Neutral Citation: [2014] IEHC 263

THE HIGH COURT

[2013 No. 154 M.C.A.]

BETWEEN

PIOTR BRYSZEWSKI

APPELLANT

AND

FITZPATRICKS AND HANLEYS LIMITED TRADING AS CATERWAY

RESPONDENT

AND

THE LABOUR COURT

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham delivered the 21st day of May 2014

1. This case and the case of *Ruskys v. Gem Pack Limited & Anor.* (Record No. 2013/153 M.C.A.) have, by agreement of all the parties, been heard together, *i.e*. in sequence one directly after the other. Both cases involve appeals pursuant to s. 28(1) of the Organisation of Working Time Act 1997 ("the Act of 1997"), from the decisions of the Labour Court by employees dissatisfied with the outcome of the proceedings. The point of law claimed to be identified by the appellants is the same point, though obviously the point is raised against different factual backgrounds in each case. In both cases the appellant is dissatisfied with the amount of compensation awarded by the Labour Court. The appellants say that the amount of compensation awarded is inadequate and that its inadequacy reflects a departure by the Labour Court from legal principles that were binding on it.

2. It is submitted, by counsel for both appellants, that the Labour Court failed to have regard to and failed to apply the principles of effectiveness, deterrence and proportionality as derived from European law and, in particular, the judgment of the European Court of Justice in *Von Colson and Kamann v. Land Nordrhein-Westfalen (Case C-14/83)* [1984] E.C.R. 1891. The appellants submit that this is contrary to the established practice of the Labour Court and to the law in respect of awards of compensation for breaches of minimum working time limits and safeguards. Furthermore, the appellants assert that the Labour Court erred in law in importing a de minimis gloss into its assessment of damages contrary to the principles of effectiveness, deterrence and proportionality, and also contrary to the entitlement to compensation upon the establishment of a breach, without more, as reflected in the judgment of the Court of Justice of the European Union in *Fuss v. Stadt Halle (No. 2) (Case C-429/09)* [2011] I.R.L.R. 176.

3. The factual background to this case is that the respondent is a limited company involved in the wholesale supply of fruit and vegetables to the catering industry. The appellant, a Polish national, was employed by the respondent since the 25th May, 2010, and continued to be employed at the time of the Labour Court decision. During the period under consideration, the appellant employee worked as a relief driver for eighteen weeks and was paid €442.48 net per week.

4. The appellant was unhappy with the arrangements in place in relation to the taking of breaks and a complaint was made to the Labour Relations Commission. Written and oral submissions were provided by both parties. The Rights Commissioner issued a decision dated the 29th January, 2013. The Rights Commissioner concluded that, based on the evidence at hearing and the records produced post-hearing, there had been a relatively small number of occasions when the claimant did not receive his proper break entitlements in breach of s. 12 of the Act of 1997. Interestingly, the Rights Commissioner stated that he did not accept the appellant's evidence in total in that regard. The Rights Commissioner did not accept, on the evidence adduced, that there had been a breach of s. 17 of the Act of 1997. However, so far as s. 12 of the Act was concerned, the complaint was regarded as well-founded and the respondent was required to pay to the appellant the sum of €300 in compensation. The appellant appealed to the Labour Court. Of significance is the final paragraph of the written submissions of the appellant to the Labour Court which began:

> "The employee would contend that the issue of the level of compensation awarded by the Rights Commissioner, even in respect of Section 12 alone, would not comply with the provisions of *Von Colson* and *Kamann*."

5. A Labour Court hearing took place on the 17th May, 2013. The court concluded that the respondent did not have a structure in place by which the appellant could have access to specific dedicated breaks in the course of the working day. The court noted that the respondent's case was that there were normally interruptions in work during which employees took breaks. The Labour Court concluded that while the appellant did avail of some rest during the work interruptions, that did not adequately meet the requirements of s. 12 of the Act of 1997. In relation to s. 17 of the Act, the court concluded that there was some element of non-compliance, but it was minor and inconsequential. In all the circumstances, the court believed that an award of compensation in the amount of €600 was fair and equitable, and the decision of the Rights Commissioner was varied accordingly.

6. Section 12 of the Act of 1997, deals with rest and intervals at work. Section 12(1) and (2) of the Act are in these terms:-

> "12(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.
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> (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*)."

7. Section 17 of the Act of 1997 deals with the provision of information in relation to working time. Section 27 of the Act of 1997 deals with complaints to a Rights Commissioner. Section 27(3) of the Act provides:-

"A decision of a Rights Commissioner under *subsection (2)* shall do one or more of the following:

(a) declare that the complaint was or, as the case may be, was not well founded,

(b) require the employer to comply with the relevant provision,

(c) require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 2 years remuneration in respect of the employee's employment . . ."

