IRISH SHIPPING

1985 No. 959 Sp. 46

IRISH SHIPPING LIMITED

APPELLANT

AND

RICHARD ADAMS AND OTHERS

RESPONDENTS

Judgment of Mr. Justice Murphy delivered the 30th day of January 1987.

This matter comes before the Court by way of appeal pursuant to Section 40 of the Redundancy Payments Act 1967 from a decision of the Employment Appeals Tribunal given on the 12th day of November 1985 by which the Respondents were held to be entitled to the payments set out in the schedule thereto.

The Redundancy Payments Act 1967 (The 1967 Act) provides by Section 7 thereof that an employee who is dismissed by his employer by reason of redundancy or is laid off or kept on short time for the minimum period shall, subject to that Act, be entitled to the payment of moneys which are known as redundancy payments subject only to certain conditions one of which is that the employee has been employed for "the requisite period". The expression "requisite period" is then defined by Section 7 (5) of the 1967 Act (as amended by the provisions in the Schedule to the Redundancy Payments

Act 1971) as meaning:-

> "A period of 104 weeks' continuous employment (within the meaning of Schedule 3) of the employee by the employer who dismissed him, laid him off or kept him on short-time, but excluding any period of employment with that employer before the employee had attained the age of 16 years".

Whilst the question of law on which the appeal is based may not have been formulated with precision it is clear that it relates to the construction to be given to the words "continuous employment" as used in Section 7 (5) aforesaid. Accordingly it may be helpful to set out the provisions of Schedule 3 of the 1967 Act (again as amended by the provisions in the Schedule to the Redundancy Payments Act 1971) under the heading "Continuous Employment". The relevant paragraphs as so amended are as follows:-

"4. For the purposes of this Schedule employment shall be taken to be continuous unless terminated by dismissal or by the employee's voluntarily leaving the employment.

5(1) Where an employee's period of service is or was interrupted by any one of the following:-

(a) a period of not more than 78 consecutive weeks by reason of sickness (including an injury),

(ai) any period by reason of service by the employee in the Reserve Defence Force,

(b) a period of not more than 26 consecutive weeks by reason of:-

(i) lay-off,

(ii) holidays,

(iii) - - -,

(iv) any cause (other than the voluntary leaving of his employment by the employee) not mentioned in clauses (i) to (iii) but authorised by the employer,

(c) any period during which an employee was absent from work because of a lock-out by his employer or because the employee was participating in a strike, whether such absence occurred before or after the commencement of this Act,

continuity of employment shall not be broken by such interruption whether or not notice of termination of the contract of employment has or had been given.

(2) During the year 1968 subparagraph (1) (b) shall have effect as if "52 consecutive weeks" were substituted for "26 consecutive weeks".

5(A) If an employee is dismissed by reason of redundancy before attaining the period of 104 weeks referred to in section 7 (5) (as amended) of the Principal Act and resumes employment with the same employer within 26 weeks, his employment shall be taken to be continuous".

Unfortunately it is not possible to set out with the same degree of confidence the facts adduced in evidence before the Tribunal. Apparently there are no statutory provisions or regulations requiring or providing for a record of the evidence taken before the Tribunal. The Solicitors on behalf of the

Appellant and the employee/Respondents did keep and have presented to this Court helpful and detailed notes of the evidence given before the Tribunal as they recalled it. Unfortunately there is a disagreement between the Solicitors as to whether certain evidence was taken into account at all by the Tribunal in coming to its conclusion and as to the terms or effect of some of the evidence which was tendered.

