THE HIGH COURT

[2016 No. 253 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO ORDER 84C RULES OF THE SUPERIOR COURTS: SECTION 28(6) OF THE ORGANISATION OF WORKING TIME ACT 1997 AND THE TERMS OF EMPLOYMENT INFORMATION ACT 1994 AND

SECTION 46 WORKPLACE RELATIONS ACT 2015

BETWEEN

EDGARAS PETRAITIS

APPELLANT

AND

PHILMIC LIMITED TRADING AS PREMIER LINEN SERVICES

RESPONDENT

JUDGMENT of Mr. Justice White delivered on 6th day of December, 2017

1. The Appellant issued a motion on 15th July, 2016, originally returnable for 17th October, 2016, appealing to this Court on points of law from the determinations of the Labour Court on 8th June, 2016, in determination numbers DWT/1640 on alleged breaches of provisions of the Organisation of Working Time Act 1997 and determination TED/1616, on alleged breaches of the Terms of Employment Information Acts 1994 – 2012. The Appellant seeks:-

(i) A Declaration that the Labour Court erred in law and misdirected itself in the manner outlined in the points of law in this appeal.

(ii) An Order that the determinations of the Labour Court be set aside.

(iii) An Order that the appeals be remitted to a differently constituted Labour Court for rehearing in accordance with fair procedures and the principle of deterrence and equivalence.

2. The pleadings were grounded on the affidavit of the Appellant's solicitor, Richard Grogan, together with copies of the submissions made to the court with notes on the original hearing and other miscellaneous documents which were exhibited in that affidavit. Michael Daly, Managing Director, of the Respondent deposed a replying affidavit on 20th October, 2016, likewise exhibiting the submissions, determinations and letters relevant to the hearing before the Labour Court. The Respondent filed its Statement of Opposition in October 2016. Richard Grogan, solicitor for the Appellant deposed and filed a replying affidavit on 1st November, 2016.

3. The grounds of the appeal and the points of law to which the appeal relate are:-

(i) That the Labour Court erred in law and misdirected itself as to the Appellant's entitlements under s. 6 of the Terms of Employment (Information) Act 1994.

(ii) That the Labour Court erred in law and misdirected itself as to the Appellant's entitlements under s. 3 of the Terms of Employment (Information) Act 1994.

(iii) That the Labour Court erred in law and misdirected itself as to the Appellant's entitlements under s. 12 of the Organisation of Working Time Act.

(iv) The Labour Court erred in law and misdirected itself in not addressing the issue of compensation to the employee under s. 12 of the Organisation of Working Time Act and the issue of setting compensation.

(v) That the Labour Court erred in law and misdirected itself in not addressing the issue as to the level of the breach identified.

(vi) That the Labour Court erred in law and misdirected itself in not setting compensation for s. 12 separate to s. 17 of the Organisation of Working Time Act.

(vii) That the Labour Court erred in law and misdirected itself as to the Appellant's entitlements under s. 19 and 21 of the Organisation of Working Time Act.

(viii) The Labour Court erred in law and misdirected itself in not applying provisions of Statutory Instrument 475/1997 and the calculation of the employee's entitlement to Public Holidays.

(ix) The Labour Court erred in law and misdirected itself as to the Appellant's entitlement to holiday pay under s. 20 of the Organisation of Working Time.

(x) The Labour Court erred in law and misdirected itself as to the Appellant's entitlements under s. 19 which was not the issue before the Labour Court.

(xi) The Labour Court erred in law and misdirected itself by engaging in an exercise of fact finding and failing to apply fair procedures.

4. The Appellant was employed as a laundry worker with the Respondent. He commenced employment on 26th April, 2012 and his employment was terminated on 18th March, 2015. The appellant was paid €8.65 an hour.

The Appellant referred a complaint to the Workplace Relations Commission claiming that the Respondent had breached provisions of the Organisation of Working Time Act 1997 and statutory instruments made pursuant to the Act and also had breached the provisions of the Terms of Employment (Information) Act 1994, and statutory instruments made pursuant to that legislation.

