STATE (FERRIS)

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Henchy J.
Griffin J.
Hederman J.

THE SUPREME COURT

1984 No. 219 S.S.
1984 No. 43

THE STATE (FERRIS)

v.

EMPLOYMENT APPEALS TRIBUNAL AND
ROYAL LIVER FRIENDLY SOCIETY

Judgment of Henchy J.
delivered the 10th December 1984

(Hederman J. conc.)

James Ferris ('the claimant') was employed as an insurance salesman from 1970 until 1983 by the Royal Liver Friendly Society ('the Society'). By 1983 he had reached the rank of Industrial Branch Inspector and was earning an annual income of about £50,000, mainly in commission. In March 1983 the Committee of Management of the Society, having considered reports of financial irregularities, informed the claimant that he was being suspended from his duties, with basic pay of £35 a week, pending the outcome of investigations.

The claimant replied to this notice of suspension by issuing a High Court plenary summons in June 1983 in which he sought, amongst other things, to have the purported suspension declared invalid.

The summons also claimed "damages for breach of contract, wrongful dismissal and breach of the plaintiff's right to natural justice." As appears from the statement of claim delivered on the 8th July 1983, from the correspondence passing between the solicitors, and from the affidavits filed in the proceedings, the expression "wrongful dismissal" in the summons was an error (apparently a typist's error) for "wrongful suspension." It was an error that, as we shall see, had serious consequences later. That it was an error I have no doubt. Indeed in April 1984 the Master of the High Court made an order giving liberty to the claimant to substitute "suspension" for "dismissal" in the sentence I have quoted from the endorsement on the summary summons. Since it is common case that the Society did not purport to dismiss the claimant until the 10 August 1983 (which was after the delivery of the statement of claim), the use of the expression "wrongful dismissal" in the plenary summons cannot be said to be other than a slip - a slip which was later, albeit belatedly, corrected. The true nature of the proceedings is to be identified by looking at all the pleadings, and they show that while they contained a reference to wrongful suspension, there was in reality no claim for damages for wrongful dismissal. In

particular, the relief asked for in the statement of claim shows that such a claim was not part of the claimant's case.

When, on the 10 July 1983, the Society resolved to dismiss the claimant, his response was to serve a notice of appeal to the Employment Appeals Tribunal ('the Tribunal') under the Unfair Dismissals Act, 1977 ('the Act') seeking redress for what he contended was an unfair dismissal. This appeal came on for hearing before the Tribunal in March 1984. The High Court proceedings, based on alleged wrongful suspension, were then still pending in the High Court.

When the claimant's case was opened before the Tribunal it was submitted on behalf of the Society that the Tribunal had no jurisdiction to rule on the merits of the case. This submission was based on s. 15(3) of the Act, which is in the following terms:

> "Where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee, the employee shall not be entitled to redress under this Act in respect of the dismissal to which the proceedings relate."

As I have indicated, the submission that proceedings for damages at common law for wrongful dismissal had been initiated by

the claimant rested entirely on the fact that the expression "wrongful dismissal" had been mistakenly used for "wrongful suspension" in the summary summons, which was issued some three months before any purported dismissal took place. It would be only by looking at the summary summons in isolation that a conclusion could be reached that the claimant had initiated proceedings for damages at common law for wrongful dismissal. This, however, is apparently what the Tribunal did. It held that, because of the use of the expression "wrongful dismissal" in the plenary summons, s. 15(3) of the Act applied. Accordingly, it held that the claimant was not entitled to redress under the Act.

The aggrieved claimant proceeded to get a conditional order of certiorari to quash the Tribunal's ruling and a conditional order of mandamus to compel the Tribunal to enter on a hearing on the merits of his statutory claim. When the hearing took place in the High Court of the application to make absolute those conditional orders notwithstanding cause shown, the cause shown was allowed and the conditional orders discharged. This appeal is from that order.

The opinion of the Judge in the High Court was that even if the Tribunal erred in holding that proceedings were initiated by the claimant seeking damages for wrongful dismissal, such a determination was within the scope of the powers conferred on the Tribunal by s. 15(3) and accordingly was not liable to be quashed by an order of certiorari. It was, he held, an order made within jurisdiction and could not be quashed.

The point, it seems to me, should be approached on the basis of the extent of the jurisdiction that was given to the Tribunal by s. 15(3). That jurisdiction amounts to a power, indeed a duty, to refuse redress under the Act in respect of the dismissal to which the proceedings relate, "where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of [the claimant]". Note that the jurisdiction under the subsection is not given to the Tribunal if it is of the opinion, or is satisfied, that a claim for damages at common law for wrongful dismissal is initiated. The initiation of such a claim as an objective fact must be proved before the Tribunal can exercise the jurisdiction given to it by s. 15(3). If the Tribunal makes an order under s. 15(3) when the

initiation of the common law claim for damages has not been proved, the order will be invalid for being ultra vires.

What the Tribunal did in this case was not simply to decline jurisdiction to decide the claimant's case on the merits, but also to seek to exercise a jurisdiction to dismiss it under s. 15(3) when the condition precedent for the exercise of that jurisdiction did not exist, that is to say, when the initiation of a claim for damages at common law for wrongful dismissal had not been proved. The Tribunal no less acts ultra vires or in excess of its jurisdiction when it seeks to rule a case under s. 15(3) when no proceedings for damages for wrongful dismissal are initiated by the claimant than when it purports to exercise that jurisdiction when proceedings that have been initiated are wrongly construed as being or containing a claim for damages at common law for wrongful dismissal. In both cases the necessary pre-condition for the exercise of jurisdiction is wanting, the Tribunal in seeking to operate s. 15(3) is acting without jurisdiction, and the order of the Tribunal is liable to be quashed on certiorari on the application of the person aggrieved.

