[2019] IEHC 693

THE HIGH COURT

IN THE MATTER OF AN APPEAL PURSUANT TO ORDER 84C RULES OF THE SUPERIOR COURTS:- NATIONAL MINIMUM WAGE ACT 2000-2015 AND SECITON 46 WORKPLACE RELATIONS ACT 2015.

[2017 No. 93 MCA]

BETWEEN

DIMITRIJ KARPENKO

APPELLANT

AND

FRESHCUT FOOD SERVICES LIMITED

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 18th day of October, 2019.

Background

1. This an appeal on a point of law from the determination of the Labour Court dated 9th February, 2017 (Determination No. NWD171). The appellant, Mr. Karpenko was employed as a production operative by the respondent from the 15th July, 2013 to the 28th February, 2014. The appeal concerns the proper interpretation and application of s. 8 of the National Minimum Wage Act, 2000 as amended (hereafter referred to as *"the Act")* which provides as follows:-

> *"(1) For the purpose of determining under this Act whether an employee is being paid not less than the minimum hourly rate of pay to which he or she is entitled in accordance with this Act, but subject to section 9, "working hours", in relation to an employee in a pay reference period, means—*
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> *(a) the hours (including a part of an hour) of work of the employee as determined in accordance with—*
>
> *(i) his or her contract of employment,*
> *(ii) any collective agreement that relates to the employee,*
> *(iii) any Registered Employment Agreement that relates to the employee,*
> *(iv) any Employment Regulation Order that relates to the employee,*
> *(v) any statement provided by the employee's employer to the employee in accordance with section 3 (1) of the Terms of Employment (Information) Act, 1994,*
> *(vi) any notification by the employee's employer to the employee under section 17 of the Organisation of Working Time Act, 1997,*
> *(vii) section 18 of the Organisation of Working Time Act, 1997, or*
> *(viii) any other agreement made between the employee and his or her employer or their representatives that includes a provision in relation to hours of work,*
>
> *or*
>
> *(b) the total hours during which the employee carries out or performs the activities of his or her work at the employee's place of employment or is required by his or her employer to be available for work there and is paid as*

if the employee is carrying out or performing the activities of his or her work, whichever, in any case, is the greater number of hours of work."

2. Mr. Karpenko in his complaint to the Workplace Relations Commission alleged that in accordance with his contract of employment his working hours were 9pm to 9am, Monday to Sunday, with shifts rostered six days per week. Therefore, he claimed that his contracted working hours, taking breaks into account, amounted to 66 hours per working week. He was paid, on average, €337.50 per week which he alleges is a rate of pay lower than the minimum required by the Act and that the respondent was in breach of the provisions of the Act and regulations made thereunder. The Rights Commissioner decided that Mr. Karpenko's claim was not well founded. He noted that Mr. Karpenko's records demonstrated that he was remunerated at the rate of €10 per hour for each hour that he worked, which was not in breach of the terms of the Act. This decision was appealed to the Labour Court.

3. The Labour Court described the statement of contractual terms as being quite extraordinary and observed, without expressing a conclusion, that it may not be in accordance with other legislative provisions. Nevertheless, it also noted that Mr. Karpenko was paid in excess of the national minimum wage for the hours that he *actually worked* or *was required to work* during the relevant pay reference period. The Labour Court referred to one of its previous determinations in *O'Leary International Limited v. Viktors Gurkovs* (MWA 12/24) where it was stated "[*The] Act was enacted to establish a national minimum rate of pay which is expressed in terms of a rate applicable to every hour worked ".* Describing this as the nub of the appeal, it concluded:-

> *"The determination of this court in O'Leary International is not authority for the claim being advanced on behalf of the complainant i.e. that he is entitled to be remunerated for hours he did not and was not required to work. It is authority for the proposition advanced on behalf of the respondent in the within appeal to the effect that the Act provides that the complainant is entitled to be remunerated at the applicable national minimum wage for the hours he actually worked"* (emphasis added).

4. By notice of motion dated 8th March, 2017 Mr. Karpenko appeals that decision.

5. The relevant provisions of his contract of employment, entitled *Statement of Main Terms of Contract*, dated 15th July, 2013 are as follows:-

PLACE OF WORK. "

> *You will normally be required to work at 68 Moyle Road, Dublin Industrial Estate, Glasnevin, Dublin 11. You will not be required to work outside the State.*

HOURS OF WORK.

> *Your normal hours of work are between 9.00pm and 9.00am Monday to Sunday. Shifts are six days a week as per roster with a 30 minute break and two 15 minute*

breaks each day. You may be required to work additional hours when authorised and as necessitated by the needs of the business.

REMUNERATION.

Your hourly rate is currently €10 per hour payable weekly by cheque or credit transfer as detailed on your pay statement."

