Neutral Citation Number: [2014] IEHC 199

THE HIGH COURT

[2013 No. 311 MCA]

BETWEEN

ANDRIUS STASAITIS

APPELLANT

AND

NOONAN SERVICES GROUP LTD

RESPONDENT

AND

THE LABOUR COURT

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 11th day of April, 2014.

INTRODUCTION

In these proceedings the appellant seeks an order pursuant to s.28 of the Organisation of Working Time Act 1997 and O.84C of the Rules of the Superior Courts 1986, as amended, declaring that the Labour Court erred in law in its written decision dated the 6th December, 2013, when it determined that the respondent had complied with the requirements of s.12 of the Organisation of Working Time Act 1997 and was entitled to rely upon the exemptions set out in the Organisation of Working Time (General Exemptions) Regulations, 1998 (S.I. No. 21 of 1998).

Should it be necessary, the appellant also seeks an order remitting his claim against the respondent to the Labour Court for reconsideration.

BACKGROUND FACTS

The appellant is a Lithuanian national who was employed by the respondents as a security officer at the premises of DHL Logistics at Airport Park in Dublin, from the 3rd September, 2009, until the 14th September, 2012. The site where the appellant worked is a warehouse facility where trucks, vans and other vehicles enter and leave the premises. The appellant's function was to monitor this traffic and for that purpose he worked from a security hut at the entrance. It is common case that he worked in eight hour shifts and that during those shifts he was not permitted to leave the security hut except for the purpose of checking vehicles entering and leaving the premises. He worked alone in performing these duties. It is also common case that his employers did not schedule any specific breaks for the appellant over the course of his shift, but rather left it to the appellant to take breaks during periods of inactivity which occurred during the shift.

The appellant was provided with kitchen facilities in the security hut and, while no specific breaks were provided for during his working shift, the respondents assert that there were significant periods of inactivity during the day during which he could take breaks. It is not in dispute but that the appellant availed of such breaks during the time in which he worked for the respondent, but he contends that, in failing to provide for specific break periods, the respondents were in breach of their statutory obligations.

The appellant brought a case before the Rights Commissioner, which was heard on the 11th February, 2003. The Rights Commissioner having rejected the appellant's claim, the appellant brought an appeal to the Labour Court which heard his case on the 23rd August, 2013.

On the 6th September, 2013, the Labour Court determined as follows:-

> "The court notes that the claimant worked for the respondent for three years during which time he made no complaint in relation to the matter now before the court. The court is satisfied as a matter of probability that the claimant was told that he could take breaks during periods of inactivity during the course of his shift. The court is further satisfied that the presence of cooking facilities in the security hut must have made it clear to the claimant (if he was ever in any doubt) that he could avail of breaks while at work. It is not denied that the claimant did in fact take breaks.
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> In these circumstances the court is satisfied that Regulation 5 of the Regulations was complied with in relation to the claimant. The Court is further satisfied that the Regulation 3 of the Regulations was operative in this case and that the claimant's employment came within the exemption provided by that Regulation."

Having concluded that the appellant's complaint was "not well founded", the Labour Court disallowed the appeal and affirmed the decision of the Rights Commissioner. The matter comes before this Court by way of appeal from that decision.

RELEVANT STATUTORY PROVISIONS

The preamble to the Organisation of Working Time Act, 1997 states that it is:-

> "An Act to provide for the implementation of Directive 93/104/EC of 23rd November, 1993 of the Council of the European Communities concerning certain aspects of the organisation of working time, to make provision otherwise in relation to the conditions of employment of employees and the protection of the health and safety of employees."

The word "break" is not defined in the Act, but "rest period" is defined as "any time that is not working time". In turn, "working time" means:-

"Any time that the employee is –

(a) at his or her place of work or at his or her employer's disposal, and

(b) carrying on or performing the activities or duties of his or her work,

and "work" shall be construed accordingly."

Section 12 of the Act provides:-

"(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.

(2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break referred to in subsection (1)

(3) The Minister may by regulations provide, as respects a specified class or classes or employee, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes (but not more than 1 hour).

