STATE (JOHN)

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THE HIGH COURT

1983 No. 456 S.S.

BETWEEN:

THE STATE AT THE PROSECUTION OF HYWEL T. JOHN

PROSECUTOR

AND

THE EMPLOYMENT APPEALS TRIBUNAL AND INBUCON MANAGEMENT CONSULTANTS LIMITED AND INBUCON MANAGEMENT CONSULTANTS (IRELAND) LIMITED

RESPONDENTS

Judgment of Mr. Justice Murphy delivered the day of January, 1984

The prosecutor, Mr. Hywel T. John, was employed by the respondents or one or other of them prior to the 9th day of April, 1981 as from which date he was dismissed. By notice dated the 7th day of October, 1981 addressed o "Rights Commissioner" and entitled "Unfair Dismissals Claim" the prosecutor complained that he had been unfairly dismissed. In that notice the prosecutor described both of the respondents as his employer. As I understand the affidavits sworn in the matter the prosecutor in fact accepts that it was the secondly named respondent, that is to say, Inbucon Management Consultants Limited, who were his employer and not the thirdly named respondents Inbucon Management Consultants (Ireland) Limited.

There is a significant conflict of fact between the prosecutor and the secondly and thirdly named respondents as to when and on whom the claim for

redress was served. In paragraph 8 of his affidavit the prosecutor avers as follows:-

"I am informed by my solicitor and believe that the said notice was served on the Rights Commissioner and on the respondent company on Friday the 9th October, 1981".

Mr. Liam MacHale in his affidavit on behalf of the respondent companies at paragraph 6 stated as follows:-

"I am instructed that on or about the 16th day of October, 1981 a claim form to the Rights Commissioner dated the 7th day of October, 1981 was received by the third named respondent Inbucon Management Consultants (Ireland) Limited".

Apart from any other infirmities in the prosecutor's case it is, therefore, contended that he failed to serve either respondent company within time and the employer respondent at all. It is not either necessary or indeed possible to resolve those issues for the purposes of the present proceedings and it must be understood that a decision herein does not imply any finding in relation to those issues.

In any event it does appear that by letter dated the 19th October, 1981 an officer of the Department of Labour wrote to Inbucon Management Consultants (Ireland) Limited referring to the notice seeking redress and

inviting that company to indicate within fourteen days whether they wished to object to the case being dealt with by a Rights Commissioner. The addressee company raised no such objection.

By letter dated the 11th June, 1982 the solicitors on behalf of the prosecutor informed the Secretary of the Employment Appeals Tribunal as follows:-

"Mr. John had originally appealed to the Rights Commissioner, a copy of the appeal form is enclosed, but now had formally objected to the hearing of the matter by the Rights Commissioner and wishes the matter to be heard by the Tribunal".

There was a notice of appeal enclosed with that letter consisting of a completed form R.P.51A. The question contained in Part 2 of that form in the terms "do you object to a claim of unfair dismisal being heard by a Rights Commissioner" is answered in the affirmative. The notice of appeal itself bears the date the 7th October, 1981 but clearly it was not served at any time prior to the 11th June, 1982.

The prosecutor had, however, through his solicitors written to the Right Commissioner on the 27th May, 1982 stating that he objected to the hearing of the matter by the Rights Commissioner.

The matter came before the Employment Appeals Tribunal on the 3rd day of

May, 1983 and the Tribunal, having reviewed the facts under the provisions of Section 8 of the Unfair Dismissals Act 1977 expressed its conclusion in the following terms:-

"In our view, Section 8 gives a claimant an election as between a Rights Commissioner and the Tribunal. It seems to us that Section 8 (2) provides that such election must be made within six months of the date of dismissal, but the present case was not referred to us until fourteen months after that date. We therefore have no jurisdiction to hear the claim".