6. In its determination the Labour Court records that it was informed by representatives of the employer that Mr. Karpenko did not work in excess of 40 hours in any one week during the relevant period of his employment and that this was not contested by the appellant. By letter dated 9th April, 2014, Mr. Karpenko, through his solicitor, made a request pursuant to s. 23 of the Act for a statement of his average hourly rate of pay for the pay reference period 17th February, 2014 to the 21st February, 2014. The respondent replied by letter dated 10th June, 2014 stating that his average hourly rate of pay for the pay reference period was €10 per hour. Mr. Karpenko was recorded as having worked 33.47 hours in that period and was paid €337.50 gross. The national minimum wage at the relevant time was €8.65 per hour.

7. It is to be noted that Mr. Karpenko made other complaints in respect of his employment with the respondent to the Rights Commissioner. In 2014, he made complaints under the Organisation of Working Time Act 1997 ("*the Act of 1997*") and the Terms of Employment (Information) Act 1994 – 2001 ("*the Terms of Employment Act").* In his determination of the 9th September, 2014, the Rights Commissioner found that the complaint made by Mr. Karpenko that he had not received a statement of employment in compliance with s. 3 of Terms of Employment Act, was well founded. Mr. Karpenko had complained that his contract of employment was deficient in that his employers name was not listed correctly, the holiday year was not stated according to the Act of 1997 and that there was no reference to the right to request a statement of the hourly rate of pay as per the National Minimum Wage Act. He also complained that no reference was made to relevant provisions of S.I. 49/1998. He sought compensation. The employer did not attend the hearing and based on uncontested evidence, the Rights Commissioner found that the contract did not fully comply with the requirements of s. 3 of the Act. He ordered the employer to pay €500 compensation within six weeks.

8. Mr. Karpenko also made a complaint pursuant to the provisions of s. 15 and s. 16 of the Act of 1997. He contended that he worked from 9:30 p.m. to 7:00 a.m. and that he was a night worker as more than 50% of his hours were worked between midnight and 7:00 a.m. It was also claimed that he worked 40 hours per week in August, 2013, 46.3 hours per week in September, 2013 and 41.35 in October, 2013 and 39.37 in November, 2013. This would seem to be somewhat at odds with what is recorded in the Labour Court's determination the subject matter of this appeal. Again, the employer did not attend and based on the uncontested evidence, in his decision of 9th September, 2014 the Rights Commissioner found that Mr. Karpenko was a night worker within the meaning of s. 16, that he had exceeded 40 hours per week on certain occasions, and that the employer had been in breach of s. 16. Compensation was measured at €500. The complaint under s. 17

of the Act of 1997 was not accepted. Mr. Karpenko maintained that he was notified of overtime with less than 24 hours' notice. The Rights Commissioner noted that this was a regular occurrence and that Mr. Karpenko was informed 15 to 20 minutes beforehand of the position. Observing that Mr. Karpenko's contract of employment *"states finishing time at 9:00 a.m. but he finished at 7 or later, but less than 9 a.m.",* he continued:-

> *"I note that the contract of employment states under 'Hours of work' 'Your normal hours of work are between 9 p.m. and 9 a.m.'. I find that this is not a contract to work those actual hours but that the hours are between these times. Therefore, I find that he does not have a contract to work twelve hours per shift but that his hours of work fall within these times. As his hours fall between 9 p.m. and 9 a.m., he was effectively notified of having to work within that period of time. Therefore, I find the employer has not breached sec 17 of this Act".* (emphasis supplied)

Submissions

9. Counsel for the appellant, Ms. Bolger S.C., submits that the Labour Court fell into error as a matter of law in the manner in which it addressed and calculated hours of work in the relevant pay reference period. Counsel submits that this case is not about interpretation of the contract, rather interpretation of the Act. It is submitted that, as a matter of statutory interpretation, it is not the actual hours worked, rather the hours of work as determined in accordance with the contract of employment which is relevant and that the Labour Court supplanted the law contained in s. 8(1) with its own analysis of the stated purpose of the Act, being to establish a national minimum rate of pay expressed in terms of rates applicable to *every hour worked.* It is submitted that the provisions of the Act are unambiguous and ought to be literally interpreted and afforded their ordinary meaning. There is no ambiguity and no justification to adopt a purposive approach thereby ascribing some other meaning to those words. The disjunctive "*or*" which is employed in the section ought to have led to a consideration of the alternatives. Similarly, the expression "*whichever is the greater*" was also not considered. The Act employs the phrase "*working hours*" rather than "*every hour worked*". Section 2(1)(b) provides that the term "*working hours*" has the meaning assigned to it by s. 8. The phrase *working hours* is repeated throughout the Act, and not phrases such as "*every hour worked*" or hours "*actually worked".* Further, the Act makes no allowance for a contention, such as made by the respondent, that it is unreasonable for an employer to have to pay for hours not worked. It is further submitted that any attempt to rely on the provisions of s. 17, by arguing that a roster constitutes notification of working hours, should not be entertained because such argument was not made to the Labour Court. Reliance is placed in this regard a letter of 10th June, 2014 from the respondent, which records that the contractual "*start and finishing*" times were as stated in the contract of employment (emphasis added). It is submitted that it would be unfair to entertain arguments in respect of rosters or s. 17 in this court as the appellant did not have the opportunity before the Labour Court to test whether the rosters, or evidence thereof, complied with the provisions of s. 17 in the assessment of relevant matters under s. 8(1)(a) of the Act.