(4) A break allowed to an employee at the end of the working day shall not be regarded as satisfying the requirement contained in subsection (1) or (2)."

However, it was provided by s.4 of the Act that the Minister could by regulation exempt from the application of s.12 any specified class or classes and by S.I. No. 21 of 1998 (Organisation of Working Time (General Exemptions) Regulations, 1998) the Minister did exempt from the application of s.12:-

"An activity of a security or surveillance nature the purpose of which is to protect persons or property and which requires the continuous presence of the employee at a particular place or places, and, in particular, the activities of a security guard, caretaker or security firm."

The Regulations also provide (at Article 3) that:-

"3. The exemption shall not apply, as respects a particular employee, if and for so long as the employer does not comply with Regulation 5 of these Regulations in relation to him or her."

The Regulations go on to provide as follows:-

"4. If an employee is not entitled, by reason of the exemption, to the rest period and break referred to in sections 11, 12 and 13 of the Act, the employer shall ensure that the employee has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as equivalent to the first mentioned rest period and break.

5. (1) An employer shall not require an employee to whom the exemption applies to work during a shift or other period of work (being a shift or other such period that is of more than 6 hours duration) without allowing him or her a break of such duration as the employer determines.

(2) In determining the duration of a break referred to in paragraph (1) of this Regulation, the employer shall have due regard to the need to protect and secure the health, safety and comfort of the employee and to the general principle concerning the prevention and avoidance of risk in the workplace."

SUBMISSIONS

On behalf of the appellant it was submitted that the time during which the appellant was required by the respondent to be present in the security hut can only be classified as "working time" both within the relevant domestic legislation and within the meaning of the Working Time Directive. "Rest periods", as defined in the legislation, are defined in opposition to working time, and an employee cannot be considered to be working and at the same time to be enjoying the benefit of a rest period.

While the present appeal was limited in its scope to a point of law, it was submitted that it was also open to the High Court to intervene if it found that the Labour Court had based its decision on an unsustainable finding of fact. In the instant case the Labour Court had erred in determining that the respondent fulfilled the requirements of Regulations 4 and 5 by awarding purported compensatory rest breaks, when at no material time was the applicant engaged in anything other than "working time" as defined by the Act. Alternatively, the findings of fact made by the Labour Court were erroneous. The periods of inactivity experienced by the appellant in the course of his duties were neither a rest period nor a break. The inferences drawn by the Labour Court from the presence of cooking equipment in the security hut were and are unsustainable having regard to the fact that the appellant was, at all times he was in the hut, required to be available to discharge work duties as they might arise. The fact that those duties may only have arisen intermittently does not alter the fact that the appellant was required to be available for the discharge of such duties and therefore could not have been on a rest period or break.

The right to a rest break during the course of work is guaranteed by Article 4 of the Working Time Directive and is an essential social right to which all workers in the EU are entitled. As such, any derogation from that right must be construed strictly. That had not happened in the instant case. The Act of 1997 and the Regulations made thereunder specifically provide that the exemption shall not apply unless the provisions of Regulation 5 are complied with. Regulation 5 had not been complied with because the employer had failed to determine the duration of any break to which the appellant was entitled and had failed also to have regard to the additional requirement to consider the "comfort of the employee" as required also by the same article of the Regulation.

In summary, given that the appellant was clearly required to be available for work and was working within the meaning of the Act of 1997 during the entirety of his eight hour shift in the security hut, he could not therefore be said to have had any rest break, whether compensatory or otherwise, for any of that period of time. It followed therefore that the appellant was afforded no breaks pursuant to Regulation 4 or 5 of the Regulations of 1998. The respondent was therefore not entitled to rely upon the exemption set out in Regulation 3 which must be strictly construed as a derogation from a European law right.