From that decision the prosecutor appealed to the Circuit Court and after the matter had been mentioned before the Circuit Court Judge the prosecutor applied for and obtained on the 26th July, 1983 a Conditional Order of Mandamu directed to the Employment Appeals Tribunal to make a determination in relation to the prosecutor's claim. The first named respondent purported to show cause by notice dated the 14th September, 1983 and the other respondents on whom the order was served filed an affidavit herein on the 1st September, 1983.

The relevant provisions of the Unfair Dismissals Act 1977 are comprised in Section 8 of that Act. The material sub-sections of that section are as follows:-

(I) A claim by an employee against an employer for redress under this Act for unfair dismissal may be brought by the employee before a Rights Commissioner or The Tribunal and the Commissioner or Tribunal shall hear the parties and any evidence relevant to the claim tendered by them and, in the case of a Rights Commissioner shall make a recommendation in relation to the claim, and, in the case of the Tribunal, shall make a determination in relation to the claim.

(II) A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under Section 17 of this Act made for the purposes of sub-section 8 of this section) to a Rights Commissioner or the Tribunal, as the case may be, within six months of the date of the relevant dismissal and a copy of the notice shall be given to the employer concerned within the same period.

(III) A Rights Commissioner shall not hear a claim for redress under this Act if:-

(a) the Tribunal has made a determination in relation to the claim, or

(b) Any party concerned notifies the Commissioner in writing that he objects to the claim being heard by a Rights Commissioner.

(V) Subject to sub-section (4) of this Section, the Tribunal shall not hear a claim for redress under this Act (except by way of appeal from a recommendation of a Rights Commissioner):-

(a) If a Rights Commissioner has made a recommendation in relation to the claim, or

(b) Unless one of the parties concerned notifies a Rights Commissioner in writing that he objects to the claim being heard by a Rights Commissioner."

Sub-sections 1 and 2 of Section 8 aforesaid read alone might appear to indicate that the claiming employee has an unfettered discretion as to whether he would elect to bring his claim before a Rights Commissioner seeking a recommendation in relation to the claim or the Tribunal seeking a determination in relation to the claim. The only qualification imposed by those sub-sections is that the claim should be initiated by giving notice in writing to a Rights Commissioner or the Tribunal "as the case may be" within the period limited by the Statute. The inclusion of the words "as the case may be " would seem to suggest that the initiating notice is to be given to

the Rights Commissioner or the Tribunal depending upon the choice made by the employee in the first instance as to the forum for dealing with his clai

However sub-sections 3 and 5 quoted above make it clear that a claim cannot be initiated before the Tribunal unless one of the parties concerned notifies a Rights Commissioner in writing that he objects to the claim being heard by a Rights Commissioner.

One of the grounds relied upon by the Employment Appeals Tribunal in their notice showing cause was the contention that a claimant who refers his claim to a Rights Commissioner is deemed to have made an election in favour of that procedure and cannot subsequently (even within and less still without the statutory period of six months from the date of the relevant dismissal) seek instead a determination by the Tribunal. Alternatively it is argued, and indeed the Tribunal have held, that the claimant must make his election to have his case determined by the Tribunal within six months from the date of the dismissal and as that was not done in the present case that they had no jurisdiction to hear the claim.

It was indeed common case that the employee could choose or elect as o whether his claim would be heard by the Rights Commissioner or the Tribune . As is clear from the statutory provisions quoted above a hearing before th

Tribunal of the employee's claim presupposes a written notice of objection to the claim being heard by a Rights Commissioner, the first question that arises is whether this Notice of Objection may or must be given before or after the claim for redress is served.

It was argued that there was something logically offensive in the concept of a person objecting to a procedure which he himself had initiated. It was submitted that a Notice of Objection by an employee could be served only before he initiated his claim and that once he had served notice of a claim to be heard by a Rights Commissioner that he was estopped from presenting a claim to the Tribunal.

