

THE HIGH COURT**JUDICIAL REVIEW****2007 263 JR****BETWEEN****DONEGAL COUNTY COUNCIL****APPLICANT****AND****THE HEALTH AND SAFETY AUTHORITY****RESPONDENT****JUDGMENT of Kearns P. delivered on the 9th day of July, 2010.**

In these proceedings the applicant seek an Order of Prohibition by way of application for judicial review to prevent the respondent from further investigating or prosecuting the applicant or its staff in respect of a road traffic accident which occurred on the 12th June, 2001 at Dunross, Culdaff on the Malin/Culdaff Road, Inishowen, County Donegal.

Shortly after 8.00 p.m. on the evening of 12th June, 2001 a tragic accident occurred at Dunross, Culdaff, County Donegal, when a grey Renault Clio driven by Sinead McDaid left the road and finished on its roof in a field on the left side of the road as one travels towards Culdaff. There was no other vehicle involved and the driver, Ms. Sinead McDaid, was thrown clear of the vehicle and sustained injuries from which she died later that night. She had been travelling alone at the time of the accident.

It is common case that workers in the employ of the applicants had been working on the road surface earlier that day. The section of roadway where the accident occurred had been newly tarred and covered over with loose chippings over a distance of approximately one mile. This work had ceased at around 11.00 a.m. and traffic control in the form of "follow me trucks" was in place until 3.00 p.m. at which point traffic control was removed and normal usage of the roadway was resumed. Loose chipping signs (slow – loose chippings – 20mph) remained in place at both ends of the works and in the middle thereof.

The accident was investigated by the Garda Síochána in 2001 and a number of statements were obtained. In particular statements were obtained from Ms. Serena McCallion and her brother-in-law, Gareth McCallion, who were themselves driving and who passed Ms. McDaid's car coming in the opposite direction shortly before the accident. Ms. McCallion confirmed that the road surface had been newly tarred with loose chippings for approximately one mile from Culdaff village towards Dunross. She also confirmed that there were three signs on the road indicating to drive slow at 20mph. Before exiting the newly tarred section of the roadway she met a silver Renault Clio coming in the opposite direction. As this car passed her car, a chipping from the road hit her car. She felt the oncoming car was travelling between 30mph – 40mph. As the car passed by, she looked in her rear view mirror and saw brake lights come on in this car which then left the road and she observed the rear of the car to rise up. In his statement, Mr. McCallion also heard chippings from the road make contact with their car and observed the car driven by Ms. McDaid. He observed it was travelling faster than their car. Garda Daniel Devlin came to the scene of the accident that evening and took measurements of the scene. He noted that there were a lot of loose stone chippings on the road which appeared to him to have been re-surfaced in the near past.

In his statement, Garda P. Moran stated that the field which the car entered is lower than the road surface by approximately 8 feet. He also stated that there was a brake mark on the road of 60 feet from the left wheel and 57 feet from the right wheel which went towards the grass verge where the Renault Clio made contact with the verge. He also stated that the newly tarred road surface with loose chippings commenced approximately 100 yards on the Malin side of where the Renault Clio first made contact with the grass margin. The evening was dry and bright at the time and the road was dry. He stated that there were two signs erected on either side of the road indicating "slow - loose chippings – 20mph" and these signs were erected 95 yards on the Malin side of where the newly tarred surface commenced. There were no road markings.

While the applicant accepts that the section of roadway which had been covered with loose chippings was a place of work for the duration of the works in progress, it contends that it ceased to be such when the workmen left the site at 11.00 a.m., notwithstanding that the free flow of traffic in both directions did not resume until 3.00 p.m. The applicant contends that the scene was not a place of work at the time of the accident at 8.10 p.m. The applicant did, however, concede on the second day of the hearing that workmen had returned to the scene of the accident the following day and had swept some chippings from the road surface. It appears also that some of the road signage may have been altered at that time. Any work undertaken on the following day by the applicant's workers did not involve placing road markings on the road surface.

The initial investigation undertaken by an Garda Síochána did not result in any prosecution being taken against any party but following representations made by the deceased's family and by local politicians on their behalf, the Garda Síochána undertook a further investigation into the circumstances surrounding the accident and eventually compiled a file which was sent to the office of the Director of Public Prosecutions to decide whether or not a criminal charge of reckless endangerment should be brought against any members or employees of the applicant herein. The Director decided that no such charge would be brought.

It appears that the information gathered by the Garda Síochána in respect of this more detailed investigation was shared with the respondent herein. The respondent had conducted some initial or preliminary investigations into the circumstances of the accident in 2001 as it was the view of the Authority the accident locus was a "place of work" and that that it had jurisdiction to do so under the Health and Safety Act, 1989.

In the meantime, the husband of the deceased brought civil proceedings against the applicants in the form of a fatal claim for compensation under the Civil Liability Act, 1961. Those proceedings were brought against the applicants and were subsequently compromised without admission of liability. The deceased's parents also mounted further civil proceedings claiming damages for

nervous shock. They were strongly of the view that there had been a very serious dereliction of duty by the servants or agents of the applicants and were determined that some form of criminal charges would be brought against those who were responsible for the state of the roadway on the occasion when their daughter tragically met her death.

