STATES (COLE) 1983 NO 43 SS 161

THE HIGH COURT State Side

THE STATE AT THE PROSECUTION OF
WINNIE COLE, ANNIE STEEDE, ROSE COSTELLO,
SHEILA FITZMAURICE, BREDA NOONAN, ANNE REYNOLDS
AND LILLIAN KERRIGAN

Prosecutors

and

THE LABOUR COURT

Respondent

Judgment of Mr. Justice Barron delivered the 24th day of July 198.

The prosecutors are all textile operators employed by Ex (Ireland) Limited. They are all members of the Irish Transport and General Workers Union (the Union) who on their behalf in October, 1981 served a claim on their employer for equal pay with a male grader maintaining that the work performed by them was like work within the meaning of Section 3 (c) of the Anti-Discrimination (Pay) Act 1974 to that performed by a male grader. This claim was rejected by the employer. The matter was then referred to the equality officer under the provisions of Section 7 of the Act. Following an investigation of the claim, this officer held in favour of the prosecutors. From this decision the employer appealed to the respondent under the provisions of Section 8 of the Act. It is in respect of the hearing before the respondent and its decision that these proceedings have been brought.

The hearing before the respondent was arranged for the 13th July, 1982

Some few days before this date, the employer arranged for a member of a firm of management consultants to visit its factory for the purpose of forming an opinion on the claim and preparing a report to be tendered in evidence on the appeal. The prosecutors were informed of the impending visit of this consultant, but refused to co-operate on the basis that they were given insufficient notice of such visit. Notwithstanding such objection the consultants visited the factory and prepared their report.

Before the hearing, each side prepared written submissions which were furnished both to the Court and to the other side. These submissions were prepared on behalf of the employer by the Federated Union of Employers and on behalf of the prosecutors by the Union and an official of each of these bodies represented the parties at the hearing. The consultants report was included in an appendix to the submission made on behalf of the employer.

At the hearing, objection was taken by the Union to the consultants report on the basis that it had not seen it prior to the hearing and had had no opportunity to refute it. The Union was offered an adjournment to consider the report further which it declined.

At the conclusion of the hearing the chairman of the respondent indicated that it was going to employ experts to provide it with a

confidential report to assist it in arriving at its decision. The note of what the chairman said is substantially as follows:

"This is a highly technical case. We have to get at the facts and are going to get our own experts. We will employ the Irish Productivity Centre on the clear understanding that we get full co-operation from both the company and the Union. If any difficulties arise after this we will make an inspection of the plant with both parties being present. The Irish Productivity Centre will report to us. If we have any doubts we will then make an inspection. The Irish Productivity Centre is being paid by us and their report will be confidential to us only. "

No objection was taken by the Union to this course. On the contrary, it seems that the Union welcomed it since it suggested that it would minimise the effect of the consultants report. This appears from the prosecutors affidavit sworn on the 12th May, 1983. Dealing with the Union objection to the consultants report she says at paragraph 4:

"The said Mr. Powell did not pursue his objection to the said report of H.T. John as the said Maurice Cosgrave advised that the Labour Court would appoint their own assessors and nominated the Irish Productivity Centre to act as such assessors and prepare a report

"on the matter in dispute and as a result he felt that the said H.T. John report would no longer be relevant."

She further went on to say that the proposed involvement of the Irish Productivity Centre was welcomed by the prosecutors.

As announced by the chairman of the respondent the Irish Productivity Centre was subsequently appointed by the respondent to prepare a report for its consideration. Donal Leonard an adviser with the Irish Productivity Centre in paragraph 2 of his affidavit sworn on the 11th May, 1983 expresses their brief in these words:

"The respondent required the I.P.C's opinion and report as to whether or to what extent a work of equal value situation existed between the entering and grading jobs in Ix (Ireland) Limited and in requiring the said opinion and report the respondent required the I.P.C. to examine the recommendations of the equality officer reference number EP6/1982 which is referred to as Exhibit A in the fourth paragraph of the affidavit of Winnie Cole sworn herein. The respondent further required the I.P.C. to have regard to the submissions of the parties to the appeal to the respondent including the appendix to the company's submission which contained a report prepared by a Mr. John a management consultant retained by I.X. (Ireland) Limited

"and in consultation with the representatives of the parties to the appeal to examine the work of the equality officer's said recommendations referred."

The Irish Productivity Centre notified both sides of its appointment and having visited the factory on at least two occasions furnished its report. No objection was taken by either party to the attendance of these experts at the factory though the prosecutors did at the time express dissatisfaction with the manner in which their visits were conducted.

