Neutral Citation: [2015] IEHC 151

**THE HIGH COURT**

**IN THE MATTER OF THE PROTECTION OF EMPLOYEES (TEMPORARY AGENCY WORKERS) ACT 2012**

**[2014 No. 475MCA]**

**BETWEEN**

**PATRICK MULHOLLAND**

**APPELLANT**

**AND**

**QED RECRUITMENT LIMITED**

**RESPONDENT**

**JUDGMENT of Kearns P. delivered on 13th day of March, 2015**

This is an appeal pursuant to Order 84C of the Rules of the Superior Court against the decision of the Labour Court dated the 9th July, 2014 which found that the appellant's complaint was not well-founded.

**BACKGROUND**

The appellant is a truck driver and at the relevant time was an agency worker as defined in s.2(1) of the Protection of Employees (Agency Work) Act 2012 ('the 2012 Act') in the employment of the respondent. He began working with Greenstar Limited ('the hirer') in or about 2009 and was paid a rate of €11.50 an hour. As a result of what he identified as discrepancies between the rate of pay he received compared with his peers and those directly employed by the hirer, the appellant brought a complaint to the Labour Relations Commission Rights Commissioners Service pursuant to s.25(2) of the 2012 Act in or about November 2012. By decision dated the 15th May, 2013 the Rights Commissioner, Mr. Eugene Hanley, determined that the complaint was not well founded and therefore must fail.

This decision was appealed to the Labour Court on the 10th June, 2013. The appeal hearing took place on the 13th May, 2014 and the 30th June, 2014. It was contended on behalf of the appellant that drivers employed directly by the hirer were paid €12.50 an hour while some with long service were paid up to €20 per hour. It was also contended that those directly employed by the hirer benefited from a more favourable overtime arrangement and a daily meal allowance. The Labour Court heard oral evidence from the appellant and from a Mr. Mark McElroy, who was formerly employed by the hirer. Evidence was also given by two officials of SIPTU. Oral evidence was also given by two witnesses on behalf of the respondent. As will be discussed in greater detail herein, the appellant sought during the hearing to introduce evidence in the form of pay-slips of other another employee, but these were deemed to be inadmissible by the Labour Court.

By decision number AWD146 dated the 9th July, 2014 the Labour Court upheld the decision of the Rights Commissioner and dismissed the appeal. The Labour Court concluded that "*on the evidence adduced the Court is forced to the conclusion that the Claimant has failed to show, as a matter of probability, that the working and employment conditions for which he contends were established by virtue of any enactment or collective agreement, or any arrangement that applied generally in respect of employees, or any class of employees, of the Hirer at the time material to his claim. In these circumstances his claim cannot succeed*."

**RELEVANT LEGISLATION**

The Protection of Employees (Agency Work) Act 2012 was enacted to give effect to Directive/104/EC of the European Parliament.

Section 2(1) of the 2012 Act defines an "agency worker" as follows –

> *"Agency worker" means an individual employed by an employment agency under a contract of employment by virtue of which the individual may be assigned to work for, and under the direction and supervision of, a person other than the employment agency.*
>
> "Basic working and employment conditions" are also defined in s.2(1) -
>
> *"Basic working and employment conditions" means terms and conditions of employment required to be included in a contract of employment by virtue of any enactment or collective agreement, or any arrangement that applies generally in respect of employees, or any class of employees, of a hirer…*

Section 6 of the 2012 Act also relates to basic working and employment conditions of agency workers and provides as follows –

> *6.— (1) Subject to any collective agreement for the time being standing approved under section 8 , an agency worker shall, for the duration of his or her assignment with a hirer, be entitled to the same basic working and employment conditions as the basic working and employment conditions to which he or she would be entitled if he or she were employed by the hirer under a contract of employment to do work that is the same as, or similar to, the work that he or she is required to do during that assignment.*

**SUBMISSIONS OF THE APPELLANT**

The appellant's appeal is based on three primary grounds: firstly, it is contended that the Labour Court misdirected itself as to the law and imposed a requirement of 'universal' as opposed to 'general' application in relation to employment conditions and rates of pay; secondly, it is submitted that the Labour Court imposed such an arduous standard of proof on the appellant that it failed to have regard to the intention of the 2012 Act; and thirdly, it is submitted that the Labour Court fell into error in placing the burden of proof on the appellant when it has previously reversed the onus of proof. I propose to deal with each of these grounds of appeal in turn.

