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THE HIGH COURT

[2015 No. 76 MCA]

IN THE MATTER OF THE PAYMENT OF WAGES ACT 1991

BETWEEN

DEVIDAS PETKUS, ROMAS PUSVASKIS, ZYDRUNAS ZUKAS, SALUIUS MATULEVICIUS, TADIS DERKANTIS, RAMUNAS NARBUTAS, LAIMONAS SEMETULSKIS, DRAGOS AIONITAOEI, ROLANDAS KAZDAILIS, DARIUS MARTANKUS, ARTUAS GRUNDAI, MINDAUGHAS MILASIUS, SERGIU NOHAI, DUMITRU VATAMANU, MAZVYDAS CEPLIAUSKAS, NERIGUS RAGUCKAS, DEIVIS BALAKAUSKAS, VILIUS CLAUAS, EVALDAS SEAVZEVICIUS, MACIEJ STEGILINSKI AND DARIUS PETKUS

APPELLANTS

AND

COMPLETE HIGHWAY CARE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 20th of January, 2017

1. This is a statutory appeal pursuant to the provisions of the Payment of Wages Act 1991, and O. 84C of the Rules of the Superior Courts.

2. By order of this Court of 19th October, 2015, time was extended to allow the applicants to appeal by way of statutory appeal.

3. A motion was issued on 27th October, 2015, originally returnable for 23rd November, 2015. The motion was grounded on the affidavit of Kieran O'Brien, Solicitor, together with exhibits. A director of the respondent company, Barry Ennis, swore an affidavit on 12th January, 2016, together with exhibits and Mr. O'Brien

swore a further affidavit on 5th July, 2016. The matter was heard before this Court on 6th July, 2016, in Kilkenny and judgment was reserved.

4. The applicants seek to set aside the determination of the Employment Appeals Tribunal of 13th January, 2015, on the following legal grounds:-

(a) the Employment Appeals Tribunal fell into an error of law in its analysis and application of the evidence to the relevant law;

(b) that the Employment Appeals Tribunal fell into an error of law in making unsustainable findings of fact and/or findings of fact for which there was no supporting evidence;

(c) that the Employment Appeals Tribunal fell into an error of law in failing to appropriate differentiate between a reduction and a deduction;

(d) that the Employment Appeals Tribunal fell into an error of law in finding that the respondent's 10% adjustment to the appellants' pay was a reduction;

(e) that the Employment Appeals Tribunal fell into an error of law in finding that the respondent's 10% adjustment to the appellants' pay was a reduction and that the Act does not apply to a reduction;

(f) that the Employment Appeals Tribunal fell into an error of law in failing to find that the respondent's 10% adjustment to the appellants' pay was not a deduction;

(g) that the Employment Appeals Tribunal fell into an error of law in failing to find that the respondent's 10% adjustment to the appellants' pay was not a deduction and consequently finding that the Act did not apply;

(h) that the Employment Appeals Tribunal fell into an error of law in failing to consider the entirety of the circumstances of the matter and failed to properly consider or apply the correct interpretation and intention of legislation protecting the payment of wages of workers under the Act and the Constitution; and

(i) that the Employment Appeals Tribunal fell into an error in law in setting aside that decisions of the Rights Commissioners and each of the appellants' cases.

History of the Dispute

5. The appellants were all employees of the respondent at the relevant time. The employees allege that the respondent unlawfully deducted 10% from their wages and withdrew a bonus. The employer claimed that due to very difficult economic trading conditions for the respondent that a reduction in wages took place. This commenced in 2009 and that the bonuses were dispensed with in 2010. The appellants made a claim to the Rights Commissioner Service of the Labour Relations Commission covering a period from March 2011 to September 2011.

6. The Rights Commissioner by decision of 30th April, 2013, decided that there was a breach of s. 5 of the Payment of Wages Act 1991, in that the 10% deduction in their pay was illegal.

7. The Rights Commissioner found that there was no illegal deduction with regard to the bonus and this portion of the claim failed.

8. The respondent appealed to the Employment Appeals Tribunal and the Tribunal in its decision of 13th January, 2005, stated:-

"The Tribunal recognises the inherent difficulty in differentiating a reduction from a deduction. A deduction or reduction of 10%, as in this case, has

different implication on the respondent's statutory liabilities. A deduction of 10% would not alter the respondent's statutory liabilities i.e. PRSI, USC, PAYE. However, a reduction does alter their statutory liabilities. It is clear from the payslips exhibited, the respondent's statutory liabilities were altered and, therefore, the Tribunal can only conclude that the 10% adjustment was a reduction. The Act does not apply to a reduction. On that basis, the Tribunal upsets the decisions of the Rights Commissioner under the Payment of Wages Act 1991, cancel the awards made to the respondents."

9. The High Court judgment in *McKenzie & Anor v. Minister for Finance & Ors* (Edwards J., 30th November, 2010) [2010] IEHC 461, was relied on by the respondent at the Rights Commissioner hearing. The Rights Commissioner, in his decision, took the view that this case concerned expenses and, therefore, it did not refer to wages properly payable as defined in the Payment of Wages Act and thus, did not rely on that judgment.