This report was commissioned and obtained in accordance with the normal practice of the respondent and upon the understanding of all parties that it would be confidential and was to be seen only by the respondent. The prosecutors suggest that they were unaware that this was the practice. In her affidavit to which I have referred the first-named prosecutrix says at paragraph 5:

"I say and believe that I have no recollection of Maurice Cosgrave informing the parties at the said hearing that the report of the said assessor would be confidential to the Labour Court as stated : paragraph 5 of the affidavit of the said Maurice Cosgrave. Neithe have I, this deponent, any knowledge that it has long been the

"practice that such reports are confidential to the Labour Court." It may well be that neither she nor the Union representative heard, or more likely paid any particular reference to, the statement of the chairman to the effect that the report would be confidential. However, the second part of the paragraph gives the appearance of being less than candid. The deponent may not have known of the practice that Irish Productivity Centre reports were confidential, but this sentence does not constitute a denial of knowledge on the part of the Union representative. I accept that it was the practice for these reports to be confidential.

The contents of the report have not been disclosed though aspects of it are referred to in Donal Leonard's affidavit including its conclusion. In paragraph 6 he says:

"I say that on the basis of the foregoing we concluded that the job of entering was not work of equivalent value to that of grading under the criteria laid down in Section 3 (c) of the Anti-Discrimination (Pay) Act 1974."

Following receipt of the experts report, the respondent by order dated the 19th October, 1982 reversed the decision of the equality officer.

On the 24th January, 1983, the prosecutors obtained a Conditional

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Order of Certiorari to quash the decision of the respondent. Cause has been shown and the matter now comes before the Court on a Motion to make absolute the Conditional Order notwithstanding the cause shown.

The decision of the Court was as follows.

"Subject:

(1) Appeal by the company against the equality officer's recommendation concerning a claim by seven female operators for equal pay with a named male grader.

Background:

(2) The company is engaged in the manufacture of textile products and operates from its premises in Tuam Co. Galway. At presen the entering operators are paid a rate of £68.62 per week and the grader is paid £79.71 per week. In October 1981 the Union on behalf of the seven female operators served a claim on the company for equal pay with a male grader. The Union maintained that the work performed by the female operators is like work in terms of Section 3 (c) of the Anti-Discrimination (Pay) Ac 1974 to that performed by the grader.

(3) The claim was rejected by the company and on the 14th Octobe 1981 the Union referred the matter to an equality officer.

The equality officer having investigated the claim issued the following conclusions and recommendation:

(These were set out in full).

(4) On 25th May, 1982 the company appealed the equality officer's recommendation to the Labour Court under Section 8 of the Anti-Discrimination (Pay) Act 1974. A Court hearing was held on the 13th July, 1982 in Tuam. On 19th July, 1982 the Court appointed assessors to assist it in making its determination. The assessors report was received by the Court on the 22nd September, 1982.

Company's Arguments:

These were set out in paragraphs 5 (a) to 5 (h).

Union's Arguments:

These were set out in paragraph 6 (I) to 6 (VI).

Determination:

(7) The Court, having taken into account the arguments of the parties and having fully considered the report of a technical assessor, reverses the recommendation of the equality officer. The Court accordingly determines that this appeal should be upheld."

The grounds upon which the Order is attacked are set out in the prosecutors affidavit. They are essentially as follows:

(1) The respondent ought not to have accepted and relied upon the report of the Irish Productivity Centre without notifying the prosecutors of its contents and allowing them to make submission in relation thereto.

(2) It took into account an improper argument.

(3) It ought not to have admitted into evidence and taken into account the report of the management consultants.

(4) It ought to have given reasons for its decision.

The Irish Productivity Centre report was challenged not only on the ground that the Union had no chance to consider it, but also on the ground that in preparing and furnishing its report the Irish Productivity Centre was acting outside the function of assessors. The Irish Productivity Centre did not act as assessors. The chairman of the respondent referred to them as experts at the hearing, and it was in this capacity that they were regarded by the parties. The use of the word assessor in the decision of the Court does not change their status which is clear from the brief which they received and from their own view of their functions. This report must be regarded as the presentation of factual evidence by experts

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together with their opinion as to the conclusion to be taken from such evidence in relation to the issue to be determined.

The acceptance of evidence of which neither party was aware and with which they had had no opportunity to deal was considered by Finlay J. as he then was in Killiney and Ballybrack Development Association Limited .v. The Minister for Local Goverment and Templefinn Estates Limited an unreported judgment delivered on the 1st March, 1974. That case related to the decision of the Minister on a planning appeal. It was an application for permission for a large building development and one of the main issues in the appeal was whether or not there would be adequate sewage facilities available for the proposed development, if the permission were granted. In his report to the Minister, the Inspector, unknwon to either party to the appeal, gave a factual report of what he himself had seen on an inspection of the sea-shore. In giving his decision and granting the permission, the Minister did not indicate whether or not he had relied on this evidence or, if he had, to what extent. The Order of the Minister was quashed. Finlay J, said towards the end of his judgment:

> "As I have indicated at the out-set of my judgment, it was contended on behalf of the plaintiff that if evidence not disclosed at the public hearing was included in the material before the Minister then

"because of the absence of any reasons in the decision of the Minister indicating upon what evidence he relied and upon what evidence he did not rely that the Court must interfere and set aside the decision of the Minister. I accept this in this particular instance as a sound submission of law".