5. The adjudication officer on 2nd February, 2016, issued separate rulings on the alleged breaches of the separates acts. On the alleged breaches of the Organisation of Working Time Act 1997, the adjudication officer decided that there was no breach of ss. 19, 21 and 23 of the Act, that there was a technical breach of s. 12 of the Act and there was no breach of s. 17 of the Act. The adjudication officer noted that the employer had technically breached s. 12 of the Act even though the complainant does get 40 minutes each afternoon's shift and the adjudication officer directed the respondent to pay the Appellant compensation of €200. In a separate ruling on the complaint on the Terms of Employment (Information) Act 1994, the adjudication officer decided that the Appellant's complaint was not well founded. The Appellant appealed both rulings to the Labour Court pursuant to s. 44 of the Workplace Relations Act 2015 and s. 28(1) of the Organisation of Working Time Act 1997. The procedural rules by which the Labour Court operates are rules made pursuant to s. 20 of the Industrial Relations Act 1946, as amended by s. 50 of the Workplace Relations Act 2015, and are described as Labour Court (Employment Rights Enactments) Rules 2016. The applicable rules are set out at Part 3 and 4 of the Rules.

6. The solicitors for the Appellant prepared two written submissions of 16th February, 2016, one submission on the alleged breach of Terms of Employment (Information) Act 1994 – 2012 and a submission on the alleged breaches of Organisation of Working Time Act 1997. The Respondent's representative, Nora Cash, Peninsula Business Services (Ireland) Limited furnished a written submission to the court also dealing with both Acts together. That submission is undated.

7. On 15th April, 2016, the solicitors for the Appellant wrote to the Labour Court and referred to a submission already furnished to the Labour Court on litigation advice privilege and a request for witness summonses. The solicitors had requested a witness summons be addressed to Mr. Mark Ramsbottom, Ms. Nora Cashe, Mr. Peter Swift. The solicitors sought and required that these individuals be summonsed to the Labour Court hearing and bring with them:-

> "copies of all advices and documentation and notes relating to any advice sought or requested from Peninsula Business Services (Ireland) Limited, Peninsula Business Services Ltd, or from either of the named parties above relating to the claim by our client against the employers referred to above.
>
> For the avoidance of any doubt we are seeking all documentation relating to any correspondence to or from any of the parties named above namely the Employer, Mr. Mark Ramsbottom or Mr. Peter Swift or any servant, agent or employee of Peninsula Business Services Ltd or Peninsula Business Services (Ireland) Limited to or from the Employer."

8. Detailed submissions on legal advice privilege and the entitlement of the persons representing the Respondent were sent to the Labour Court. It was submitted that the Respondent's chosen representative should not have a right of audience before the Labour Court. The submission also referred to a possible conflict of interest as Peninsula Business Services (Ireland) Limited may have indemnified the Respondent in respect of any part of a claim.

9. The submission concluded by stating:-

> "Based on the above arguments we are seeking witness summons as set out above. We are also requesting the court to rule on the issue of Peninsula Business Services (Ireland) Limited being allowed represent the employer in the particular circumstances particularly unless they disclose whether they or any associated company have a financial interest in the outcome. We are seeking that witness summonses be issued."

10. It was submitted that the Respondent's representatives did not have a right of audience before the Labour Court. In the replying submission, the Respondent asserted the right of representation and also stated that Philmic Limited trading as Premier Linen Services did not have a contract of insurance with PBS and that it had no financial interest in the case. It also dealt with litigation advice privilege.

11. A hearing took place before the Labour Court on 19th April, 2016. Mr. Grogan in his affidavit of 15th July, 2016, stated:-

> "The case consisted of an invitation to the parties to submit written submissions in the ordinary course a week prior to the hearing. At the hearing, the parties were required to read their submissions and did answer questions of the court. The oral testimony of witnesses comprised the evidence of the Appellant and Ms. Daly for the Respondent but only as regards the contract of employment and staff handbook but all other matters were dealt with on oral and written submissions by the representatives of the Appellant and the Respondent."

12. He further stated:-

> "The issue of litigation advice privilege was material and important to the case because the Respondent was represented by persons who are not bound by the professional codes of conduct of either of the Law Society of Ireland or the Bar Council of Ireland. However, I was not permitted by the Labour Court to pursue my application in respect of the issue of legal advice privilege."