**(i) Interpretation of the relevant legislative provisions**
Counsel on behalf of the appellant submits that the 2012 Act was enacted to give effect to Directive 2008/104/EC and that it is clear that the intention of the legislation is to ensure that employees such as the appellant who fall under the definition of agency workers are entitled to legal protection to afford them the same rights and privileges as direct employees.

It is submitted that a large amount of evidence was adduced by the appellant in the Labour Court hearing which showed that he was afforded less favourable conditions than directly employed workers. The appellant submits that in addition to his own evidence, evidence was submitted by Mr. Mark McElroy, a directly employed driver, and two SIPTU officials, which evidence it is contended was sufficient to show that there were higher rates of pay and that these were of general application.

It is submitted that the term 'general application' clearly derives from s.2 of the 2012 Act. Counsel refers the Court to the decision of the Labour Court in *Robert Costello v. Team Obair Limited* [2014] 76 wherein it was noted that the term:-

> *"…was intended to give s.6 of the Act a wide ambit so as to encompass conditions of employment established within a hirer by systems used for that purpose in employments where collective bargaining does not take place. It can also include less formal arrangements established by custom and practice. However the term connotes an objective modus operandi for determining conditions of employment rather than a subjective assessment of individuals."*

Counsel submits that the Labour Court sought to distinguish this decision in the present case on the basis that general application had been established in and that it "*cannot be relied upon to relieve a claimant from the requirement to prove the primary fact that at the time material to his or her claim the hirer had in place established working and employment conditions of general application and what those working and employment conditions were*".

It is submitted that the appellant is not seeking to be relieved of the requirement to prove that at the material time the hirer had in place established working and employment conditions of general application. Rather, it is the appellant's position that this requirement was met and that sufficient evidence was adduced as would allow the Labour Court to infer the rate was of general application.

The appellant also refers to a previous Labour Court decision in *Elizabeth Stafford v. Ernest Isaacson & Others* [AWD 142] where it was held that a rate was of general application where five out of six workers were on the same rate. Counsel for the appellant submits that imposing an obligation on a claimant to show such a high prevalence of a rate of pay would require that a large number of witnesses be called. In any event, counsel contends that the Labour Court in the present case has imposed a requirement of establishing 'universal application' which was never intended by the legislation. It is submitted that this approach is manifestly unfair on claimants such as the appellant and would prevent effective redress under the Act.

It is further submitted that the Labour Courts interpretation of the relevant provision is more readily complied with in cases where there is a collective agreement in place, thereby preventing equal access to justice for those claimant's who are employed somewhere that does not have a collective agreement in place.

The appellant contends that in making the decision it did, the Labour Court stepped outside of the 2012 Act and created a new and artificial definition of the term "general application" which lacks any clarity or grounding in reality.

**(ii) Standard of Proof**
It is submitted on behalf of the appellant that the decision of the Labour Court was largely based on a purported lack of evidence that rates of pay were of general application within the hirer. While the term 'general application' seemingly derives from s.2 of the 2012 Act, it has no precise definition and it is submitted that the standard of proof expected by the Labour Court in relation to this phrase is so unreasonably high that no claimant could ever realistically reach it.

It is submitted that the Labour Court failed to give any or any adequate regard to the evidence of Mr. McElroy, who the appellant contends gave compelling evidence as an appropriate comparator. It is submitted that in noting that Mr. McElroy was not aware of the rates paid to others drivers, the Labour Court expected the appellant's witnesses to give evidence of matters that they had no personal knowledge about.

The Labour Court also refused to admit pay-slips of other employees on the basis that they constituted hearsay. Counsel contends that such rigorous adherence to the rules of evidence was unreasonable in all the circumstances and unnecessary in light of settled law that permits non-judicial bodies to adopt more relaxed rules in furtherance of the interests of justice. In this regard, the Court is referred to the decision in *Kiely v. Minister for Social Welfare* [1977] IR 267 where Henchy J. stated:-

> *"Tribunals exercising quasi-judicial functions are frequently allowed to act informally—to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like—but they may not act in such a way as to imperil a fair hearing or a fair result…*
>
> *… The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth"*

Furthermore, it is contended that the Labour Court allowed the respondent to meet a significantly lower standard of proof than the applicant in showing that the rates were not of general application. It is submitted that such an approach is contrary to the interests of justice and has potential to give rise to absurd results. Counsel asserts that the standard of proof imposed by the Labour Court places a potentially insurmountable evidential burden on parties seeking relief under the 2012 Act.

**(iii) Burden of Proof**
Counsel for the appellant submits that while ordinarily in disputes of this sort 'he who asserts must prove', there are certain matters relating to specific contracts of employment of other people that would lay beyond the means of knowledge and means of proof of an average claimant. It is submitted that placing the burden of proof on the claimant to show that a rate of pay is of general application effectively disbars anyone from ever being successful in claiming under the 2012 Act as no claimant will have access to the payment structure of their employer.