The position in the present case appears at first sight to be somewhat different. In Killiney and Ballybrack Development Association Limited .v. The Minister for Local Government and Templefinn Estates Limited the parties were unaware that such evidence was going to be put before the Minister whereas in the present case they were aware that this would happen. The respondent submits that this knowledge coupled with a failure to object to this procedure amounted to a waiver by the prosecutors of their right to object subsequently. In support of this submission, Counsel for the respondent relied upon Corrigan .v. Irish Land Commission 1977 I.R. 317. In that case, the plaintiff could have objected to the two Lay Commissioners who heard the matter since he was aware that they had signed the certificate giving rise to the application. His failure to object to the composition of the Tribunal was regarded as a waiver of his right to object subsequently. At page 326 Henchy J. said:

"If those Commissioners had decided the objection in his favour, I ha

"no doubt that the appellant would have had no complaint to make about their possible bias. He would gladly and unquestionably have accepted their decision. It is only because their decision turned out to be adverse to him that it was belatedly decided to raise the complaint of possible bias. In my view the appellant is debarred by his prior conduct from doing so. To put the matter in sporting parlance - having elected to play on under the advantage rule in the hope of scoring but having failed to do so, he cannot now be heard to claim a foul."

That case was decided on the basis of estoppel by election. The plaintiff was aware of the irregularity and notwithstanding he elected to continue. Here the matter is not the same. I have no doubt that the prosecutors would not have complained if the decision had been in their favour, but that is not the essence of the matter. The essence of the matter is whether or not the prosecutors were aware of the exact nature of the report which would be furnished and of the use to which it would be put. I am not prepared to hold that they were so aware. In Corrigan .v. Irish Land Commission, the irregularity had already occurred and its effect could be assessed. Here it had not occurred when the alleged election took place and its full effect could not then have been assessed. In these

circumstances, this case is on further consideration no different from Killiney and Ballybrack Development Association Limited .v. The Minister for Local Government and Templefinn Estates Limited. This ground of objection succeeds.

Had it not done so, I would still have felt constrained to quash the Order of the respondent. Having regard to the brief given to the Irish Productivity Centre and the detailed manner in which it was carried out there is a serious danger that the decision of the respondent would be believed to be the decision of these experts. In such circumstances, justice would not be seen to be done.

In arriving at this latter conclusion, I am not suggesting any impropriety on the part of the Court or the Irish Productivity Centre. Everything which was done was done in the utmost good faith. The Irish Productivity Centre has the backing of both sides in industry. It is totally impartial and it is competent. For all these reasons, the practice which has evolved has much to recommend it. Unfortunately, it is these very factors which cause its legal downfall.

This effectively determines this case. In deference to Counsel I propose nevertheless to deal shortly with the other submissions made.

Clearly the Court should not have considered the arguments set

out in paragraph 5(a) of its decision. In his Affidavit, the Chairman of the respondent says that no consideration was given to this argument. Nevertheless, even if it did take this argument into account, certiorari would not lie. Where proceedings are regular upon their face and the inferior tribunal has jurisdiction, certiorari does not lie for error within jurisdiction even on a point of law: see The State (Davidson) .v. Farrell, 1960, I.R. 438.

The objection to the admission of the report of the management consultants misconceived the nature of this report. It was part of the employers'case. The Union was entitled to comment on the manner in which it was prepared or presented, but such objections could only go to its weight and not to its admissibility. It is clear from what happened at the hearing that there was no lack of fair procedures in regard to its admission.

The Court is not required to give reasons. It is true that it may be difficult to assess whether or not an appeal lies on a point of law unless reasons are given. However, the unsuccessful party will have been present at the hearing and so in a position to know whether any point of law was argued or could arise depending upon the findings of fact. In such circumstances, it would be open to that party to request

the Court to give its decision in such a way that an appeal on a point of law could be taken. This is the position when an arbitrator is asked to put his award in the form of a special case for the opinion of the Court. If a request for reasons had been made before the decision, but none given in it, then the remedy might lie if such was required to enable the party to proceed with an appeal on a point of law. In the present case, I would not have made the Conditional Order absolute on this ground alone. In the circumstances the Conditional Order will be made absolute.

Henry Barron

28/9/83.