Neutral Citation Number: [2013] IEHC 581

THE HIGH COURT

[2013 No. 38MCA]

IN THE MATTER OF

THE SAFFETY HEALTH AND WELFARE AT WORK ACT 2005

BETWEEN

STOBART (IRELAND) DRIVER SERVICES LIMITED

APPELLANT

AND

KEITH CARROLL

RESPONDENT

JUDGMENT of Kearns P. delivered on the 20th December, 2013.

INTRODUCTION

1. This is an appeal from the decision of the Labour Court given on the 17th January, 2013, in respect of an appeal which the appellant had brought from a determination of the Rights Commissioner. In the proceedings the respondent claimed that his dismissal from his employment with the appellant constituted penalisation under s.27 of the Safety Health and Welfare at Work Act 2005 (hereafter the Act of 2005) and claimed compensation and reinstatement. The Rights Commissioner upheld the respondent's claim on the 29th August, 2012.

2. The respondent is an employee of the appellant company and was employed by it as a truck driver on the 22nd October, 2010. His employment was terminated by the respondent company on the 14th October, 2011, after the respondent had made a complaint of being tired and unable to fulfil his driving duties.

THE FACTUAL BACKGROUND

3. On the 12th October, 2011, the respondent completed a shift of driving a truck long distance for the appellant company. It had involved a 15.5 hour journey from Dublin to Ballinasloe and back, inclusive of breaks of 1.75 hours. Before departing on this journey the respondent's manager Mr. Kelly had informed him that his next shift would begin on the 13th October, 2011, at 23.55. The respondent requested not to be rostered to work on the 13th October, 2011, as he believed he had worked excessive hours. Mr. Kelly took the position that drivers could work up to 60 hours but that he would look into it. The respondent was told to speak to Mr. Pepper, another manager, which he did on his return to site on the morning of the 13th October, 2011. Mr. Pepper told him to go home and get some sleep before commencing his next shift at 23.55. The respondent then left the site at 10.30am and went home to bed. There was at this stage no reference by the respondent to his tiredness or fatigue or inability to work the later shift. He was advised by his manager that, if he had a grievance he could pursue it through the appellant's grievance procedure.

4. The respondent woke at approximately 16.40 to a number of missed calls from Mr. Pepper. On checking his voicemail the respondent had a message from Mr. Pepper stating that, having checked the records, the respondent had worked 47 hours and had not yet reached his maximum working hours. The respondent had claimed to have worked 53 hours up to that stage. The next message was to inform him that his shift was to start at 23.45.

5. The respondent then called to speak with Mr. Pepper but he was off site so he spoke with another manager Ms. Kelleher. A number of conversations ensued in which the respondent stated several times that he was too tired to drive. The last of these conversations took place at 18.45 after which the respondent went back to bed after being informed that the run would be left open.

6. The respondent began to feel that his job would be at risk and so later that evening the respondent called his work to take on the shift but was informed that alternative arrangements had been made.

7. The next day, the 14th October, 2011, the respondent received a letter from the appellant dismissing him on the grounds that his withdrawal of labour was deemed to be a refusal of a reasonable management request/instruction and under the appellant's disciplinary procedure was deemed to amount to a gross misconduct.

HISTORY OF THE PROCEEDINGS

8. On the 29th August, 2012, the Rights Commissioner issued a recommendation that the respondent's complaint was well-founded and required the appellant to re-instate the respondent from the 20th October, 2011, on his previous terms and conditions and to compensate him for his loss of wages from the 20th October, 2011, to the date the decision was implemented. The Rights Commissioner stated as follows:-

> *"..I find that [the respondent's] complaint regarding being fatigued and having worked excessive hours satisfies s.27(3)(c) …..while the [appellant] was fully entitled not to automatically accept 'fatigue' as a reason for the [respondent] not working his next shift, a complaint by a driver of a large truck that he was fatigued and concerned about his ability to drive safely did, I believe, warrant investigation….*
>
> *…..no investigation was carried out or fair procedure followed prior to the decision to terminate the [respondent's] employment….*
>
> *…The [respondent] was summarily dismissed for refusing to comply with an instruction to work as rostered. I am satisfied that if he had not complained of being fatigued due to working excessive hours, he would not have been*

dismissed as these were the reasons for his refusal to work the shift."