13. Mr. Michael Daly, Managing Director of the Respondent in his affidavit of 20th October, 2016, stated:-

> "The matter pursued by the Appellant before the Labour Court was dealt with by way of oral testimony of witnesses including the evidence of Ms. Daly for the Respondent. The case also involved the filing of written submissions by the parties with the Labour Court."

14. In his replying affidavit of 1st November, 2016, Mr. Grogan stated:-

> "I say that the Labour Court while it dealt with the issue of representation, at no stage dealt with the issue of the request of witness summons nor did the Labour Court in its determination set out the basis on which it had determined not to issue witness summons. Further, the said Labour Court refused to allow your deponent read the submission relating to the issue of litigation advice privilege."

15. Substantial documentation was before the Labour Court including an Employee Handbook. In his affidavit of 15th July, 2016, Mr. Grogan states the Respondent disclosed under the Freedom of Information Act an Employee Handbook which was dated 2015, but then produced a handbook dated 2013 at the hearing.

16. In the originating Notice of Motion, ground 1, stated:-

"The documentation provided was various documents headed Statement of Main Terms of Employment. There was also a booklet entitled Employee Handbook. It is accepted that the Appellant commenced employment in 2012. The original Handbook produced to the Appellant under the Data Protection request was dated 2015. At the hearing before the Labour Court, the document which was produced was dated February 2013. Subsequently, the Respondent submitted a document the Labour Court being an Employee Handbook purportedly dated December 2010. This document was not produced in evidence. It was submitted by letter dated 20th April, 2016, after the hearing. On 22nd April, 2016, the firm of Richard Grogan and Associates wrote to the Court Secretary advising that the firm had serious concerns in relation to the documentation as furnished being the new Staff Handbook and that same was required to be formally proved and that the Appellant required to cross examine in respect of same."

17. In the Statement of Opposition the Respondent, stated-

"The Respondent further contends that the Appellant was furnished with a Statement of Main Terms of Employment in April 2012 and that he entered into employment in April 2012. As such the Appellant is incorrect in asserting that the Respondent breached the section of the said Act relating to provision of said terms. This submission was made to the Labour Court at hearing by the Respondent. The Respondent also contends that the Appellant was furnished with a staff handbook and signed confirmation of same on or about the 26th April, 2012. This matter was dealt with and raised before the Labour Court in submission and a copy of the said documentation and confirmation of receipt of the handbook by the Appellant was furnished also by the Respondent to the court. In the hearing of the matter before the Labour Court, the Respondent also clarified that the Appellant worked under a series of fixed term contracts and was in receipt of new contracts each time a previous contract concluded. It was further clarified by the Respondent that the Appellant was issued with a contract of indefinite duration in January 2014 and a copy of same was furnished to the Labour Court in support of this submission.

The Respondent further made the submission to the Labour Court in the course of the hearing of the matter that the most recent contract of employment as per the Terms of Employment (Information) Act 1994 was also signed and dated by the Appellant on or about 26th January, 2014.

The Respondent further submitted to the Labour Court that the Contract of Employment which was produced and furnished to the court outlined the following:

Commencement date of Employment,

Job Title,

Place of work,

Hours of work,

Rest periods in accordance with the Organisation of Working Time Act, Remuneration,

Sunday premiums,

Annual leave entitlement,

Public Holidays,

Remuneration or toil,

Sick pay,

Disciplinary rules and procedures,

Disciplinary appeals procedure,

Grievance procedure

Notice of termination.

Information in respect of PRSI scheme,

Safety at work and

Amendments to the terms of condition of employment.

The Respondent further provided a copy of a document to the Labour Court which was signed by the Appellant confirming that he had read the staff handbook on receiving his new contract of employment."

Correspondence subsequent to the Labour Court hearing on 19th April, 2016.

18. The Respondent's advisers, Peninsula Business Services (Ireland) Limited wrote to the solicitor for the Appellant and the Labour Court on 21st April, 2016. The letter to Mr. Grogan stated:-

"As per the court's request, please see the Employee Handbook issued to your client dated December 2010."