8. Section 28 of the Act of 1997 deals with appeals from and enforcement of recommendations of a Rights Commissioner. Section 28(6) of the Act is in these terms:-

"A party to proceedings before the Labour Court under this section may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive."

9. Counsel for the appellant argued that even though the Labour Court increased, indeed doubled, the Rights Commissioner's award, the amount awarded was so low that it could not be said to be effective, proportionate or dissuasive. Rather it is submitted the award was a nominal one. In relation to the suggestion that the proceedings before the Labour Court and the award made by it did not comply with the principles of effectiveness, was not dissuasive nor did it serve to deter it is interesting to observe that an affidavit sworn by Mr. Michael Hanley, a director of the respondent company for the purpose of the present appeal, refers to the fact that, arising from the appellant's claim pursuant to the Terms of Employment (Information) Act 1994, updated and more complete terms and conditions of employment were furnished to the appellant with specific reference to the fact that the appellant had two rest periods during his working day. In addition, the respondent company installed a digital clocking in system which records start times, finishing times and daily rest periods, at a cost of €6,150 inclusive of VAT.

10. The principles enunciated in *Von Colson & Kamann v. Land Nordrhein-Westfalen* are well-known and indeed are routinely applied by the Labour Court. The relevant section of the judgment, at pp. 1908 and 1909, is as follows:-

"23. Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

24. In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

. . .

26. However , the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.

27. On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

28. It should, however, be pointed out to the national court that although Directive No 75/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."

11. The factual background against which those objectives were made is significant and it must be said was very different from the facts of the present case. Ms. Von Colson and Ms. Kamann had sought employment in Werl Prison, a male prison. The authorities refused to engage Ms. Von Colson and Ms. Kamann for reasons relating to their gender. The officials responsible for recruitment justified their refusal to engage the plaintiffs by reason of the problems and risks connected with the appointment of female candidates and proceeded to appoint instead male candidates who were less qualified.

12. The Arbeitsgericht Hamm found that, under German law, all it could do was award Ms. Von Colson the expenses incurred by her in applying for the post (DM 7.20) and not make any award to Ms. Kamann.

13. 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*.

14. 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.

15. This appeal is couched as an appeal on a point of law, and I do not quarrel with that. However, in substance, it is an appeal in relation to quantum. There is a well-established line of jurisprudence which requires that the courts should exercise a degree of restraint, and indeed deference, when confronted with decisions of specialist Tribunals. See, by way of example, *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34; *Hayes v. Financial Services Ombudsman & Ors*. (Unreported, High Court, MacMenamin J., 3rd November, 2008); *University College Cork v. Bushin* [2012] IEHC 76 and *Ashford Castle Limited v. Services Industrial Professional Technical Union* [2006] IEHC 201, [2007] 4 I.R. 70.

16. The cases of *University College Cork v. Bushin* and *Ashford Castle Limited v. Services Industrial Professional Technical Union* are of particular interest given that the specialist Tribunal in question in both cases was the Labour Court. In the course of his judgment in *Ashford Castle Limited v. Services Industrial Professional Technical Union*, Clarke J. commented as follows, at paras. 42 and 43:-

> "42. . . . it seems to me that the Labour Court, when exercising its role under the Act of 2001 [the Industrial Relations (Amendment) Act 2001], is very much towards the end of the spectrum where it is required to bring to bear its own expert view on the overall approach to the issues. It, correctly in my view, identified that its decision must be one which is fair and reasonable to both sides. Precisely what is fair and reasonable in the context of terms and conditions of employment is a matter upon which the Labour Court has great expertise and, in my view, the Labour Court is more than entitled to bring its expertise to bear on the sort of issues which arise in this case.
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> 43. For those reasons it does seem to me that a very high degree of deference indeed needs to be applied to decisions which involve the exercise by a statutory body, such as the Labour Court, of an expertise which this court does not have."

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.

18. Of course, if there was reason to believe that the Labour Court was unaware of the principles as set out in *Von Colson & Kamann v. Land Nordrhein-Westfalen*, or was ignoring them, the position would be very different. However, there is no reason whatever to believe that the court was unaware of the *Von Colson & Kamann* line of jurisprudence. In this particular case, the submission from the appellant had made specific reference to *Von Colson & Kamann v. Land Nordrhein-Westfalen*, so reminding the Labour Court of the relevance of the decision, if any reminder was indeed necessary.

19. In this case, the submission from the appellant has included among the papers a number of earlier Labour Court decisions. It seems that was designed, at least in part, to suggest that the current decision was out of line with earlier precedence where there had been higher awards. It is worth looking briefly at those cases.