The appellant submits that while it is accepted that a claimant should not be allowed to simply make a bald assertion and expect a respondent to rebut it, the claimant is only required to prove the primary facts relevant to his or her claim on the balance of probabilities. Counsel refers the Court to previous decisions of the Labour Court (*Elizabeth Stafford v. Ernest Isaacson & Others; Team Obair*) as authority for the proposition that the Labour Court has previously reversed the onus of proof in circumstances where it would be otherwise inequitable to allow the normal rules to stand.

Counsel further refers the Court to other areas of employment equality law where it is contended that the burden of proof is reversed. In *Jämställdhetsombudsmannen v. Örebro Läns Landsting*, Case C-236/98 the ECJ held that "*where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay*." It is submitted that the same approach should apply in the present case.

For the above reasons, counsel for the appellant submits that the decision of the Labour Court should be overturned.

**SUBMISSIONS OF THE RESPONDENT**

Counsel for the respondent submits that the appellant has over-stated the protections offered by the 2012 Act and that the appeal is misconceived. It is submitted that in order to establish whether equality of conditions exists, an agency worker must find a source of terms from which better terms than his own can be established by pointing to a contractual term, a collective agreement or other agreement that generally applies to directly hired workers who do comparable work. In the present case, it is submitted that the appellant simply did not succeed in doing this and is now effectively seeking to have the evidence reconsidered before this Court, rather than advancing an appeal on a point of law.

It is submitted that the appellant's interpretation of the 2012 Act presumes that wages are somehow standard and consistent in industry and that an employer must explain in every case why they are not. Having regard to the complexities of wage structures, it is submitted that this is an over-reaching and impractical argument. The respondent asserts that the 2012 Act is not a means to ensure that all workers doing the same job must work under the exact same conditions of employment, and nor is it a means to ensure that employers must explain in every case why this is not so. It is not sufficient for the appellant to merely show that one comparable directly hired worker was paid differently. He must show that he does not have equal access to a term that applies generally to directly hired workers.

In relation to the standard of proof required by the Labour Court, counsel for the respondent submits that the Labour Court had appropriate regard to and did not err in relation to the following sources of information:

(a) Testimony of Mr. Mark McElroy

It is submitted on behalf of the respondent that the evidence of Mr. McElroy relates to only one individual driver who gave further evidence that he was unaware of what other drivers were paid. He was not in a position to give evidence as to generally applicable rates of pay. This, it is submitted, is accurately and appropriately reflected in the decision of the Labour Court.

(b) Evidence of SIPTU officials

Evidence was given by Mr. David Lane and Mr. Owen Reidy, both SIPTU officials. Mr Reidy was unable to assist the Labour Court as to the percentage of drivers represented by SIPTU and it is submitted he was therefore unable to assist as to whether or not there was a generally applicable rate of pay.

Mr. Lane gave evidence in relation to a purported collective agreement of 15th April 2013. The respondent's solicitor states in his affidavit that unsigned and undated evidence was accepted from Mr. Lane in relation to this. It is submitted that this is an indication of the Labour Court's indulgence of the appellant's position. In any event, it is submitted that this purported agreement post-dated the appellant's claim and the Labour Court had appropriate regard to it in arriving at its decision.

(c) Payslips

The appellant sought to introduce a number of pay-slips of persons who were not present to give evidence at the hearing. The respondent accepts that bodies such as the Labour Court and tribunals exercising quasi-judicial functions are not strictly bound by the rigorous rules of evidence as long as they do not act in such a way as to imperil a fair hearing. However, it is submitted that the Labour Court did not apply the rules of evidence in a stringent way in circumstances where no evidence was offered by the persons named on the payslips or the persons who prepared or generated the documents. Counsel refers the Court to the decision of Geoghegan J. in *Ryanair v. Labour Court* [2007] ELR 57 and in particular the criticisms of the Labour Court therein.

In relation to the burden of proof, the respondent contends that if the appellant's submission is correct a situation would exist where a claimant can simply make a bald assertion, or rely on just one comparator in support of his claim, while the onus then shifts to the respondent to prove that there is no generally applicable rate of pay of which the claimant has been deprived.

