Neutral Citation no. [2004] NICA 31

Ref:	**COGC5021**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**17/09/04**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DESMOND CLERKIN AND OTHERS

Appellants/Applicants;

and

WARRENPOINT HARBOUR AUTHORITY

Respondents.

COGHLIN J

[1] This is an appeal by way of a case stated by an Industrial Tribunal dated 30 October 2003. The case stated relates to a preliminary issue determined by the Industrial Tribunal sitting in Belfast on 29 and 30 May and 31 July 2003. The question stated for the opinion of the Court of Appeal is:

> "Was the Tribunal correct in law in determining that the changes in the conditions and terms of employment as negotiated and agreed between the Respondent and SIPTU on or about 23 May 2001 were incorporated into the appellant's contracts of employment on 30 May 2001?"

Background Facts

[2] At all material times each of the appellants was employed by the respondent in working operations carried out at Warrenpoint Docks. Each appellant was a member of the union and the workforce had been unionised initially through the ATGWU and, subsequently, through SIPTU.

[3] The Tribunal found that for a period of up to 25 years prior to the events in question it had been the practice for a review of the terms and conditions of employment to be put in train at the end of the old year or the beginning of the new. After negotiation with the union members and/or their shop stewards the full-time union official would communicate a claim to management and negotiations would take place. Eventually a final package

would be agreed between union and management which would then be put to the men in general meeting. It was open to the employees to accept or reject this package and, if it was rejected, fresh negotiations would take place and a further package would again be put to the men in general meeting. Once the package or a revised packaged proved acceptable to the employees the various provisions contained therein would be implemented and put into effect without further ado.

[4] The Tribunal found that, over the years, these negotiations between union and management encompassed a variety of matters including flexibility, life insurance cover, sick pay and pay in general. In respect of pay the usual outcome of the annual negotiations would be an increase in pay. However, this was not invariably the case and in 1993 the rate of bonus in relation to tonnage was halved although it was anticipated that the pre-negotiation rate of bonus would be maintained as a result of greater productivity producing a doubling of tonnage, in 1995 increases in pay were negotiated for some employees while others were subjected to a pay freeze and in 1999 different percentages of pay increases were negotiated for different groups of employees.

[5] Two of the appellants gave evidence before the Tribunal and they agreed with Mr McDade, a full-time SIPTU official who gave evidence upon their behalf that voting by the employees on the proposed package of provisions and conditions was seldom unanimous but that it was always accepted by those who dissented that they would abide by the decision of the majority. Mr Goldie, the respondent's Chief Executive confirmed that this was the process as a result of which pay and/or conditions of employment were negotiated, agreed and implemented and the Tribunal recorded that both sides were in agreement that this process worked well for both the employees and the company.

[6] In relation to the specific question posed by the Tribunal for the Court of Appeal the Tribunal found the following facts:

(1) In the year 2001 the usual procedure was adopted although, upon this occasion, the proposals included a restructuring of pay under the terms of which the men would receive a standard weekly wage supplemented by individually assessed weekly skills allowances. The package included the provision of new benefits such as increased holiday pay arrangements, improved sick pay and enhanced pension and death benefit scheme.

(2) The discussion period was lengthier than usual and, eventually, a meeting of the employees took place on 30 May 2001. The meeting was addressed by the respondent's Managing Director who handed out a letter and booklet setting out the proposals in full to each employee. This was followed by a question and answer session between the men and their union

official. The matter was put to the vote and the package was accepted by 16 votes to 7.

(3) The documents distributed by the respondent's Managing Director at the meeting included a letter addressed to each employee purporting to "offer" employment which concluded with a section headed "Acceptance of Contract" which confirmed that the employee had received and read the statement of terms of employment together with the associated documents and it included a space for the signature of the employee indicating acceptance of the "offer". These letters were to be returned by 15 June 2001.

(4) The Tribunal found that the distribution of this documentation complied with a wish expressed by the older employees to be furnished with written terms and conditions of employment in the same way as new employees.

(5) The Tribunal were provided with a document prepared by the respondent to record the schedule of progress on wage negotiations which included a note referring to the progress of the return of the contracts and a reference to seven people, including the appellants, who were said to be "holding out". A note dated 25 June 2001 referred to a meeting between management and union at which a request for improved terms for these seven people were made but the same note recorded that management had restated their position which was that the terms had been fully negotiated after 8 months consultation, that the men concerned had refused to cooperate in previous discussions and that the respondent had given 28 days of notice of change in the terms of employment which were introduced on 1 July 2001.

(6) Taking into account the clear evidence of a very longstanding tradition of collective bargaining between the parties in relation to pay and conditions, the absence of any other accepted method by which terms and conditions had ever been agreed or negotiated between the parties and the full recognition by the respondent of SIPTU since its inception as holding the exclusive bargaining and negotiating right on behalf of the employees the tribunal came to the conclusion that the appellants' contracts of employment included a term implied by custom and practice which was reasonable, certain and well-known to both sides that the terms and conditions of their employment could be settled by collective bargaining and subsequently incorporated into the contracts of employment.

The Submissions of the Parties

[7] In concise and well-reasoned written and oral arguments Mr O'Donohue QC, on behalf of the appellants, concentrated his attention upon three main submissions:

(a) While he was prepared to accept that contractual terms and conditions, including a negotiated reduction in income, could be impliedly incorporated in the contract of employment as a result of custom and practice, Mr O'Donohue QC submitted that, on the basis of the facts proved, no reasonable Industrial Tribunal, as a matter of law, could have come to the conclusion that such a custom and practice had been established.