19. Mr. Grogan in a letter to the Labour Court of 22nd April, 2016, copied to the Respondent's advisers stated:-

"I would confirm that I did receive a hard copy of the purported Staff Handbook which it is alleged was furnished to my client. We on behalf of our client are formally challenging same. We under Data Protection Act received a document updated June 2015. Before the Rights Commissioner Service, we received the document issue number 0 of February 2013

at p. 188 of the employer submission given into the Labour Court. We now obtain a further document which is dated December 2010, as issue 0. We have serious concerns in relation to the documentation as furnished. We require that document to be formally proved and we will be cross examining in respect of same. We are not admitting the document without formal proof. We request that the division re-sits to hear matters and we will be renewing our application on the next day for the witness summonses."

20. Peninsula wrote a letter to the Labour Court on 26th April, 2016, a copy of which was furnished to Mr. Grogan, Solicitor. The letter stated:-

> "I am surprised at this correspondence as the Chairman, Mr. Foley advised all parties that he did not require additional submissions in the matter only the Handbook. Mr. Foley confirmed that the hearing had concluded.
>
> In addition, any issue regarding the Handbook could have been dealt with at the hearing on 19th April, 2016, if Richard Grogan and Associates had sent the Respondent a copy of their Submission in advance of the hearing. Richard Grogan and Associates sent other correspondence and were well aware of the address to which he could have sent the copy submissions.
>
> Richard Grogan and Associates cites "serious concerns in relation to the documentation," but failed to inform the court what these concerns might be. Instead, Richard Grogan and Associates have asked the court to facilitate what we are concerned may be a vexatious agenda.
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> Richard Grogan and Associates have now requested that the Court reconvene the hearing so they can have the opportunity to further cross examine witnesses who they already cross examined on 19th April, 2016. Richard Grogan and Associates request to reconvene an entire Division of the Labour Court is disproportionate to the complexity of the matter before the court. At the hearing on 19th April, 2016, the Claimant gave evidence in relation to signing that he had read his employee handbook (issue 0).
>
> Richard Grogan and Associates' letter of 22nd April, 2016, purports to identify p. 188 of the Respondent's booklet as being issue 0 February, 2013. We have serious concerns over this statement, as p. 188 of the Respondent's booklet is clearly identified as issue 1."

Labour Court Determinations.

21. The Labour Court proceeded to issue a written determination separately in relation to each Act. These determinations were issued on 8th June, 2016. In both determinations, the court stated it considered the matter of representation in accordance with s. 44 of the Workplace Relations Act 2015, and in accordance with the provisions of s. 44(9)(a)(iv) decided to permit the Respondent to be represented by Peninsula Business Services Limited.

22. Then in determination DWT1640 Organisation of Working Time Act 1997, it proceeded to deal with ss. 12, 17, 19, 21 of the Act. The court found that the Respondent had breached s. 12 of the Act and had breached s. 17 of Act. The court noted that there was a conflict of evidence in that the Appellant was not afforded adequate breaks and in respect of s. 17, the court noted it was presented with conflicting evidence as regards the notification provided to the Appellant as regard changes to start and finishing times when they occurred and the court preferred the evidence of the Appellant on this matter and the court found that the Respondent had breached s. 17 of the Act. The court noted in relation to s. 19 of the Act that it had been provided with extensive detail of the payments made to the Appellant in respect of annual leave and the court finds that the Respondent was not in breach of s. 19 of the Act. In respect of s. 21 of the Act, the Labur Court noted it had been provided with extensive detail as regards the payments made to the Appellant in respect of Public Holiday falling in the cognisable period of the within claim, the Court found that the Respondent was not in breach of s. 21 of the Act. The final determination in relation to the Organisation of Working Time Act 1997, allegations was:-

> "The court finds that the Respondent was in breach of the Act at ss. 12 and 17. The Court finds that the Respondent was not in breach of the Act at ss. 19
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> 21. The Court measures the compensation which is just and equitable in all of the circumstances at €1,000 and requires the Respondent to pay compensation in that amount to the Appellant."