It is submitted that had it been the intention of the legislature that a claimant was only required to show less favourable treatment compared to just one other employee, such a provision would have been included in the 2012 Act. Similar provisions have been included in a number of other employment equality protection measures such as section 7 of the Protection of Employees (Part Time Work) Act 2001 and section 5 of the Protection of Employees (Fixed Term Work) Act 2003, both of which refer to a "comparable employee". The 2012 Act however refers to 'employees' or 'class of employees' which the respondent submits is indicative of an inescapable requirement of generality.

It is submitted that in the *Stafford* case relied upon by the appellant there was no shifting of the burden of proof as suggested. Rather, the Labour Court had already established that there was a generally applicable rate of pay and this even appeared to be conceded by the respondent. In the present case, the appellant has fallen well short of establishing that any generally applicable rate applied.

Counsel for the respondent submits that another crucial factor in this case is that the appellant was positively and proactively assisted by the Labour Court, who afforded him the opportunity to summons a member of management of the hirer who could give evidence in relation to pay structures. However, the appellant failed to do so and instead chose to rely solely on the evidence of Mr. McElroy and the SIPTU officials.

**DISCUSSION**

It is clear that the purpose of the relevant provisions of the 2012 Act is to ensure that agency workers are entitled to the same basic working and employment conditions as he or she would be entitled to if they were directly employed by the hirer to carry out the same or similar work. The protections afforded by the Act are crucial to ensuring that no unfairness arises in this regard, and the Labour Court has a vital role to play in safeguarding the rights of agency workers.

The correct interpretation and application of the term 'general application', which it is accepted by both parties derives from s.2 of the Act, is central to this appeal. I have carefully considered the submissions of both parties and do not accept the submission advanced on behalf of the appellant that the Labour Court stepped outside of the 2012 Act or created a new and artificial definition of the term in the present case which effectively required the appellant to establish 'universal' as opposed to 'general' application.

A person seeking to rely on the protections offered by the Act must be able to establish that a contractual term, collective agreement, or some other entitlement or agreement is in place which they have been denied by virtue of being an agency worker. The Court accepts the submission by counsel for the respondent that had it been the intention for the legislature for a complainant to identify just one fellow employee who received a different rate of pay, such a provision would have been included in the Act.

The appellant in the present case simply failed to establish, even on a *prima facie* basis, that some generally applicable arrangement was in place at all. The Court is satisfied that this was due to the manner in which the appellant chose to present his case rather than any error on the part of the Labour Court.

In relation to the standard of proof, the Court accepts that it is well settled, as stated by Henchy J. in *Kiely v. Minister for Social Welfare*, that tribunals or bodies exercising quasi-judicial functions are not strictly bound by the rules of evidence and formalities associated with courtroom procedures. However, there is no evidence to suggest that the Labour Court imposed an excessively high standard of proof in the present case. On the contrary, there is evidence to suggest that the Labour Court accepted undated and unsigned evidence from witnesses called to give evidence in support of the appellant's case. Furthermore, the Labour Court has had express regard to the evidence tendered by the witnesses for the appellant in its decision of the 9th July, 2014.

The Court also accepts the submissions of the respondent in relation to the Labour Court's decision to deem the pay-slips to be inadmissible. The relevant pay-slips related to one individual who was not present to give evidence at the hearing and the Labour Court indicated that this was not a sufficient method to demonstrate generally applicable rates of pay across the hirer company. In fact, as stated in the affidavit of Mr. Barry O'Donoghue, solicitor for the respondent, at the hearing on the 17th September 2013 the Labour Court informed the appellant of the possibility of seeking to have a summons issued to compel the attendance of a member of management from the hirer who could give evidence in relation to rates of pay. Counsel for the respondent submitted that this option was not pursued as the appellant was satisfied that the evidence given to the Labour Court was sufficient and no indication to the contrary was given. However, the Court is satisfied that this omission by the appellant is of particular significance and that any evidential burden now complained of was self created.

In relation to the burden of proof, while other statutory schemes such as the Employment Equality Acts allow for a complainant to establish facts from which it may be presumed that discrimination has occurred and require a respondent to prove the contrary, there is no such provision in the 2012 Act. In the *Stafford* case as relied upon by the appellant, a generally applicable arrangement had already been established before the onus switched to the respondent. That is not the case in the present proceedings and there was no basis for the Labour Court, on foot of the limited evidence advanced in support of the appellant's complaint, to reverse the burden of proof.

The appellant in the present case elected to rely on the evidence of just one directly hired driver as a comparator and failed to establish that a generally applicable rate of pay existed. The Court is satisfied that the Labour Court afforded the appellant every opportunity to present his case and did not impose unduly strict or rigorous evidential requirements on the appellant.

**DECISION**
For the reasons outlined above the appeal is dismissed.