9. The Rights Commissioner went on to decide:-

> *"Having fully considered the oral and written submissions made by the parties, I find the [respondent's] complaint to be well founded. I require the [appellant] to reinstate the [respondent] with effect from 20th October 2011. The [respondent] is to be reinstated on his previous terms and conditions of employment….I also require the [appellants] to compensate the [respondent] in full for his loss of wages from the 20th October 2011 to the date of this decision when implemented."*

10. In their appeal to the Labour Court the appellant asserted that the Rights Commissioner had erred in law and fact, that the respondent had not made out a claim of penalisation under s.27 of the Act of 2005, that the respondent had not shown that he had suffered a detriment within the meaning of s.27 of the Act of 2005 as a result of a protected activity and that the remedy of reinstatement fell outside the remit of the recommendation of the Rights Commissioner.

11. The respondent acting under s.13(1) of the Act of 2005 gave as his evidence in the Labour Court that he represented to his employer that he was too fatigued to perform the driving as requested by the appellant. He contended that his actions came within s.13 (a) of the Act of 2005 and that he was "*comply[ing] with the relevant statutory provisions, as appropriate, [to] take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work."*

12. The Labour Court held:-

> *"..the Court is satisfied that the [respondent's] notification to management of his tiredness…can come within the parameters of acting in compliance with the relevant statutory procedures as provided for within s.27(3)(a)….*
>
> *…that the decision to dismiss the [respondent] followed immediately after exchanges took place concerning the [respondent's] request not to be scheduled for duty….The Court notes that the dismissal was carried out in a very precipitous manner; it did not follow the company's disciplinary procedures and was a departure from the company's normal practice. In such circumstances the proximity of the dismissal following the raising of a health and safety matter raises a causal connection between the detriment complained of and the invoking of the Act. Having considered all the relevant details the court is satisfied that but for the representations he made about being too tired to work the [respondent] would not have been dismissed as these were the reasons for his refusal to work….*
>
> *..For the reasons set out above the Court finds the [respondent's] claim to be well founded."*

RELEVANT LAW

13. Section 13(1)(a) of the Act of 2005 sets out as follows:-

> *"13.—(1) An employee shall, while at work—*
>
> *(a) comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work".*

14. Section 27 of the Act of 2005 provides:-

> *"27.—(1) In this section "penalisation" includes any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.*
>
> *(2) Without prejudice to the generality of subsection (1), penalisation includes—*
>
> *(a) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2001), or the threat of suspension, lay-off or dismissal,*
>
> *(b) demotion or loss of opportunity for promotion,*
>
> *(c) transfer of duties, change of location of place of work, reduction in wages or change in working hours,*
>
> *(d) imposition of any discipline, reprimand or other penalty (including a financial penalty), and*
>
> *(e) coercion or intimidation.*
>
> *(3) An employer shall not penalise or threaten penalisation against an employee for—*
>
> *(a) acting in compliance with the relevant statutory provisions,*
>
> *(b) performing any duty or exercising any right under the relevant statutory provisions,*
>
> *(c) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work,*
>
> *(d) giving evidence in proceedings in respect of the enforcement of the relevant statutory provisions,*
>
> *(e) being a safety representative or an employee designated under section 11 or appointed under section 18 to perform functions under this Act, or*
>
> *(f) subject to subsection (6), in circumstances of danger which the employee reasonably believed to be serious and*

imminent and which he or she could not reasonably have been expected to avert, leaving (or proposing to leave) or, while the danger persisted, refusing to return to his or her place of work or any dangerous part of his or her place of work, or taking (or proposing to take) appropriate steps to protect himself or herself or other persons from the danger.