23. In its determination DT1616 on the alleged breach of the Terms of Employment (Information) Acts, the court in its discussion and determination stated:-

> "Discussion
>
> The Court heard evidence from the parties as regards the material which was supplied to the Appellant in purported fulfilment of the Respondent's obligations under the Act at section 3. The Court is satisfied that the Appellant was supplied with a document headed Statement of Main Terms of Employment within the timeframe set out at s. 3(1) of the Act and that he acknowledged receipt of that document by signature dated 26th August, 2012. The Court is also satisfied, on the balance of probability that the Appellant was supplied on that date with a booklet entitled Employee Handbook which was dated 2010 at p. 2 of that booklet.
>
> The Appellant contends that the material supplied to him was inadequate in that it did not meet the requirements of the Act at s. 3 in relation to information as to hours of work, Sunday Working, Annual Leave, Public Holiday Working and as regards section 3(g) and 3(ga) .
>
> The Court is satisfied that the material supplied to the Appellant complied with s. 3 of the Act in all respects save for ss. 3(g) and 3(ga) . No submission has been made to the Court as regards a detriment accruing to the Appellant as a consequence of this deficiency of material supplied to the Appellant.
>
> Any claim of the Appellant as regards the operation of Sunday Working arrangements, Public Holiday Working arrangements or Annual Leave arrangements in the Respondent's employment must be made in accordance with the terms of relevant legislation. The Court cannot address such matters in the within case.

Determination

The court finds that the Respondent was in breach of the Act at s. 3(g) and 3(ga) . No submission has been made to the Court to the effect that the Appellant suffered any detriment as a result of these breaches. The Court measures the compensation amount which is just and equitable having regard to all the circumstances of this case as being nil. The recommendation of the Adjudication officer/Rights Commissioner is varied accordingly."

The Law

24. This is a statutory appeal. This Court exercises supervisory jurisdiction only on points of law. The Labour Court is an expert Tribunal on employment law. It is entitled to substantial curial deference in its deliberations.

25. In *Henry & Denny v. Minister for Social Welfare* [1988] 1 I.R. 34, Hamilton C.J. stated:-

> "I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

26. In *Ahern v. UCC* [2005] 2 I.R. 577, the Supreme Court dealt with the issue of the determination of facts as a question of law. McCracken J. stated:-

> "The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)."

27. In *UCC v. Bushin* [2012] IEHC 76, Kearns P. stated:-

> "Bodies such as the Labour Court are, in my view, entitled to a significant degree of curial deference with regard to the way in which they conduct their business. I would exercise that discretion in the instant case in favour of non-intervention to grant the relief sought by the appellant in this appeal."

28. It is self evident also that the Labour Court is not a court of law bound by the strict provisions of the Rules of the Superior Courts, Circuit Court Rules and the District Court Rules and stricter laws of evidence in respect of both oral, documentary and real evidence. The Labour Court is entitled pursuant to the legislation governing it's operation to adapt its own rules which are different to the ordinary courts. It has a duty to apply fair procedures to apply *audi alteram partem* and to give reasons for its decisions.

29. In *Earagail Eisc Teoranta v Ann Marie Doherty & Ors* [2015] IEHC 347, Kearns P. stated:

> "The Court accepts that previous decisions of the Court have established that the duty to give reasons does not require extensive analysis of every aspect of a complaint and indeed, as held in *Faulkner*, the 'gist' of the basis for a decision is sufficient. However, in the present case I am satisfied that the brief determination of the Tribunal is wholly inadequate to meet even this low threshold. It is not clear how the Tribunal arrived at the determinations……..There is no engagement whatsoever, however minimal, with the detailed submissions of the Appellant..

30. The Court is satisfied that the determinations of the Labour Court in this appeal are clear and did engage with the submissions and gave reasons except in one instance which the Court shall return to.

31. It would be detrimental to the operation of these expert Tribunals if the Superior Courts in their supervisory jurisdiction set a standard of evidence in reality no different from those operating in the ordinary courts. The huge advantage of an informal and inexpensive system for the resolution of employment disputes should not be underestimated.

32. The court will deal with a number of the grounds of appeal together. Grounds 1 and 2 relate to the Labour Court's determination TD1616 on the Terms of Employment (Information) Act 1994 – 2012.

33. Grounds 3 – 6 deal with ss. 12 and 17 of the Organisation of Working Time Act 1997. Grounds 7 – 10 deal with the Labour Court's determination on ss. 19, 20 and 21 of the Organisation of Working Time Act and Statutory Instrument 475 of 1997.