On behalf of the respondents, it was submitted that it was not in dispute that the appellant was provided with his daily rest period of

at least eleven hours between shifts and his weekly rest period. The dispute between the parties focussed exclusively on breaks at work which are set out in s.12 of the Act of 1997. While s.4 (3) of the Act provides that the Minister may by regulations exempt certain activities from the application of s.12, s.6 contains certain safeguards in respect of such exemptions and maintains the distinction between rest periods and breaks as follows:-

> "6-(1) Any regulations, collective agreement, registered employment agreement or employment regulation order referred to in section 4 that exempt any activity from the application of sections 11, 12 or 13 or provide that any of these sections shall not apply in relation to an employee shall include a provision requiring the employer concerned to ensure that the employee concerned has available to himself or herself such rest period or break as the provision specifies to be equivalent to the rest period or break as the case may be, provided for by section 11, 12 or 13.
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> (2) Where by reason of the operation of subsection (1) or (2) of section 4, or section 5 an employee is not entitled to the rest period or break referred to in section 11, 12, or 13 the employer concerned shall-
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> (a) ensure that the employee has available to himself or herself a rest period or break, as the case may be, that in all the circumstances, can reasonably be regarded as equivalent to the first mentioned rest period or break, or
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> (b) if for reasons that can be objectively justified, it is not possible for the employer to ensure that the employee has available to himself or herself such an equivalent rest period or break, otherwise make such arrangements as respects the employee's conditions of employment as will compensate the employee in consequence of the operation of subsection (1) or (2) of section 4, or section 5."

Regulation 4 of S.I. No. 21 of 1998 also provides as follows:-

> "4. If an employee is not entitled, by reason of the exemption, to the rest period and break referred to in section 11, 12 and 13 of the Act, the employer shall ensure that the employee has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as equivalent to the first mentioned rest period and break."

It was submitted there had been no error of law in circumstances where arrangements for a break for the appellant had been put in place which were, at the very least, equivalent to the breaks referred to in the Act. In fact, it was submitted, the arrangements put in place by the respondents provided for more rest for the employee than did those provided for by the Act.

It was further submitted that there was no error of law in the instant case and no unsustainable findings of fact. The Labour Court had correctly determined that the respondent was entitled to rely on the exemption contained in Regulation 3 of the Regulations of 1998, subject to compliance with Regulation 5 and there was no error of law on the part of the Labour Court. The Labour Court had found as a fact that the appellant was allowed to take breaks during periods of inactivity and was thus perfectly entitled to determine that the respondent had complied with the provisions of Regulation 5.

It was further submitted that the facts of the instant case were identical with those considered by the Employment Appeals Tribunal and the Court of Appeal in the case of *Hughes v. Corp. of Commissionaires Management Ltd*. [2011] I.R.L.R. 100 (Eat), [2011] I.R.L.R. (C.A.). In that case the Court of Appeal had stated:-

> "We would accept that if a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics then we do not think it would meet the criteria of equivalence and compensation. In this case the arrangements plainly did meet those criteria, as the EAT found. Indeed, since the rest break begins again following any interruption, many would say that this was more beneficial than a Regulation 12 'Gallagher' break would be."

In *Gallagher & Ors. v. Alpha Catering Services Ltd*. [2004] EWCA Civ.1559 the court examined equivalence and compensation as regards a rest period and a rest break where the employees complained that they were not entitled to rest breaks under Regulation 12 of the Regulations of 1998. *Gallagher* can be distinguished from the instant case as in *Gallagher* the company was not entitled to rely on a derogation and so the issue of compensatory rest did not apply. The decision in *Hughes* referred to *Gallagher* and examined what was meant by a '"Gallagher rest break" at para. 38:-

> "In a special case, such as the present one, the worker is not entitled to a 'Gallagher' rest break. The employer is, however, obliged 'wherever possible' to allow the worker to take 'an equivalent period of compensatory rest'. It is plain that this is not the same as a 'Gallagher' rest break. Certainly, the objective is to provide the worker with some break from his duties but the language of equivalence and compensation shows that it is something which is not identical to a 'Gallagher' break. It can denote something which makes up for the fact that the worker does not receive such a break, by providing a break that is as near in character, quality, and value to a 'Gallagher' rest break as possible. The precise elements of that equivalent period of compensatory rest will obviously vary according to the facts and circumstances of the individual case. In some cases, it may be possible for the employer to provide a break that very nearly meets the 'Gallagher' criteria – circumstances where the worker is technically 'on call' during the 20 minute break, but is, in practice, never called on, for example. In others, it may be that less freedom is able to be afforded to the worker during his break but he does get one or it may be that no break at all can possibly be given during the shift of each cycle, but that is compensated for by the worker being given a double break of 40 minutes in the second shift he works in the cycle. There are, no doubt, many other possible scenarios."