(4) The dismissal of an employee shall be deemed, for the purposes of the Unfair Dismissals Acts 1977 to 2001, to be an unfair dismissal if it results wholly or mainly from penalisation as referred to in subsection (2)(a).

(5) If penalisation of an employee, in contravention of subsection (3), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2001, relief may not be granted to the employee in respect of that penalisation both under this Part and under those Acts.

(6) For the purposes of subsection (3)(f), in determining whether the steps which an employee took (or proposed to take) were appropriate, account shall be taken of all the circumstances and the means and advice available to him or her at the relevant time.

(7) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (3)(f), the employee shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he or she took (or proposed to take) that a reasonable employer might have dismissed him or her for taking (or proposing to take) them."

15. Section 28(3) of the Act of 2005 provides:-

"(3) 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 take a specific course of action;

(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."

THE APPEAL

16. The appellant denies that any health and safety complaint was made to the company and that the respondent's view that he had worked excessive hours cannot be construed as a complaint which would be a protected act such as to bring the concept of penalisation under s.27 of the Act of 2005 into force.

17. The appellant claims that the Labour Court fell into an error of law in its analysis of the evidence and application of the relevant law and that the respondent's notification of tiredness to management cannot be deemed to fall within s.27 (3) (c) of the Act of 2005.

18. The appellant also claims that the respondent's statement that he was tired cannot be deemed to be a "complaint" under s.28 of the Act of 2005 and that he has not established that he has suffered any detriment.

19. It is also claimed that the remedy of reinstatement as awarded by the Labour Court was not an appropriate remedy in the circumstances and that the Labour Court fell into an error of law in awarding reinstatement and compensation to the respondent.

20. The respondent claims that he was dismissed after making a health and safety claim to the company in contravention of s.27 of the Act of 2005.

21. He claims that he represented to his employer that he was too fatigued to complete or perform the driving of the proposed route on the 13th October, 2011, and asserts that this is a representation and complaint that comes within s.13(1)(a) of the Act of 2005.

22. The respondent submits that the interpretation of the complaint under s.13 of the Act of 2005 is a matter of fact for determination by the tribunal and is not a point of law capable of being appealed.

23. It is submitted by the respondent that under s.27 of the Act of 2005 the respondent's employment was terminated in the immediate aftermath of his request not to be scheduled for duty due the complaint made that he was tired which amounts to penalisation.

DISCUSSION

24. The respondent's employment was undoubtedly terminated in the immediate aftermath of his refusal to work and his representations that he was too fatigued to drive. Penalisation under s.27(3) of the Act of 2005 states that "an employer shall not penalise or threaten penalisation against an employee for (*a*) acting in compliance with the relevant statutory provisions, (*b*) performing any duty or exercising any right under the relevant statutory provisions, (*c*) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work".

25. Section 13 as a whole sets out the employee's duties, and its ethos would, in the context of this case, oblige a driver to have regard for the safety and care of not just himself but also those who an employee such as he may meet if driving a heavy goods vehicle in a fatigued state. In fact the employee must under s.13(h)(i) "report to his or her employer or to any other appropriate person, as soon as practicable…any work being carried on, or likely to be carried on, in a manner which may endanger the safety, health or welfare at work of the employee or that of any other person".

26. There is no requirement in the Act to report any complaint via a grievance procedure. The Act specifically states "report…as soon as practicable". Thus the respondent in this case can be deemed to have made his complaint when he reported that he was too tired to drive. There is no requirement that he be "at work" in the strict sense of the term when he does so, so long as the work is "likely to be carried on". To limit an employee's ability to report a complaint to working hours would greatly inhibit the application of the Act. If, for example, an employee was located in an open plan office and wished to complain discreetly that work was being carried out in an unsafe manner, it would be an unreasonable construction of the Act to limit his ability to make his complaint to working hours or the narrow confines of the place of work.