34. Ground 11 is a separate ground dealing with the issue of litigation advice privilege and the request for witness summonses. This Court feels it appropriate to deal with one issue covering both determinations by the Labour Court and that is the submission that the Labour Court did not address the issue of *von Colson and Kamann*, a decision of the European Court of Justice and has failed to determine appropriate compensation in accordance with what the Appellant contends is the appropriate principle which should be followed by it in assessing compensation.

35. The issues are helpfully summarised at para. (b) of the Appellant's outline legal submissions which are as follows:-

> (i) Whether the Labour Court acted in breach of the Appellant's right to fair procedures and his right to contest the evidence in the case, in accepting the Employee Handbook dated December 2010, which was submitted after the hearing and which was not formally proven in evidence by the Respondent without affording the Appellant an opportunity to cross examine the Respondent in respect of the document.
>
> (ii) Whether the Labour Court misdirected itself in respect of the Appellant's entitlements under s. 3 and 5 of the Terms of Employment (Information) Act 1994 and in particular whether the Labour Court erred in law in failing to consider the principle of effectiveness as set out by the Court of Justice in von Colson and Kamann.

(iii) Is there a requirement to show detriment under the Terms of Employment (Information) Act.

(iv) Whether the Labour Court is required to specify how compensation was set as regard the breaches identified in respect of s. 12 and 17 of the Organisation of Working Time Act in light of the fact that the provisions of s. 12 are a fundamental social right arising from Directive 94/104/EC and the principle of effectiveness and to be persuasive of an employer in line with the determination of *von Colson and Kamann.*

(v) Whether the Labour Court fell into error in respect of the Appellant's entitlements under the Organisation of Working Time Act.

(vi) Whether the Labour Court erred in law and/or breached the Appellant's rights including his right to fair procedures in failing to determine the request for witness summonses refusing to permit the appellant's legal representatives to make submissions relating to the issue of legal advice/litigation privilege and failing to address these issues in its determination and in failing to give reasons for its decision in this regard.

36. In respect of grounds 7, 8, 9 and 10, in the original Notice of Motion that is that the Labour Court fell into error in respect of the Appellant's entitlements under the Organisation of Working Time Act. These grounds are not points of law, they are factual matters appropriately determined by the expert Tribunal, the Labour Court. This Court cannot see any point in determining this issue according to the principles of *Ahern v. UCC* that is an examination as to how the Labour Court found certain facts.

37. This Court would make the general observation that when it comes to determining entitlements pursuant to Part 3 of the Organisation of Working Time Act 1997 covering holidays, that is s. 19 entitlement to annual leave, section 20 time and pay for annual leave. Section 21 entitlement in respect of public holidays. Section 22 public holidays, supplemental provisions and s. 23 compensation of cesser of employment, that it should be especially particular to have regard to the special expertise of the Labour Court in determining these issues and also have regard to the type of procedures that it has adopted as to written submissions on these issues. This Court does not consider that the Labour Court should be required to go into detail on it's calculation of these payments unless there is a breach of a substantive nature contrary to the provisions of the legislation.

The Employee Handbook dated December 2010.

38. There is one important dispute of fact which this Court has not been able to resolve, did the Labour Court in the course of its hearing on 19th April, 2016, request a copy of the Employee Handbook 2010 or was this documentation sent to the Labour Court arbitrarily without seeking the consent of the solicitor for the Appellant. To determine this issue on the point of law, the court has to have regard to some factual matters. In its discussion as part of its determination, the Labour Court was satisfied that the Appellant was supplied with a document headed Statement of Main Terms of Employment within the timeframe set out at s. 3(1) of the Act and that he acknowledged receipt of that document by signature dated 26th August, 2012. That conclusion is beyond dispute as written documentation was furnished to the Labour Court that reflected that he had received a written statement of key particulars with regard to terms and condition of employment. He had acknowledged in the written document of 26th April, 2012, that he had read an Employee Handbook issue 0. In its letter of 22nd April, 2016, to the Labour Court, the solicitors made the assertion "we have serious concerns in relation to the documentation as furnished". There was no reference to what those concerns were. The Labour Court was entitled to request that a copy of the Employee Handbook of 2010 be furnished to the court. This Court simply has no information about the difference between Employee Handbook 0 which the Appellant clearly acknowledged that he had received and read and accepted was part of his contract of employment as distinct from an earlier edition of the Employee Handbook. The onus was on the Appellant to demonstrate to this Court the serious concerns in relation to the documentation as furnished. In view of the substantive hearing on the issue when the Appellant had a full opportunity to give evidence, to cross examine the employer representative to make submissions and to examine documentation that he himself had signed, the breach of fair procedure was minimal if any. It would have arisen if there was no permission granted by the Labour Court to hand in the document and if the Respondent had furnished the document arbitrarily without procuring consent at the hearing from the Labour Court and that in addition there were substantial variations from Employee Handbook 0. If there was a breach of fair procedures, it was a particularly minor one.