In a sense it is surprising that any difficulty should arise with regard to the relationship between the Respondent/ employees and Appellant Shipping Company. The Respondents (other than the Minister for Labour) are all seamen who did serve on the Appellant's ships from time to time in the years prior to the 3rd of December 1984 when the Appellant Company was ordered to be wound up by the Court. In accordance with the Merchant Shipping Act 1894 (Section 113) the Master of the Appellant's ships was bound to enter into a written crew agreement with every seaman carried in his ship. In addition to that record the Master was required (under Section 128 of the 1894 Act) to sign a certificate of discharge in respect of each seaman on the occasion of his discharge or on payment of his wages. In the result there is a detailed written record in respect of each of the employee/Respondents showing the dates on which they were engaged to crew particular vessels falling within the provisions of the Merchant Shipping Act 1894 and the date of their discharge from that service. An examination of these certificates of discharge show varying periods of engagement in respect of different ships and also varying periods - sometimes weeks and sometimes months - elapsing between engagements. The certificate of discharge does not identify the employer

as such but merely the ship on which the seaman is engaged. No doubt it would be a simple matter for anybody familiar with the shipping industry in Ireland to identify the employer by reference to the ships named in the documentation or indeed to establish the ownership of those ships by reference to the appropriate Register but obviously any Court or indeed any outsider would require some evidence or information to relate the particular vessels to particular employers.

However, even if it must be accepted that during a period of, say, 4 years next prior to the commencement of liquidation of the Appellants the employees/Respondent had seen service exclusively with the Appellant Shipping Company it would be of the utmost importance, as I see it, to have proper evidence as to the relationship between the seamen and the Shipping Company in the period between engagements if one is to determine whether as a matter of fact and law the seamen were continuously in the employment of the Shipping Company throughout the whole of a given period notwithstanding the periodic nature of their service. If for example the period between engagements consisted exclusively of holidays or shore leave or if the seamen were in receipt of some form of pay or retainer (as some of the Appellants' employees were) such facts would not be merely important: it seems to me that they would be decisive in establishing the continuity of the employment.

On behalf of the Appellants it is said that the Tribunal heard evidence on the 20th of June 1985 from one of the Respondents, namely, Patrick Nugent, which made it clear that every seaman was on his discharge free to seek employment with any other employer and was in no way committed to

Irish Shipping Limited nor indeed was that Company committed to him. Furthermore, Mr. Nugent readily conceded that pending re-engagement the seaman was unemployed and entitled to sign on at the local Labour Exchange. On the same date Captain Langran who was the Superintendent of seagoing personnel with the Appellant Company gave evidence of the relationship between the Company and the seamen. And it is the Appellant's case that his evidence was to the effect that non permanent ratings such as the Respondents had no legal right to re-engagement with the Appellant Company. However, it is contended on behalf of the Respondents that the Tribunal had arrived at its decision as to the right of the employees/Respondents to redundancy at an earlier hearing, namely, on the 29th of May 1985 and this contention is in fact supported by the records produced by the Appellant's Solicitors. Mr. Michael Quinn's very detailed Court attendance docket in relation to the proceedings of the 29th of May 1985 records the views of the Tribunal on that date in the following terms:-

> "The Tribunal took the view that the periods after the shore leave has expired and before the ratings are recalled to the ships were merely lay-offs. In particular the Tribunal looked at the record of the ratings who made repeated journeys with the Company and took the view that it was always in the contemplation of both the Company and the ratings themselves that the same persons would return to Irish Shipping Limited. Therefore the Tribunal took the view that the ratings were only on a "lay-off" within the meaning of the Redundancy Repayments Acts and as

such have not lost their continuity of employment".

Again Mr. Michael Quinn's attendance on the Tribunal's proceedings of the 20th of June 1985 records the Tribunal as pointing out on that date:-

"The Tribunal refused to re-open the arguement as to the entitlement of ratings to redundancy".

Perhaps even more disturbing in relation to the available evidence is the analysis made by Mr. John B. Quinn, the Solicitor on behalf of the employee/Respondents, of the service of each of his clients with the Appellant Company. That analysis was set out as exhibit A in the Affidavit sworn by the Solicitor in connection with the proceedings before this Court. It shows that at least two of the employees/Respondent, namely, Kevin Lambe and Karl Keogh undertook voyages with other employers after they had commenced work with Irish Shipping Limited.