It was further submitted that Directive 93/104 must be construed in such a manner as to limit the scope of derogation to what is necessary. Exemptions under Regulation 3 of the Regulations of 1998 and the requirement to allow a break under Regulation 5 must be construed in a manner consistent with the requirement for the appellant to be continuously present in the security hut, which is the relevant exempted activity. It was submitted that having regard to the nature of the exempted activity and the health, safety and comfort of the employee, the rest breaks available to the appellant comply with the requirements of Regulation 5. The Directive in its recitals recorded:-

> "It is necessary to provide that certain provisions may be subject to derogations implemented, according to the case, by the Member States or the two sides of industry. As a general rule, in the event of a derogation, the workers concerned must be given equivalent compensatory rest periods."

The Directive thus acknowledges that it may not be possible to guarantee uninterrupted rest breaks for workers engaged in certain

activities and Article 4 of the Directive sets out a pragmatic requirement in respect of rest breaks where the working day is longer than six hours with a margin of appreciation being afforded to national legislation. The appellant in this case was undoubtedly afforded adequate rest by the respondent.

In reply counsel further stressed that the particular requirements of Irish law were such that the employer must fix the duration of any break. That had not occurred in the instant case and, for that reason, the appellant was entitled to succeed.

DISCUSSION
The Organisation of Working Time Act 1997 gave effect to Directive 93/104/EC (the "Working Time Directive") in Irish law. The Directive provides for rest periods and breaks (Articles 3-5) and, of course, it is not in dispute in this case that the appellant was provided with his daily rest period and his weekly rest period. The entire controversy between the parties herein concerns breaks at work and whether the arrangements put in hand for this appellant by his employers come within the terms of permissible derogations, both under the Directive and under the Act of 1997.

Both sides in the case before the Court were in agreement that principles of strict construction must be extended to any derogation which, as in this case, operates to exempt the employer from strict statutory obligations. That requirement of "strict construction" can only mean in this particular context that an interpretation is adopted which most effectively secures the rights of an employee as envisaged by both the Directive and the legislation. Thus, the Court is satisfied that any arrangements put in place must satisfy the criteria of equivalence and compensation.

On a purely factual basis, it is difficult to see how it could possibly be argued that the appellant in this case is less well off by virtue of the arrangements put in place for compensatory rest in his case. It is common case that, when not required to operate the barrier or check vehicles in or out of the premises, the appellant could move to an area in the security hut where he had available to him kitchen and other facilities, although, of course, he was not at liberty to move away from the security hut. It is not in dispute but that these were the arrangements for breaks and that the appellant availed of them.

There is thus something of a paradox inherent in this case. The appellant is arguing for an interpretation of the relevant statutory provisions whereby he would be entitled to specific breaks of fixed duration during his working shift. If successful, such an outcome to the proceedings could in real terms have the effect of significantly reducing the appellant's periods of actual rest. Equally, in arguing the case for the employer, a result could occur whereby an employee could spend more time resting – and perhaps significantly more – than the time spent in the actual discharge of his security functions. It seems to the Court that the parties to this appeal have both been driven to adopt positions which seem to be actually inimical to their own wider interests.

Both parties made detailed submissions as to the role of the Court in an appeal of this nature. The Court is satisfied that the jurisdiction of the High Court in this regard was comprehensively addressed by Hedigan J. in the case of *An Post v. Monaghan* (Unreported, High Court, Hedigan J., 26th August, 2013) [2013] IEHC 404, where he stated (at p. 14):-

> "This is an appeal on a point of law from a decision of the Labour Court. I will deal first with the role of the court in such an appeal. It is plainly a limited role. The court may only intervene where it finds that the Tribunal based its decision on an identifiable error of law or an unsustainable finding of fact. The court should be slow to interfere with the decisions of the Labour Court because it is an expert administrative tribunal. See *Henry Denny & Sons v. The Minister for Social Welfare* [1998] I.R. 539. Unless a claim of irrationality is sustained, the court cannot weigh the strengths or weaknesses of the arguments or evaluate its determination thereon. See *Wilton v. Steel Company of Ireland* [1999] E.L.R. 1 (O'Sullivan J., at p.5). The Court may, however, examine the basis upon which the Labour Court found certain facts. It can consider whether certain matters ought or ought not to have been considered or taken into account by the Labour Court in determining the facts. See *N.U.I. Cork v. Ahern* [2005] IESC 40 (McCracken J.)."