10. In the relevant contract of employment governing the relationship between the appellants and the respondent, there is no specific reference to the right to deduct wages except at para. 20 where it states "changes to terms of employment, the company reserves the right to make reasonable changes to any of your terms and conditions of employment set out in this contract description and should this occur you will be notified in advance in writing of the nature and date of the change subject to consultation."

The Law

11. Section 5 of the Payment of Wages Act 1991, states:-

"(1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—

(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.

(2) An employer shall not make a deduction from the wages of an employee in respect of—

(a) any act or omission of the employee, or

(b) any goods or services supplied to or provided for the employee by the employer the supply or provision of which is necessary to the employment,

unless—

(i) the deduction is required or authorised to be made by virtue of a term (whether express or implied and, if express, whether oral or in writing) of the contract of employment made between the employer and the employee, and

(ii) the deduction is of an amount that is fair and reasonable having regard to all the circumstances (including the amount of the wages of the employee), and

(iii) before the time of the act or omission or the provision of the goods or services, the employee has been furnished with—

(I) in case the term referred to in subparagraph (i) is in writing, a copy thereof,

(II) I n any other case, notice in writing of the existence and effect of the term,

and

(iv) in case the deduction is in respect of an act or omission of the employee, the employee has been furnished, at least one week before the making of the deduction, with particulars in writing of the act or omission and the amount of the deduction, and

(v) in case the deduction is in respect of compensation for loss or damage sustained by the employer as a result of an act or omission of the employee, the deduction is of an amount not exceeding the amount of the loss or the cost of the damage, and

(vi) in case the deduction is in respect of goods or services supplied or provided as aforesaid, the deduction is of an amount not exceeding the cost to the employer of the goods or services, and

(vii) the deduction or, if the total amount payable to the employer by the employee in respect of the act or omission or the goods or services is to be so paid by

means of more than one deduction from the wages of the employee, the first such deduction is made not later than 6 months after the act or omission becomes known to the employer or, as the case may be, after the provision of the goods or services.

(3)

(a) An employer shall not receive a payment from an employee in respect of a matter referred to in subsection (2) unless, if the payment were a deduction, it would comply with that subsection.

(b) Where an employer receives a payment in accordance with paragraph (a) he shall forthwith give a receipt for the payment to the employee.

(4) A term of a contract of employment or other agreement whereby goods or services are supplied to or provided for an employee by an employer in consideration of the making of a deduction by the employer from the wages of the employee or the making of a payment to the employer by the employee shall not be enforceable by the employer unless the supply or provision and the deduction or payment complies with subsection (2).

(5) Nothing in this section applies to—

(a) a deduction made by an employer from the wages of an employee, or any payment received from an employee by an employer, where—

(i) the purpose of the deduction or payment is the reimbursement of the employer in respect of—

(I) any overpayment of wages, or

(II) any overpayment in respect of expenses incurred by the employee in carrying out his employment,

made (for any reason) by the employer to the employee, and

(ii) the amount of the deduction or payment does not exceed the amount of the overpayment,

or

(b) a deduction made by an employer from the wages of an employee, or any payment received from an employee by an employer, in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision, or

(c) a deduction made by an employer from the wages of an employee in pursuance of a requirement imposed on the employer by virtue of any statutory provision to deduct and pay to a public authority, being a Minister of the Government, the Revenue Commissioners or a local authority for the purposes of the Local Government Act, 1941 , amounts determined by that authority as being due to it from the employee, if the deduction is made in accordance with the relevant determination of that authority, or

(d) a deduction made by an employer from the wages of an employee in pursuance of any arrangements—

(i) which are in accordance with a term of a contract made between the employer and the employee to whose inclusion in the contract the employee has given his prior consent in writing, or

(ii) to which the employee has otherwise given his prior consent in writing,

and under which the employer deducts and pays to a third person amounts, being amounts in relation to which he has received a notice in writing from that person stating that they are amounts due to him from the employee, if the deduction is made in accordance with the notice and the amount thereof is paid to the third person not later than the date on which it is required by the notice to be so paid, or

(e) a deduction made by an employer from the wages of an employee, or any payment received from an employee by his employer, where the employee has taken part in a strike or other industrial action and the deduction is made or the payment has been required by the employer on account of the employee's having taken part in that strike or other industrial action, or

(f) a deduction made by an employer from the wages of an employee with his prior consent in writing, or any payment received from an employee by an employer, where the purpose

of the deduction or payment is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of any amount by the employee to the employer, or

(g) a deduction made by an employer from the wages of an employee where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of any amount by the employer to the court or tribunal or a third party out of the wages of the employee.

(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."

12. The court accepts the well established principle in relation to an appeal on a point of law that the Superior Courts have repeatedly applied a consistent significant

curial deference which is summarised by Hamilton C.J. in *Henry Denning & Sons Ireland Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, stating:-

> "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."

13. In the same case, Keane J. citing with approval the comments of Carroll J. in the High Court, stated:-

> "In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law."

14. In the same judgment, Keane J. cited the decision of Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 ILRM 421, when he stated:-

> "If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his 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."