DEFERENCE TO TRIBUNAL
27. The Labour Court had the benefit of oral evidence, documentary evidence, and legal submissions from both parties. It comprehensively considered the applicable law.

28. The principles governing an appeal on a point of law from the Labour Court are well settled by the Superior Courts. There is significant curial deference extended to a specialist tribunal which has heard and assessed the evidence.

29. In the case of *Henry Denning & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 Hamilton C.J. noted at pp.37 - 38:-

> *"I agree with the judgments about to be delivered but 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."*

30. The court may only interfere in a finding of an expert tribunal where there was no evidence whatsoever to support it. In *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 I.L.R.M. 421 Kenny J. in the Supreme Court noted that *"findings on primary facts [of a commissioner should not be set aside by the courts unless there was no evidence whatever to support them"*, he goes on to note that *"[i]f however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw."*

31. This point is further elucidated in the judgment of Murphy J. in *Faulkner v. Minister for Industry and Commerce* (Unreported, High Court, Murphy J., 25th June, 1993). At page 8 of his judgment, which also concerned an appeal under Section 21 of the Employment Equality Act, 1977, Murphy J. states that:

> *"It is well settled law that, where a quasi judicial function is delegated to an expert administrative tribunal, the decision of such a tribunal cannot be challenged on the grounds of irrationality if there is any relevant material to support it. Authority for this proposition is to be found in the judgment of the Chief Justice in O'Keeffe v. An Bord Pleanála [1992] I.L.R.M. 237 at 262 in the following terms:*
>
> *'I am satisfied that in order for an applicant for judicial review to satisfy a Court that the decision making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the Court that the decision making authority had before it no relevant evidence which would support its decision.'"*

32. Finally the case of *Mulchay v. Minister for Justice, Equality and Law Reform & Ors*. [2002] E.L.R. 12 at p.17 O'Sullivan J. discusses the discretionary quasi judicial function f the Labour Court:-

> *"More centrally, in the paragraph under review the Court is rejecting the invitation to draw an inference having considered all the material including the oral evidence and the cross-examination. That is precisely the discretionary quasi judicial function with which the Labour Court (and no one else) is charged to carry out. The fact that one may disagree with the conclusion, or strongly disagree with it, is - in law - neither here nor there. It is the Labour Court and no one else which is charged under our law with carrying out this quasi judicial function and it is only if their conclusion is so abhorrent to logic and common sense or involves an error of law that the High Court will interfere with it. Clearly the Court was within its jurisdiction to accept the written and oral assurance of the employer in preference to the written and oral assurance of the employee and I cannot accept that in so doing they are in breach of legal principle or have offended logic and common sense to the point where this Court should interfere."*

33. It cannot be said that in not invoking the grievance procedure the respondent cannot make a complaint under s.13 of the Act of 2005. To do so would require the complainant to make a formal complaint, work the shift for which he was fatigued and then after resolution of the matter the issues he raised could be addressed. This makes no logical sense and puts in peril both the fatigued employee and those he may encounter in the course of driving a heavy duty truck over a long distance.

REQUIREMENT TO GIVE REASONS
34. The appellant contends that reasons were required to be given by the Labour Court for the decision to reinstate and rely on the case of *Kelly v. Commissioner of An Garda Siochana* (Unreported, Supreme Court, 11th May, 2013) and the decision of Fennelly J. in the case of *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59 (Unreported, Supreme Court, 6th December, 2012).

35. The decision of the Labour Court is a seven page comprehensive examination of the background of the claim, a summary of the complainant's case, the respondent's position, the law, the conclusions of the court and the determination based on this. This is in stark contrast to the sparse statement handed down in *Kelly v. Commissioner of An Garda Siochana* (Unreported, Supreme Court, 11th May, 2013).