10. Counsel for the respondent, Mr. Shearer B.L. submits that the appellant relies on an incorrect, restrictive and selective interpretation of the relevant term of the contract that his contract of employment required him to be available for work for 12 hours a day, six days per week. He accepts that the wording of the contract might benefit from rephrasing, but it is submitted that the appellant ignores the phrase "*as per roster*" which qualifies the meaning and effect of the contractual term. Each word in the contract must be presumed to have some meaning and counsel argues that the appellant's contract of employment must be read, was intended to be read and was in fact read by the appellant in conjunction with his weekly roster. Further the wording employed in the contract is "*between..."* and not "*from…. 9 p.m. to 9 a.m."* and provides for rostering on a maximum of 6 shifts per week with those shifts occurring between 9 p.m. and 9 a.m. He submits that the interpretation of the contractual provision proposed by the appellant would necessarily render the respondent in breach of the Act of 1997. The contract should be construed in a lawful way and in support counsel places reliance on *dicta* of Kay L.J. in *Mills v. Dunham* [1891] 1 Ch 576, that "*it is … a settled canon of construction that where a clause is ambiguous a construction which would make it valid is to be preferred to one which would make it void"*. He argues that an exercise demanded by s. 8(1)(a) of the Act is to assess all matters referred to, including notifications under s. 17, in this case being the roster. Counsel also refers to a letter from a fellow employee which was before the Labour Court. The letter confirms that she worked in the fruit kitchen of the respondent's premises between March, 2013 and November, 2015 and received advanced notification of her working hours; a roster was placed on the kitchen notice board informing her and all employees of the working hours for the following two weeks

11. Mr. Shearer B.L. also contends that *res judicata* applies, or at minimum the appellant is estopped from pursuing this case because in his 2014 recommendation, the Rights Commissioner accepted that Mr. Karpenko was paid €10 per hour. It is therefore submitted that because compensation and redress under both pieces of legislation are calculable by reference to the amount paid per week and that the assessment of compensation of €500 must have been calculated by reference to the sum of €10 per hour, that Mr. Karpenko should not be permitted to make a contrary case now.

12. Ms. Bolger S.C. in reply submits that this is not a breach of contract claim, that the contract was drawn up by the respondent and was placed before the Labour Court. It is contended that the Rights Commissioner's determination in 2014 could not be binding on this Court, that there was never a determination of the issue of how wages should be calculated under s. 8 of the Act and res judicata could not apply in the context of a different piece of protective legislation. More fundamentally it is argued that it has never been the appellant's case other than that he was paid €10 for the hours which he in fact worked and therefore estoppel cannot arise. Counsel submits that the evidence before the Labour Court of another employee about rosters is not evidence of the notification of a roster to the appellant; and is not in accordance with a letter in reply to particulars in which the company identified the contract as containing the times of work. It is submitted that there is no evidence of the appellant being informed of the hours of work, other than that outlined in the contract and that in any event this case was never made

before the Labour Court. As to the merits, it is submitted that it is not relevant to consider that the Labour Court might arrive at the same conclusion after the proper interpretation and application of the requirements of the Act. The appellant is entitled to have his working hours determined and calculated in accordance with the statutory requirement.

The role of the Court – appeal on point of law and curial deference

13. This is an appeal on a point of law pursuant to s. 46 of the Workplace Relations Act 2015. In *Fitzgibbon v. Law Society* [2015] 1 I.R. 156, Clarke J. (as he then was) stated that where the legislature confirms a right to a statutory appeal, it must be assumed that it was intended to have some meaning and purpose. In *An Post v. Monaghan* [2013] IEHC 404, Hedigan J. observed that the role of the court is limited, and it may intervene only where it finds that the decision is based on an identifiable error of law or an unsustainable finding of fact. The authorities highlight that such decisions are made by expert administrative tribunals and when it comes to the question of fact, a practical reason for the reluctance to interfere is that this Court has not heard the evidence which the tribunal had the benefit of hearing. In *Dunnes Stores v. Doyle* [2014] 25 E.L.R. 184, Birmingham J. considered that a finding of fact by an Employment Appeals Tribunal is deserving of great respect because it is made by a Tribunal representing both sides of industry. In *Health Services Executive v. Abdel Raouf Sallam* [2014] IEHC 298, Baker J. observed that the High Court must show appropriate curial deference to the Labour Court, but that such deference arises when the Labour Court deploys its particular expertise on industrial relations issues.