20. One of those cases, *ISS Ireland Limited v. Gfencheva* (WTC/09/155, 19th May, 2011), involved four appellants and the division of the Labour Court determining the case was chaired by Mr. Kevin Duffy, Chairman of the Labour Court, who is also the chairman of the division in the present case. In that case, the decision made specific reference to *Von Colson & Kamann v. Land Nordrhein-Westfalen.* The Labour Court found that there were no aggravating factors and that there were a number of mitigating factors. Nonetheless, the court observed that the Act of 1997 had been contravened and that this must be marked by the court in considering the question of redress. Awards of €1,000 by the Rights Commissioner, in respect of two appellants, were upheld. In the case of two others, the claims were held not to be well-founded, and the Rights Commissioner had, in one case, reached the same conclusion. In the case of *O'Malley v. Liachavicius* (WTC/06/59, 14th March, 2007), the chairman of the division of the Labour Court was again Mr. Duffy. In that case, the claimant was a plasterer who had obtained an award of €2,000 from the Rights Commissioner, but was dissatisfied with the decision and appealed to the Labour Court. The Labour Court was satisfied on the evidence of the claimant that he was working between 11 and 12 hours per day or between 55 hours and 72 hours per week, thus exceeding the maximum hourly working week permitted by the Act of 1997. He received only an estimated 50% of the total holiday pay due to him and the court was also satisfied that the claimant was persistently required to work hours in excess of the statutory maximum and that he was deprived of rest periods.

21. The Labour Court indicated that it was conscious that the provisions of the Act of 1997 and of the Directive, on which it was based, were health and safety imperatives. The court made reference to the fact that the appellant was a foreign national unfamiliar with his rights in Irish law and practice, and proceeded to allow his appeal increasing the award to €5,000. It would be immediately obvious that, in that case, the Labour Court was dealing with a case of an altogether different level of seriousness. In *Goode Concrete Limited v. Karpauskas* (WTC/06/63, 22nd February, 2008), the Labour Court made an award of €1,750 in respect of a breach of s. 12 of the Act of 1997, an aspect of the claim which had failed before the Rights Commissioner. This was in addition to upholding an award of €1,000 made by the Rights Commissioner in respect of a complaint pursuant to s. 17 of the Act. Of note, the Labour Court commented that the scheduling of the claimant's deliveries did not include any provision, in practice, for the taking of breaks and that, having regard to the scheduling, the provisions relating to breaks in the contract of employment were illusory. The court went on to comment that the "duty to provide breaks is a health and safety imperative which has been characterised as a fundamental social right in European Law", referring to comments by Attorney General Tizzano in *R. v. Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union (B.E.C.T.U.) (Case C-173/99)* [2001] I.R.L.R. 559 and to the judgment of Lavin J. in *Royal Liver Assurance Limited v. Mackin & Ors.* [2002] 4 I.R. 427.

22. In *Harbour House Limited v. Jurksa* (WTC/07/53, 7th April 2008), a number of breaches of various sections of the Act of 1997 were considered. The Rights Commissioner awarded €2,000 and both parties appealed the decision. The Labour Court increased the award to €3,000, commenting that "the judicial redress provided should not only compensate adequately for economic loss sustained but must provide a real deterrent against future infractions."

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.

25. The appellant has also argued that the Labour Court erred in law in importing into its assessment of damages what is described as a *de minimis* gloss, which it said is contrary to the principles in *Von Colson & Kamann v. Land Nordrhein-Westfalen*, with reference also made to the case of *Fuss v. Stadt Halle (No. 2).*

26. In my view there is no substance in this criticism. The reference to *a de minimis* gloss is an abbreviation of the legal maxim *de minimis non curat lex*, usually translated as "the law does not concern itself with trifles". It is a recognition that some matters are of such minimal significance that the law will not involve itself with them. In my view, it is clear that there is no scope for the suggestion that the Labour Court had introduced a threshold of minimum gravity below which it would not become involved. On the contrary, in a situation where the complainant had been in a position to avail of rest during work interruptions and had done so, but where the structures providing for this did not adequately meet the requirements of the legislation and where there had been a breach of s. 17 of the Act, that was described as minor and inconsequential there was still an award of €600 which was the amount that was regarded as fair and equitable. Borrowing the language of other areas of the law, the Labour Court was in effect operating on the basis that breaches of the legislation are actionable per se and without proof of special damage. That is entirely consistent with the specific statement in *ISS Ireland Limited v. Gfencheva* that, even in a case where there were no aggravating factors and a number of mitigating factors, breaches of the Act of 1997 had to be marked by the court.

27. In summary, I am of the view that there is no basis for interfering with the decision of the Labour Court and this appeal, couched as it must be as an appeal on a point of law, fails.