15. There seems to have been some confusion about the relevance of the *McKenzie* judgment. At para. 5.8, of his judgment Edwards J. stated:-

"Finally, the Court agrees with the respondents' submission that the Payment of Wages Act, 1991 has no application in the circumstances of this case. First, as has been pointed out, correctly in the Court's view, 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'. Secondly, even if that were not so, any alleged breach of the Payment of Wages Act, 1991 is not a justiciable controversy before the High Court in circumstances where that Act sets up a specific enforcement mechanism to be availed of elsewhere in such circumstances."

16. This judgment was considered in a further judgment of the President of the High Court in *Earagail Eisc Teoranta v. Doherty & Ors* [2015] IEHC 347, the then Kearns P. stated:-

"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."

17. At the hearing before the Employment Appeals Tribunal, the appellants' representatives SIPTU made a detailed supplementary submission on the effect of the *McKenzie* case and submitted that Case No. PW86-W87/211, *Bessborough Centre Limited v. Long & Ors* decision of 13th April, 2013, had been wrongly decided because of an incorrect interpretation of the *McKenzie* case.

18. This Court can see no reference in the papers placed before the Employment Appeals Tribunal of any argument in relation to statutory liabilities of PRSI, USC and PAYE which was a reason for the Tribunal's differentiation between deduction and reduction.

19. The determination of the EAT is silent on the McKenzie case although the supplementary submissions of the appellants specifically address same. The decision of the Rights Commissioner's was detailed and rejected it as a precedent.

20. The determination did not summarise the evidence adduced by the appellants and the respondent, and did not comprehensively and concisely deal with any issues as to fact, nor did not summarise the legal materials put forward by either party.

21. The entire decision of the Rights Commissioner was under appeal including the failure of the Rights Commissioner to find in favour of the appellants that a bonus

was improperly withheld and came within the parameters of Section 5 of the Payment of Wages Act 1991. This was not addressed in the Tribunal decision.

22. The Tribunal did explain this differentiation between a reduction and a deduction. It seems to have followed the obiter comment of Edwards J in *McKenzie*, but did not set out any of the legal arguments on how it came to differentiate the legal arguments and make its decision.

23. Unfortunately, the McKenzie case has caused particular confusion to the determinations of Employment Appeals Tribunal and Rights Commissioners on the issue of Section 5 of the Payment of Wages Act 1991. This is clear from a number of decisions which have been furnished to the court as follows:-

(i) *Bessborough Centre Limited v. Long*, Case No. PW86-W87/2011, a decision of the Employment Appeals Tribunal on appeal from the Rights Commissioner decision. The Employment Appeals Tribunal determination is dated 11th April, 2013;

(ii) Santry Sports Injury Clinic and Padden and Ors Pw 251/255/2011 EAT 16th July 2013.

(iii) *Hog Heaven Limited v. O'Gorman*, Case No. PW774/2012, a determination of the EAT on 3rd March, 2014, on appeal from the Rights Commissioner;

(iv) *Hamilton v. Earagail Eisc Teoranta*, a decision a Rights Commissioner of 17th May, 2016. (r-15937-pw-15/SR.)

(v) *InisBofin Community Services Programme Company Limited v. Burke*, Case No. PWD1614, which is an appeal of an adjudication officer's decision. This determination was issued on 18th May, 2016.

24. The EAT determination the subject of this statutory appeal in the opinion of this Court, falls a long way short of the standard this Court would expect in detailing the arguments that have been made and giving reasons, and explaining its decision.

25. I do not accept that the determination of the tribunal, that there was a reduction of wages as distinct from a deduction, is a pure question of fact. It is a mixed question of law and fact. The basis of the conclusion was that a reduction as distinct from a deduction altered the Respondents statutory liabilities. Because an Employer arbitrarily reduces the wages of an employee, without the consent of the employee, and alters the amount of PAYE, PRSI, and USC accordingly does not necessarily remove the reduction from the jurisdiction of the Payment of Wages act 1991, entitling the Employer to ignore it's provisions.

26. It is not a matter for this Court to decide the substantive issue, but for the relevant decision making body set up under the Payment of Wages Act 1991 if a reduction is allowed at all pursuant to the provisions of s. 5 of the Payment of Wages Act 1991, without the consent of an employee. It is unfortunate that an obiter sentence in a judgment of this Court which did not relate to the payment of wages at all and which was put into practice by way of statutory instrument has caused such confusion.

27. The judgment of Kearns P. in *Earagail Eisc Teoranta v. Doherty* of 5th June, 2015, has clarified that issue. The *McKenzie* case is not precedent to allow a reduction of wages which does not offend s. 5 of the Payment of Wages Act 1991.

28. The court is satisfied that the appellants are entitled to succeed in relation to para. (h) of their notice of motion, that is that the Employment Appeals Tribunal fell into an error of law in failing to consider the entirety of the circumstances of the matter and failed to properly consider or apply the correct interpretation and intention

of that legislation protecting the payment of wages of workers under the Act and the Constitution.

29. It is, therefore, appropriate to allow the appeal and remit the matter back to the Employment Appeals Tribunal for further determination.