Whilst this argument is not without merit it does not seem to me that it can prevail in the present circumstances. The section clearly envisages "any party concerned" serving a Notice of Objection. It is not confined to the employer. Then the right which the employer has is so expressed in the section as to be exercisable - as indeed in his case it must be - after the proceedings have been initiated. It follows, therefore, that the section in its terms permits an employer to object subsequent to the initiation of the proceedings so that the respondent's argument involves saying that precisely the same words are not

adequate to give the same right to the employee. So to construe a statute could only be justified in very special circumstances. I do not believe that the court would be justified in doing so in the present case. It does seem to me that there may be circumstances and that the legislature may properly have anticipated that circumstances could arise in which an employee having decided to seek a recommendation from a Rights Commissioner would subsequently - perhaps with the benefit of professional advice - properly seek instead a determination by the Tribunal. In any event the provisions dealing with the service of an objection notice seem to be to some extent an administrative rather than a substantive procedure. Certainly there is no indication in the statute that the right to object must be based upon any belief, real or imagined, that a Rights Commissioner would be in any way disqualified from dealing properly or effectively with the claim. Furthermore the formal notice must be served even though a direct application to the Tribunal would of itself presumably indicate a negative intent in relation to the Rights Commissioner as much as it would a positive intent in respect of the Tribunal. For those reasons it seems to me that to some extent, at any rate, the service of the objection notice is a procedural step - albeit an

important one - and not directly related to the rights of the employee or the case which he proposes to make.

In the circumstances it seems to me that there is no sufficient justification for inferring that the right of the employee - unlike that of the employer - to serve a Notice of Objection is limited to the period prior to the service of the original claim for redress.

The second question which the argument of the respondents raises is whether under section 8 aforesaid the decision of the employee/claimant to alter his tactics and invoke a hearing by the Tribunal in place of the Rights Commissioner must be made within 6 months of the date of the dismissal and notice of that change likewise given within the 6 months period.

What sub-section 2 of section 8 requires is that notice should be given within the appropriate time of the initiation of a claim for redress. It does not require as a statutory condition precedent to the exercise of jurisdiction that notice should be given of subsequent decisions taken in relation to that claim. Now it is clear that a claim which is commenced by an employee for a hearing before the Rights Commissioner may conclude with a determination by the Tribunal if only for the reason that the employer in the exercise of his statutory

discretion objects to the hearing before the Rights Commissioner. Notwithstanding the change of course that the proceedings might take it seems to me that the claim for redress would be the claim to a hearing before the Rights Commissioner and that once notice of that claim was duly served that the statutory pre-conditions would be fulfilled. If the position were otherwise serious difficulties would arise in applying the section. For example if a claimant postponed initiating a claim until nearly the expiration of the statutory six months period and the employer served a notice of objection on the last day of the statutory period then, if the claimant was required to give notice to the Tribunal of the fact tha the claim would in those circumstances be brought before the Tribunal instead of the Rights Commissioner such notice would not be given within the time limited by the statute. However, apart from this practical consideration it seems to me that the section by its terms only requires that notice should be given of the initiation of the claim for redress and that this condition is met and the purpose of the act fulfilled when notice of the claim as originally formulated is duly given.

It can be appreciated that the service of notice on the Tribunal would be desirable and that the failure to give such notice might involve administrative problems. On the other hand I think it reasonable to

assume that the secretariat and administrative services relating to both the Rights Commissioner and the Employment Appeals Tribunal are provided by the Department of Labour which no doubt assists in processing the claims irrespective of which body ultimately adjudicates thereon. In any event I am satisfied that the legislature did not impose or intend to require the service of a second or additional notice in such circumstances as a condition precedent to the exercise by the Tribunal of its jurisdiction. The fact that a second notice is not in my view, necessary, where the "change of course" is due to the intervention of the employer the same principle is equally applicable where the change is brought about by the decision of the employee/claimant himself. In these circumstances it seems to me that the cause shown by the Employment Appeals Tribunal must be disallowed and the conditional order made absolute.