36. In *Faulkner v. The Minister for Industry and Commerce* [1997] E.L.R. 107 at p.113 O'Flaherty J. in the Supreme Court noted that minute analysis or reasons are not required to be given by administrative tribunals, that the duty on administrative tribunals to give reasons in their decisions is not a particularly onerous one. Only broad reasons need be given:

> *"The Equality Officer found that she was, the Labour Court reached the opposite conclusion and there was material on which it could do so. It did not expound on its reasons but, without any doubt, the reasons were available in the materials which it said that it considered. I would reiterate, what has been said on a number of occasions, that when reasons are required from administrative tribunals they should be required only to give the broad gist of the basis for their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."*

37. In my view the reasons given by the Labour Court for its decision, including that of reinstatement, were adequate.

REINSTATEMENT
38. The issue of reinstatement is a controversial issue. Reinstatement is, in this particular case, a significant step to direct. In most cases it may be impractical or even unworkable because of the lost trust and broken relationships but issues surrounding a relationship of trust and confidence are of minimal importance here as the respondent spends a large portion of his working time on the road and has minimal interaction with his employers. As under s.28(3)(b) of the Act of 2005 the remedies available include "requir[ing] the employer to take a specific course of action" this can be interpreted to include reinstatement.

DISMISSAL
39. It was submitted that relief should not be granted because by analogy with the Unfair Dismissals Acts 1977 to 2007, the employee would not have qualified as he had only eleven months and three weeks service having started working with the appellant company on the 22nd October, 2010, and his employment being terminated on the 14th October, 2011.

40. In relation to the one year service requirement under the Unfair Dismissals Acts the court was referred to the case of *Sharma and Saharan v. Employment Appeals Tribunal and J&I Security Limited (Notice Party)* [2010] 21 E.L.R. 262.

41. The case made out in *Sharma* centered around whether the one year's service requirement applied to dismissals under the Act of 2005. The applicants in that case were dismissed from their employment as security guards having made complaints to the notice party regarding a health and safety matter (lack of rest breaks). The Employment Appeals Tribunal held that it had no jurisdiction to hear the claim as the applicants did not have one year's service as required under the Unfair Dismissals Acts. Hedigan J. on appeal to the High Court held that "employees who pursue claims under the Unfair Dismissals Acts for penalisation as defined in s.27 of the Act of 2005 must have one year's continuous service with the employer who dismissed them."

42. In the present case the claimant alleges he was penalised under s.27 for a complaint made pursuant to s.13 of the Act of 2005. It is not submitted that he was unfairly dismissed under the Unfair Dismissals but that he was penalised due to a complaint made pursuant to s.13 of the Act of 2005 and this resulted in a penalisation by way of dismissal as per s.27 of the Act of 2005. The Act at s.27(2)(a) notes that penalisation can be "suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2001), or the threat of suspension, lay-off or dismissal". It *includes* dismissal under the Unfair Dismissals Acts but does not in any way limit it to dismissal under that Act.

DECISION
43. The Rights Commissioner and the Labour Court, to which this Court extends deference, both concluded that the respondent was subject to penalisation as set out by s.27 of the Act of 2005 for making a complaint under s.13 of the same Act.

44. Looking first at the original Council Directive 89/391/EEC of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work and at Council Directive 91/383/EEC of 25 June 1991 on Measures to Improve the Safety and Health at Work of Workers with a Fixed-Duration or Temporary Employment Relationship which set down procedures to improve the safety of workers and their rights, it is notable that the ethos behind the Acts of 1989 and 2005 is to ensure the health and safety of employees and those they may encounter in the course of their work.

45. There is no issue as to fair procedures. The caselaw as discussed above means that in the circumstances of this case ample reasons were given in the determination from the Labour Court and it is not a mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made.

46. Thus on the application of s.13 of the Act of 2005 the respondent in the case before the court acted appropriately in reporting his fatigue. He was subjected to penalisation as described by s.27 of the Act of 2005. He made a complaint of the risk to his safety and that of others if he were to drive in a fatigued state and was dismissed the following day.

47. Hence, the court would dismiss the appellant's appeal and uphold the determination of the Labour Court.