14. Thus, it is clear that the role of this court on this appeal is limited. It may only intervene where an error of law has been demonstrated or where a finding of fact has been made which is unsupported by the evidence. The authorities also acknowledge that the process by which findings of fact are made may be a question of law.

Decision

15. Among the purposes described in the long title to the Act are to provide for the determination, declaration and review of a national minimum hourly rate of pay for employees, and the entitlement of employees to remuneration for employment at a rate not less than, or calculated by reference to, that national minimum hourly rate. The Act provides a mechanism for the calculation of employees' entitlements.

16. In arriving at its determination the Labour Court referred to the provisions of ss. 8(1)(a)(i) and 8(1)(b) and found as a matter of fact that the complainant was paid in excess of the national minimum wage for the hours that he actually worked/was required to work during the relevant pay reference period. In its determination the Labour Court concluded that *O'Leary* was authority for the proposition advanced on behalf of the respondent that the Act provides that the complainant is entitled to be remunerated at the applicable national minimum wage "*for the hours he actually worked".*

17. I accept that the provisions of the Act under consideration are unambiguous and therefore it is appropriate to construe them in accordance with a literal interpretation. In my view s.

8(1) requires the meaning of *working hours* under the contract to be addressed and assessed. It has a particular statutory definition. In the context of this case, it requires that the hours (including a part of an hour) of work of the appellant be determined in accordance with the contract of employment, or the total hours during which he carried out or performed the activities of his work at his place of employment, or was required by his employer to be available for work, whichever is the greater number of *hours of work*. The assessment of the alternative is mandated by s. 8 of the Act which notably contains no reference to the expression *hours worked.*

18. In my view, the Labour Court in its approach to the determination of this issue erred by equating hours actually worked with working hours as defined in the Act. By so doing it did not engage in the necessary exercise of the assessment of *whichever is the greater* between the hours of work as determined in accordance with the contract of employment and the total hours during which Mr. Karpenko carried out or performed the activities of his work at his place of employment or was required by his employer to be available for work and was paid as if he was carrying out or performing the activities of his work.

19. It is only in the analysis of these two issues, in the context of the facts as found, could the Labour Court have arrived at a conclusion as to which was the greater number of hours of work. On that basis I must conclude that the Labour Court fell into error of a type envisaged by Kearns P. in *Earagail Eisc Teoranta v. Ann Marie Doherty and Others* [2015] IEHC 347, where it is appropriate for the court to intervene.

20. Counsel for the respondent argues that *res judicata* or, alternatively, estoppel applies even though neither defence was raised before the Labour Court. With regard to *res judicata* no authority is relied on in support of this contention in a case such as this, particularly given the differing nature of the statutory provisions and processes in question. While the Rights Commissioner in his decision of 9th September, 2014 concluded that there had not been a breach of the provisions of s. 17 of the Act of 1997, the claim concerned an issue relating to notification of overtime and not the assessment of hours of work or working hours. Regarding estoppel, it appears to me that the Rights Commissioner was concerned with the provisions of different legislation. It is also clear that the hourly rate payable under the contract of employment is expressly stated to be €10 per hour and no contrary case is made in that regard. What is in issue in this case is the number of hours of work and working hours as defined in s. 8.

21. I should also say, I believe that there is merit in Mr. Shearer's submission that on a proper interpretation of the terms of the contract of employment, it is unlikely to mean that the employee's work extends to 66 hours a week. To so construe it would appear to ignore the words in the contract that "*shifts are six days a week per roster*". The roster is also mentioned in the contract in the context of holiday pay. It is evident from the contract of employment that the hours of work are not stated to be *from* but *between* 9 p.m. and 9 a.m. Therefore, the roster is likely to assume importance in the determination of what constitutes the hours of work under the terms of the contract. In the assessment of the appropriate "*working hours*" under s. 8. the provisions of s. 17 of the Act of 1997

are also likely to be relevant but it cannot be said that the Labour Court engaged in an analysis of whether and to what extent a roster existed and the effect, if any, that this may have had in terms of the application of s. 17.

22. I must conclude, therefore, that the Labour Court did not engage in the exercise that it was required to when determining the "*working hours*" of the appellant as defined in s. 8 of the Act and that in failing to do so it fell into error as a matter of law. It may well be that the Labour Court arrives at the same result having engaged in such exercise and to that extent the appeal may have little substantive merit. Nevertheless, the Act is an important piece of protective legislation and the proper interpretation and application of s. 8 is of general relevance and importance.

23. For all of the above reasons, I must accede to the application and direct that the matter be remitted to the Labour Court for further determination.