In these circumstances Counsel on behalf of the Appellants anticipated that it would be contended on behalf of the Respondents that there was an underlying contract of service between the Shipping Company and the seamen from the dates on which they were first engaged respectively and that the commencement and termination of particular voyages merely represented periods of active duty or special contracts within the framework of the overall relationship of master and servant which continued until it was terminated by the winding-up Order. Counsel made reference to three Judgments of the U.K. Employment Appeal Tribunal delivered in November 1985 (Hellyer Brothers Limited and McLeod & Others; Boyd Line Limited and Pitts and Boston Deep Sea Fisheries Limited .v. Wilson and Another) in which a similar argument had been

advanced with only a limited measure of success. However, Counsel had wrongly anticipated the case to be made on behalf of the Respondents. The arguement advanced on behalf of the Minister for Labour was not dependent upon any special finding of fact by the Tribunal. On the Minister's behalf it was contended that the concept of "continuous employment" within the meaning and for the purposes of the Redundancy Payments Act 1967 was a wholly artificial one and that an employee could be within the employment of a particular employer at a given time and accordingly continuously in his employment over a longer period even though at the particular time he was unemployed and drawing unemployment benefit or even though he should be in the active paid employment of a different employer. This courageous and far-reaching argument was based on the particular provisions of the Third Schedule to the Redundancy Payments Act 1967 which deem employment to be continuous notwithstanding the occurrence of particular events or significant interruptions in the employee's period of service with the employer concerned. It is not necessary for me to deal with this interesting arguement at the present time.

On behalf of the Respondent it was contended that the conclusion of the Tribunal was based on findings of fact which were within the jurisdiction of the Tribunal and not reviewable on appeal to this Court. In my view that arguement is well founded.

The decision of the Tribunal dated the 10th of November 1985 recites in two brief paragraphs the arguements and evidence placed before it. The recited facts include the following:-

1. That at the end of a tour of duty it was understood by all concerned that they (the seamen) would return to serve in the same or another vessel owned by Irish Shipping Limited.
2. That over the periods of employment the seamen worked on the Appellent's ships and on no other ships.
3. That it was common to spend 6 months at sea followed by 4 months on shore.
4. That the first few weeks of the period spent on shore was paid leave.
5. That Captain Langran gave evidence on behalf of Irish Shipping Limited and agreed first that contact was maintained between Irish Shipping Limited and the seamen and secondly that he felt obliged to put the seamen on ships when a suitable vacancy arose.

The recitals make no reference to the evidence of Patrick Nugent and it is not clear whether the Tribunal attached no importance to it or disregarded it on the basis that it had reached its decision before the evidence was tendered. Again it is not clear whether in dealing with the evidence of Captain Langran (also given on the 20th of June 1985) they were interpreting his evidence as an admission on behalf of the Shipping Company that it was legally obliged to re-engage the Respondent/employees or that it was only a moral obligation as stated in his affidavit in the present proceedings. Certainly it does not appear to have been drawn to the attention of the Tribunal that some of the employees/ Respondents were in fact employed at material times by other shipping companies. In the absence of any official record of the

proceedings before the Tribunal it is likely that these apparent discrepancies will continue to arise. Nevertheless it seems to me that on the hearing of an appeal to this Court on a point of law under Section 40 to the Redundancy Payments Act 1967 I must - in the absence of agreement between the parties - accept the facts as stated in the decision of the Tribunal.

In essence what the Tribunal did was to advert to the statutory presumption of continuity of employment under Section 10 (A) of the Redundancy Payments Act 1971 and then to advert to the facts of the case as found by them to see whether those facts rebutted the statutory presumption. Furthermore, the Tribunal in reviewing their findings of fact recognised that by virtue of Schedule 3 of the Redundancy Payments Act 1967 certain interruptions of service did not break the continuity of employment. The interruptions which were excluded were ones for periods not exceeding 26 consecutive weeks by reason of lay-off, holidays or any cause (other than voluntary leaving of his employment by the employee) and other than lay-off or holidays but authorised by the employer. As I understand it what the Tribunal concluded was that in the circumstances of the case the periods spent by the employee/Respondents ashore constituted for the first part thereof holidays and, to the extent that the employee was not re-engaged when he sought to resume his service, lay-off and that the balance of the period was "another similar cause authorised by the employer". It seems to me that on the basis of the evidence accepted by the Tribunal that they were entitled as a matter of law to reach that

conclusion and accordingly I must dismiss the appeal.

Francis J. Heath

11/3/87