I am quite satisfied in this case that there was no unsustainable finding of fact by the tribunal. It was perfectly entitled to hold that the arrangements put in place whereby the appellant could obtain rest during periods of inactivity at work provided a sound factual basis for its findings. The court was entitled to find that the arrangements either met the statutory requirements or satisfied a test that they complied with requirements of equivalence and compensation in lieu thereof.

The Court is therefore satisfied that the single issue which it must determine is whether the Labour Court fell into error in its interpretation and construction of the relevant statutory provisions.

DECISION
Under the requirements of the Organisation of Working Time (General Exemptions) Regulations 1998 the appellant is entitled to compensatory rest breaks and the respondent relies on Regulation 3 to claim that no breach of the appellant's rights has occurred. What falls to be determined is the classification of the terms "working time", "rest periods" and "breaks". As set out above all are defined under the Directive except for the term "break". The terminology of domestic legislation must be determined in light of the wording and purpose of the Directive as per the European Court of Justice (E.C.J.) in *Marleasing SA v. La Comercial Internacionale de Alimentation SA* (Case C-106/89) [1990] E.C.R. I-4135. It is submitted on behalf of the appellant that the definition of the term "rest period" as referred to in *Sindicato de Medicos de Asistencia Publica (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valanciana* (Case C-303/98) [2000] E.C.R. I-7997 and *Landeshauptstadt Kiel v. Jaeger* (Case C-151/02) [2003] E.C.R. I-8415 (cases where the issue of rest periods for doctors was considered) ought be differentiated from working time to mean that an employee cannot be both working and enjoying a break. The E.C.J. in that context held that in the case of a doctor, time "on call" was to be construed as working time. This however cannot be deemed to be analogous to the case presently before the court. The "rest period" is the time between shifts as opposed to a break which occurs within the working day. Although there is no set definition of "break" it must be interpreted in the particular circumstances of this case to mean that the employer must ensure that the employee is afforded the compensatory breaks as per the derogations under the Regulation. The Court must then move to the examination of the compensatory breaks afforded under national legislation.

In relation to s.6 of the Act of 1997 the appellant states that the employee was not provided with a compensatory or equivalent rest period or break in circumstances where the employee was not entitled to the "ordinary" rest period or break under ss.11, 12 or 13. Under s.6 (2) (b) the employer has an obligation to make "such arrangements as respects the employee's conditions of employment as will compensate the employee". These arrangements must compensate the employee for the derogation under ss.11, 12 or 13. As per s.6 (3) the compensatory arrangements can not be monetary or of any material benefit. However the requirement under s.6 (2) may be met where the employee is provided with better physical conditions or amenities or services whilst at work as per s.6 (3) (b). In this instance the employee was provided with kitchen facilities and an area within which to take breaks during periods of inactivity. The employee in this case was permitted to take such breaks as he wanted during periods of inactivity and was provided with amenities and facilities to do so. Therefore the requirement to provide compensatory rest periods in relation to the derogation from

the statutory rest periods and or breaks must be deemed to have been complied with.

Further, the decision in the Court of Appeal in the case of *Hughes v. Corp. of Commissionaires Management Ltd.* [2011] I.R.L.R. 100 (Eat), [2011] I.R.L.R. (C.A.) fortifies the view of this Court in finding that the criteria of equivalence and compensation for breaks were met by the arrangements put in place by the employer. The view of the Court of Appeal in the Hughes case was that, since the rest breaks in fact begin again following any interruption, this type of break may be regarded as even more beneficial than the statutorily defined breaks.

I would dismiss the appeal.