

the only finding of fact made by the Tribunal is as stated in paragraph nine of the affidavit of their Secretary, Miss Regan, and is not a fact indicated by the Supreme Court nor required by the Unfair Dismissals Act of 1977. In that paragraph Miss Regan says:

"The chairman stated that the Tribunal had carried out an inquiry in accordance with the principles set out in the Ferris case and found that the second named respondent's purpose in initiating the High Court proceedings was to prevent his dismissal."

However, in the following paragraph of her affidavit Miss Regan expressly adopts the statements in the affidavit of William Soffe for the Dublin Corporation of the "rulings of the Tribunal and the reasons given by the said rulings". These do not support Mr. Kelly's argument for a restricted record or construction of the ruling of the Employment Appeals Tribunal. In support of the application to make absolute the Conditional Order of Prohibition Mr. Kelly also argued that the only facts material to the requirements of Section 15(3) of the Unfair Dismissals Act 1977 are to be found in the Court and the official documents, namely, the dates which show that the High Court proceedings had been commenced before the appeal to the Employment Appeals Tribunal was initiated and after the notice of dismissal. He contended that upon the plain meaning and true construction of Section 15(3) once proceedings for wrongful dismissal have been initiated the plaintiff cannot retract, nor, by abandoning them, proceed for relief under the Unfair Dismissals Act 1977. The Plaintiff's purpose in commencing the High Court proceedings, he argued, is not relevant, the only material fact being whether or not proceedings for the particular relief were, as a matter

of election, initiated and the jurisdiction of the High Court invoked.

Section 15 is expressed in subsection (1) in a negative form from which it appears that the purpose of the section is to prevent an abuse of the Court process and to avoid any attempt to oust the jurisdiction of the Courts established under the Constitution. It seems to me that the evidence as to the purpose of the High Court proceedings initiated in this matter and the intentions of Laurence Mooney was considered by the Tribunal to enable it to resolve a doubt as to what sort of relief was being claimed under the description "damages for breach of contracts". Because the words used in the claim before the High Court did not correspond with those used in Section 15(3) of the Unfair Dismissals Act 1977 the Employment Appeals Tribunal had a doubt. That doubt was resolved by the Tribunal by construing the claim for damages for breach of contract as not including damages at common law for wrongful dismissal. Upon such construction the priority as between the High Court Plenary Summons and the notice of appeal to the Employment Appeals Tribunal as a matter of a point of time for the purpose of Section 15(3) of the Unfair Dismissals Act 1977 is not a material matter.

The argument of Ms. Clissman on behalf of the Employment Appeals Tribunal showing cause was to a large extent founded upon the assumption that Laurence Mooney had not been dismissed at the time the Plenary Summons was issued. The notice of appeal to the Employment Appeals Tribunal signed by Laurence Mooney shows otherwise as does the evidence given to the Tribunal. The determination of the Tribunal that the claim in the Plenary Summons for damages for breach of contract is not a claim for damages for wrongful dismissal makes it unnecessary further to

consider that argument. Ms. Clissman submitted in support of the determination of the Tribunal that a claim for damages for breach of contract is not necessarily a claim for damages for wrongful dismissal and she gave instances in support of this argument. For that reason she argued the true nature of the claim was a matter of doubt to resolve which the Tribunal correctly heard the oral evidence of Laurence Mooney, the Plaintiff in the High Court action, to enable it to make the finding of fact indicated in the judgments of the Supreme Court in the State (Ferris) .v. Employment Appeals Tribunal. The Tribunal correctly inquired, she submitted, into the facts leading to and the circumstances relating to the issuing of the High Court proceedings and the further course of action of Laurence Mooney in seeking a remedy. The inference drawn by the Tribunal from the evidence heard and considered as to the ambit of the claim by Laurence Mooney for damages for breach of contract is that it does not involve a claim for damages for wrongful dismissal. Such a determination by the Employment Appeals Tribunal, Ms. Clissman submitted, is within their jurisdiction as conferred upon them by the Unfair Dismissals Act of 1977.

In his affidavit to show cause Laurence Mooney at paragraph 4 of his affidavit swears as follows:

"I say that it was at all times my instructions to my solicitors in the said proceedings that my objective was either to establish that my employment had not validly been determined or alternatively if it had to obtain an order reinstating me. At no time did I instruct my solicitors to seek compensation by way of damages for wrongful dismissal. Indeed, I say that I was advised at the outset that I could not lawfully bring concurrent proceedings in the High Court for damages for wrongful dismissal and in the E.A.T. for compensation

and/or reinstatement."

At paragraph 6 of his affidavit Laurence Mooney swears as follows

"I say that having regard to my instructions, my legal advisers in drafting the Statement of Claim hereinbefore referred to did not think it proper or worthwhile to proceed with any claim for damages and did not in fact do so.

In the premises, I say that the only issue which is now before this Honourable Court in the said proceedings is whether or not my employment has validly been determined."

In his affidavit Laurence Mooney does not put before the Court any evidence of facts relating to the issue which the Tribunal had to resolve upon the objection to jurisdiction raised by the Corporation in these present proceedings. In this he is correct as he is bound by the determination of the Tribunal upon such issues and the evidence given to them, and the instant application is not an appeal from such determination.

Upon an application such as this it is not the function of this Court to investigate, as if at first instance, the truth or credibility of the evidence before the Tribunal. For the purpose of this application it is sufficient that in showing cause the Tribunal enables the Court to be satisfied that it properly inquired into the issue raised as to its jurisdiction and set about the resolution of the doubt encountered in a just and regular manner and in accordance with law. On this application this Court must also be satisfied that the Tribunal had before it evidence capable of supporting, and upon which it could reasonably arrive at, the determination in fact made. It is not necessary nor appropriate for this Court to consider whether this or another Court might have arrived at, or in the event of an appeal may arrive at, a different conclusion upon the evidence disclosed.

In the light of the evidence of Laurence Mooney as given by him to the Tribunal and as presented on oath by his affidavit to this Court it seems to me that justice would best be served by allowing cause shown. In the pending proceedings in the High Court Laurence Mooney will be bound by his sworn testimony in these proceedings. In the proceedings before the Tribunal his evidence given in this Court and in the further High Court proceedings will be available to assist the Tribunal in assessing the evidence presented to them.

I am of opinion therefore that cause shown should be allowed and the Conditional Order discharged and thus permit the Tribunal to proceed with the hearing before them of the remaining two issues raised in paragraphs two and three of the notice of appeal delivered by the Dublin Corporation. I am further of opinion that although the effect of making absolute the Conditional Order obtained would have been similar to that of an Order of Certiorari it does not follow that the discharge of the Order of Prohibition would deprive either party of a right of appeal from the ultimate decision of the Tribunal after its resumed hearing or of a right to apply for an Order of Certiorari if appropriate at that final stage.

S.G.
16/10/86