The failure to apply the principles of effectiveness, deterrence and proportionality derived from European Law with particular reference to the judgment of the European Court of Justice in von Colson and Kamann v. Land Nordrhein-Westfalen Case C-14/83 [1984] ECR 1891.

39. This point of law has been already comprehensively reviewed in the High Court judgment of *Bryszewski v. Fitzpatrick and Hanley Limited* (Unreported, Birmingham J., 21st May, 2014), the Appellant seeks to differentiate the findings in this judgment because the Labour Court in the instant case did not differentiate in the compensation awarded pursuant to s. 12 and s. 17 of the Act. The Labour Court in its determination on the Organisation of Working Time Act 1997, in respect of ss. 12 and 17 of the Act allowed the Appellant's appeal from the determination of the adjudication officer. While the adjudication officer's compensation of €200 was in respect of the technical breach only of s. 12 of the Act, the Labour Court in awarding compensation for a breach of ss. 12 and 17 of the Act awarded compensation of €1,000. Birmingham J. in *Bryszewski* at para. 13 stated:-

> "In contrast, in the present case, while the award decided upon by the Labour Court was not a large one, indeed by any standards, it has to be seen as a modest one. It could not though, in my view, be regarded as nominal, certainly not purely nominal in the context that that phrase was used in Von Colson & Kamann v. Land Nordrhein-Westfalen."

40. At para. 14 he stated:-

> "The circumstances in which breaches of the Act of 1997 occur are likely to vary very significantly. Some cases may involve breaches that are major and deliberate with serious consequences for the employees involved and could probably, in some cases, be described as egregious. On the other end of the spectrum, there may be breaches which were unintentional, minor, rectified and, in practice, were of little consequence. A division of the Labour Court, composed as it is of persons of experience representing both sides of industry, is particularly well-positioned to make an assessment of how a particular breach is to be categorised."

41. The Appellant in his submission to the Labour Court referred specifically to *von Colson and Kamann*. Birmingham J. in his judgment reviewing a number of Labour Court decisions from para. 20 to 22 of that judgment noted that the Labour Court was very familiar with the judgment, and went on to state at para.23 and 24:-

> 23. "I have referred to the outcome of a number of appeals to the Labour Court, mainly brought by appellant employees, to show that it is abundantly clear that the Labour Court takes breaches in this area seriously, but that, as is to be expected, awards in individual cases diverge to a significant extent.

> 24. The Labour Court is well-positioned and does scale breaches and identify where on the scale a particular breach falls. It has done that in this case and I can see no basis whatsoever for interfering with its determination."

42. Birmingham J. stated at para. 17:-

> 17. "I think it is of some interest that the classic statement of the approach to be taken in such cases is found in the judgment of Hamilton C.J. in Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare. Indeed, MacMenamin J. commented in Hayes v. Financial Services Ombudsman & Ors. that the judgment of Hamilton C.J. was so well-known as not to require quotation. It is, however, interesting that the observations were made by Hamilton C.J. in the context of the Appeals Officer addressing the question whether shop demonstrators were employed under a contract of service or a contract for services. This issue of contract of service or for services is one that has been addressed frequently by the courts over the centuries, often in the context of whether the case was one of vicarious liability. Notwithstanding that, Hamilton C.J. commented that the courts should be slow to intervene with the decisions of expert administrative bodies. Over and above that, it seems to me that where an assessment of quantum is involved, which must inevitably involve an element of deciding where on the spectrum a particular breach is to be placed, a body such as the Labour Court is particularly well-positioned to undertake the task and it is certainly a case where the courts should be slow to intervene."