(b) Mr O'Donohue QC further submitted that, even if the custom and practice established could legitimately have been found to include the incorporation of such a term, such a term would have constituted a "deduction" from wages would not be of any effect unless comprised in the written terms of a contract given to the worker or of which the worker was notified in writing with, in either case, the furnishing of such document or the making of such written notification taking place prior to the making of the relevant deduction in accordance with Article 45(2)(*a*) and (*b*) of the Employment Rights (Northern Ireland) Order 1996.

[8] By way of response, Mr Devlin BL, who appeared on behalf of the respondents, submitted that:

(a) No basis could be ascertained for treating a term which had the effect of reducing the earnings of some or all of the employees as any different from any other terms or conditions which it was accepted could legitimately be incorporated into a contract of employment as a result of custom and practice. In this case the Industrial Tribunal were perfectly entitled to come to the conclusion that such a term could be legitimately incorporated into the employment contracts on the basis of the nature and extent of the custom and practice established in evidence.

(b) In relation to the appellants' argument based upon Article 45 of the 1996 Order Mr Devlin BL referred to the provisions of sub-article (3) which provides that:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

Devlin BL argued that, in the circumstances of the instant case, the implied incorporation of the relevant terms and conditions, including the reduction in earnings, was effected by the vote that took place on 30 May 2001 and that, consequently, the reduced earnings payable with effect from 1 July 2001

where the wages "properly payable". In such circumstances "no deduction" existed that could attract the provisions of Article 45.

Conclusions

[9] In this case the Industrial Tribunal found as a fact that there had been a very longstanding tradition of collective bargaining between the management and the union in relation to pay and conditions. Indeed, the Tribunal concluded that, on the evidence, there was no other way in which pay, terms or conditions had been or were negotiated. Having so found the Tribunal went on to reject the argument put forward on behalf of the appellants that so far as pay was concerned, past custom and practice could only be used to imply terms which produced, at worst, a pay freeze or standstill. We consider that the Tribunal was right to do so. Whatever may have been the practical expectations of the negotiators, there is no doubt that the agreement to half the "tonnage bonus" had the potential to reduce earnings and it was accepted by both sides that, in the past, negotiations had produced a pay "freeze" for some of the workers but not for others and that, upon other occasions, different percentage increases for different groups had resulted. In our view, it is important to remember that the collective bargaining procedure for so accepted as satisfactory by both management and unions produced a "package" of terms and conditions each year the achievement of which might well involve a balance of advantages and disadvantages depending upon the perception of the negotiator. As the Industrial Tribunal recorded in the course of paragraph 12 of its decision dated 30 October 2003:

> "The evidence was that previous negotiations had involved a situation in which some employees had suffered by comparison with others and on one occasion when a new pay arrangement had the potential for all employees to suffer. There was no suggestion of any understanding on anyone's part that only terms which were beneficial to each employee would be binding."

[10] We have been unable to find any authority in support of the proposition that a distinction is to be drawn between evidence of a custom and practice sufficient to effect changes generally to terms and conditions and custom and practice sufficient to effect fundamental changes, such as a reduction in pay. Such a distinction has been specifically rejected by the Court of Appeal in England and Wales in *Henry & Ors v London General Transport Services Limited* [2002] IRLR 472 a decision in which, in the course of giving the judgment of the court, Pill LJ said, at page 475:

> "I also agree with EAT that the Tribunal erred in law in introducing a distinction between

> fundamental changes to the contract and other changes without explaining the basis upon which they did so. On the face of it, if the appropriate custom and practice is established, it can be expected to cover all contractual terms."

In this case we are quite satisfied that the Industrial Tribunal was entitled to conclude that the evidence before it had established a custom and practice that, to use its own words, was wide enough to have "… included all pay and conditions whether beneficial or detrimental" (see paragraph 6).

[11] It follows from the conclusions that we have set out above that we must also reject the argument put forward by Mr O'Donohue QC based on Article 45 of the 1996 Order. Since it is our view that the Industrial Tribunal were perfectly entitled to form the opinion that a relevant term was impliedly incorporated into the contracts of employment by the collective bargaining process culminating in the vote on 30 May 2001 in accordance with a certain, reasonable and long-established custom and practice, it follows that the wages paid to the employees with effect from 1 July 2001 were "properly payable" by the respondent, within the meaning of Article 45(3) of the 1996 Order and that, consequently no deduction existed that was capable of attracting the provisions of Article 45(2)(*a*) or (*b*). In *Hussman Manufacturing Limited v Weir* [1998] IRLR 288 the EAT sitting in Edinburgh confirmed that a reduction in income which was a consequence of a lawful alteration in the terms of the contract of employment could not amount to an unauthorised deduction within the meaning of Section 13(3) of the Employment Rights Act 1996 (the equivalent provision applicable in England and Wales to Article 45(3) of the 1996) and in the *Henry* case a similar submission, based on the legislation in force in England and Wales, to that advanced by Mr O'Donohue QC in this case was rejected by the Court of Appeal with Pill LJ observing at paragraph 25 of the judgment:

> "For the appellant, Mr Juss made a submission, not made below, that the statutory provisions as to unlawful deduction of wages (Sections 13, 14 and 23 of the Employment Rights Act 1996) precluded an acceptance by conduct of a variation of a contract involving a reduction in wages. I have found nothing in the statute to support the submission that an employee is incapable in law of accepting by his conduct a variation. If he does accept, there is no deduction of the wages (Section 31 and no payment of `less than the total amount of the wages properly payable' (Section 13(3))."

[12] In the circumstances, the appeal must be dismissed.