As to the present case, being satisfied that the proceedings

relied on did not in reality contain a claim for damages at common law for wrongful dismissal, I am of the opinion that the order made under s. 15(3) is a nullity for having been made without jurisdiction. I would therefore disallow the cause shown and grant an absolute order of certiorari to quash it. Since it has not been suggested that the Tribunal will now be unwilling to decide the statutory claim on its merits, I would make no order on the application for an order of mandamus.

Approved
S.H.
11/12/84

STATE (FERRIS)

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Griffin J.
Hederman J.

(43-84)

THE SUPREME COURT

1984 No. 219 S.S.

THE STATE (FERRIS)

v.

EMPLOYMENT APPEALS TRIBUNAL AND
ROYAL LIVER FRIENDLY SOCIETY

JUDGMENT delivered on the 10th day of December 1984 by

GRIFFIN J.

I agree with the judgment delivered by Mr. Justice Henchy. I would like however to add some comments of my own.

While the Unfair Dismissals Act, 1977, made provision for redress for employees unfairly dismissed from their employment, and for the determination of claims for such redress, it nevertheless preserved by s. 15 the right of a person so dismissed to recover damages at common law for wrongful dismissal. That section however provided that a claim for such redress and a claim to recover damages for wrongful dismissal were alternative remedies - the person dismissed could claim either remedy but not both.

A claim under the Act is, and is clearly intended to be, more advantageous to the dismissed employee than is a claim for damages

for wrongful dismissal. The burden of proof is on the employer - the dismissal is deemed, for the purposes of the Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal (s. 6). The remedies available to him are reinstatement in the position which he held immediately before his dismissal, re-engagement either in that position or in a different position which would be reasonably suitable for him, or compensation not exceeding 104 weeks remuneration in respect of the employment from which he was dismissed (s. 7). In the instant case the employer alleges that, because the plenary summons issued on behalf of the claimant included a claim for damages for wrongful dismissal, he is debarred by s. 15(3) of the Act from claiming redress under the Act, and that therefore the advantages he might obtain under the Act are not open to him.

The plenary summons was issued on the 23rd June 1983, some seven weeks before he was dismissed on the 10th August 1983. In the plenary summons he claimed a declaration that his purported suspension on the 23rd March 1983 was invalid and of no effect, and, in addition to other declarations and injunctions, he claimed "Damages for breach of Contract, wrongful dismissal and breach of

the Plaintiff's Constitutional Rights to natural Justice." As Mr. Justice Henchy has pointed out in his judgment, the word "dismissal" was a typist's error. The true position was disclosed in the statement of claim, which was delivered on the 8th July 1983, in which the claim of the plaintiff was based on the purported suspension in March; in the relief claimed the word "suspension" had been substituted for the word "dismissal" in respect of the claim for damages. The matter does not however end there. Four days after delivery of the statement of claim the claimant issued a notice of motion claiming (inter alia) a mandatory order compelling the defendants to allow him to carry out his duties, and an order that the defendants should pay him the sum of £13,600, being his loss of earnings since his purported suspension. The motion was heard by Keane J. on the 25th July 1983, and he reserved his judgment, which he delivered on the 29th July 1983, refusing the application for the orders sought. The employers, who vigorously contested that motion, could not have been under any misapprehension as to the nature of the proceedings which were brought by the plaintiff, especially when it is borne in mind that all the steps in the action up to the end of July, 1983 were taken before the plaintiff was in

fact dismissed.

On the 8th September 1983 the claimant appealed to the Employment Appeals Tribunal for redress under the Act. On the 16th September 1983 the employers gave notice of appearance, and one of the grounds upon which the appeal would be contested was therein stated as follows:-

> "The Appellant has sued the respondent under Common Law procedures for damages for wrongful dismissal which proceedings are being defended. A copy of the issued Plenary Summons is attached hereto. Accordingly the Employment Appeals Tribunal has no jurisdiction in this case."

When the claimant's solicitor received this notice of appearance, he immediately wrote to the employers' solicitors informing them of the circumstances in which the typographical error in the plenary summons had occurred. He pointed out that this was borne out by the wording of the statement of claim, which was prepared at the same time as the plenary summons, and by the fact that the claimant had not been dismissed when the plenary summons was issued. There was no reply to that letter. There was therefore no dismissal in respect of which any proceedings at common law could have been

brought when those proceedings were instituted. Although they were fully aware of the true position when the hearing before the Employment Appeals Tribunal took place in March 1984, the employers nevertheless sought to take advantage of the fact that the word 'dismissal' had been used in error in the plenary summons, and the Tribunal accepted their submission.

For the reasons given by Mr. Justice Henchy in his judgment, I entirely agree that in the circumstances of this case the order made by the Employment Appeals Tribunal was one which was not made within jurisdiction and which was therefore a nullity. I would accordingly allow the appeal and concur in the order proposed by Mr. Justice Henchy.

F.G.

12.12.1984