43. The compensation was awarded under Part 2 of the Organisation of Working Time Act 1997, which specifies a minimum rest period and other matters relating to working time. While it is certainly desirable that the court would break down the compensation as between the breach of ss. 12 and 17, this Court does not consider it a mandatory requirement. It is not relevant that the provisions of s. 17 of the Act are not part of the Directive 93/104/EC of 23rd November, 1993.

44. It was not a requirement of the Labour Court to reference specifically the "Van Colsen" judgment. It's function was to measure in a fair and reasonable way compensation for breaches using it's particular expertise.

The Provisions of the Terms of Employment (Information) Act
45. An Appellant does not need to show detriment to be awarded compensation pursuant to s. 3 of the Terms of Employment (Information) Act 1994 for any alleged breach thereof. The only breach that the Labour Court determined was that of 3(g) and 3(ga) ,

> "(g) The rate or method of calculation of the employee's remuneration and the pay reference period for the purposes of the National Minimum Wage Act, 2000,
>
> (ga) that the employee may, under section 23 of the National Minimum Wage Act, 2000, request from the employer a written statement of the employee ' s average hourly rate of pay for any pay reference period as provided in that section."

46. The Labour Court heard all the evidence from the Appellant and the Respondent. Its finding was to uphold the claim of the Respondent in the more substantial matters that it had provided substantial information to the Appellant by way of a contract of employment which the Appellant signed and an additional Employee Handbook which was available to him and which he acknowledged having had received and read. The compensation to be awarded to the Appellant was a matter for the Labour Court.

Litigation Advice Privilege and the Application for Witness Summonses
47. This is one aspect of the appeal which causes concern to this Court on the nature of the application made to the Labour Court by the Appellant and the failure of the Labour Court to deal with the issue in their determination.

48. Again, the evidence is somewhat unclear to the court because the Labour Court did not permit the Appellant to read the submission on litigation privilege but this Court does not know why. This Court having decided all the other issues, is faced with a decision to refer this matter back for determination by the Labour Court or to deal with it in some other way.

49. There was no objection made to the adjudication officer about the Respondents representation. There does not seem to have been any request for a specific document.

50. In its letter to the Labour Court of 15th April, 2016, requesting witness summonses and in the submission to the Labour Court on litigation advice privilege and request for witness summons, the Appellant gave no reason whatsoever why he was seeking the documentation, and did not identify any specific documentation. The Appellant, in the ordinary courts could not possible succeed in obtaining an order for discovery without following that procedure. The application was as broad as possibly can be. The submission sought:-

> "copies of all advices and documentation on any advice sought or requested from Peninsula Business Services (Ireland) Limited, Peninsula Business Services Limited or from either of the named parties above relating to the claim by our client against the employer as referred to above.
>
> For the avoidance of any doubt we are seeking all documentation relating to any correspondence to or from any of the parties named above, namely the employer Mr. Mark Ramsbottom or Mr. Peter Swift or any servant, agent or employee of the Peninsula Business Services or Peninsula Business Services (Ireland) Limited to or from the employer."

51. In the letter, the solicitor stated:-

> "The employee is entitled to request witness summonses to require that information be furnished for the purposes of fair procedures applying.
>
> As this is information, the employee is entitled to access and review to ascertain does it have an impact or bearing on the employee's case."

52. That is a classic trawling exercise for no significant reason., and on the basis of fair procedures alone, this Court regards it as an unfair request.

53. The Labour Court should have dealt with this issue in its written determination as to the reasons why it did not issue witness summonses and why it did not receive the submission.

54. The issue raised about litigation advice privilege being available to a business advisory firm who are not solicitors or barristers is an important one. It should, however, be decided in a context of an appropriate genuine dispute relating to documents sought and their category so that either an expert Tribunal or the High Court on a statutory appeal can determine this important issue appropriately.

55. The court does not consider it appropriate to remit this matter back for determination by a differently constituted panel. The refusal of the Labour Court to initially entertain the litigation advice privilege submission or to issue witness summonses had no bearing on the fairness, justice or otherwise of the Labour Court's determination on the issues which were before it.

56. The court refuses the reliefs sought.