Ultimately in November, 2006, some five and a half years after the accident, the respondent decided to further investigate the matter, relying on this occasion on s.34 of the Safety, Health and Welfare at Work Act 2005 (hereinafter "the 2005 Act").

The respondent contends it has jurisdiction to conduct such an investigation on the basis that the location of the accident, namely, the stretch of roadway in question, was at the relevant time a "place of work" within the meaning of the 2005 Act.

On 12th March, 2007 the applicant instituted judicial review proceedings in which it sought an order of prohibition to prevent the respondents from either investigating or prosecuting Donegal County Council or its staff in relation to the material incident or from prosecuting or attempting to prosecute Donegal County Council, its staff or solicitors, pursuant to the provisions of s. 77(2)(d) of the Safety, Health and Welfare at Work Act 2005.

An order of *certiorari* was sought by the applicant to quash the decision of the respondent to order a new investigation into the material incident and six declarations were sought by the applicant in the following terms:-

- (i) The investigation commenced by the respondent in November/December 2006 is ultra vires the powers of the respondent conferred upon it by the 2005 Act.
- (ii) The provisions of the 2005 Act have no application to the material investigation.
- (iii) The location of the material incident was not a place of work within the meaning of the 2005 Act.
- (iv) The proposed investigation is time-barred or statute-barred.
- (v) The decision made by the respondent to investigate the applicant in relation to the material incident constitutes an oppressive exercise of the respondent's functions and powers pursuant to the 2005 Act.
- (vi) The respondent has failed to afford Donegal County Council or its employees fair procedures in the manner in which it has purported to investigate the material incident.

The grounds advanced by the applicant in support of its application for those reliefs may be summarised as follows:-

- (a) The respondent concluded its investigation into the material incident under the relevant provisions of the Safety, Health and Welfare at Work Act 1989 and the provisions of the 2005 Act do not apply to the date of the material incident.
- (b) The location of the material incident is not a "place of work" for the purposes of the 2005 Act, therefore, the material incident does not come within the ambit of s. 34 of that Act and that Act has no application to the investigation or any intended prosecution.
- (c) Retrospective application of the investigative and penal provisions of the 2005 is ultra vires.
- (d) Any prosecution brought by the respondent in relation to the material incident is time-barred and/or out of time.

THE SAFETY, HEALTH AND WELFARE AT WORK ACT, 2005

The Act of 2005 in its long title purports to do the following:-

"To make further provision for securing the safety, health and welfare of persons at work and for the enforcement of the relevant statutory provisions, to give further effect to Council Directive 89/391/EEC of 12th June, 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Council Directive 91/383/EEC of 25th June, 1991 on measures to improve the safety and health at work of workers with a fixed-duration or temporary employment relationship, to provide for the further regulation of work activities, to continue in being and confer additional functions on the National Authority for Occupational Safety and Health and rename that body as the Health and Safety Authority, to repeal the Safety, Health and Welfare at Work Act 1989, to provide for the repeal of certain other enactments and the amendment of the National Standards Authority of Ireland Act, 1996 and to provide for related matters."

Section 2 contains various definitions.

"Accident" means an accident arising out of or in the course of employment which, in the case of a person carrying out work, results in personal injury.

"Place of work" includes any, or any part of any, place (whether or not within or forming part of a building or structure), land or other location at, in, upon or near which, work is carried on whether occasionally or otherwise and in particular includes:

- (a) in relation to an extractive industry including exploration activity, the whole area intended to house workstations to which employees have access for the purpose of their work relating to the immediate and ancillary activities and installations of, as appropriate—
 - (i) the surface or, as the case may be, underground extractive industry, including overburden dumps and other tips and any accommodation that is provided and, in the case of the underground extractive industry, any working area,
 - (ii) the extractive industry through drilling onshore including any accommodation that is provided, and

(iii) the extractive industry through drilling offshore, including any accommodation that is provided,

(b) a tent, trailer, temporary structure or movable structure, and

(c) a vehicle, vessel or aircraft."

Notwithstanding the repeal of the Act of 1989, the National Authority for Occupational Safety and Health, by virtue of s. 32 of the Act of 2005, continued in being.

The general functions of the Authority are set out in s. 34 of the Act of 2005 and those functions include, at s. 34(1)(d) the making of "adequate arrangements for the enforcement of the relevant statutory provisions".

By virtue of s. 62 of the Act of 2005 the Authority may authorise Inspectors for the purposes of the enforcement of all or any of the relevant statutory provisions within the relevant area of its responsibility. By virtue of s.64, an Inspector may at any time enter any place where he or she has reasonable grounds for believing is used as a place of work and may make inquiry to ascertain whether the relevant statutory provisions have been or are being complied with. By virtue of s. 70 of the Act of 2005, the Authority may at any time direct any of its staff to investigate the causes and circumstances surrounding any accident, incident, personal injury, occurrence or situation or any other matter related to the general purposes of the Act. By virtue of s. 72 of the Act, the Authority may serve an information notice on any person requiring that person to give to the Authority within such period and such form as may be specified in the notice any information specified in the notice that the Authority may reasonably require. By virtue of s. 77 of the Act of 2005 a person commits an offence where such person prevents, obstructs, impedes or delays an Inspector from exercising any functions conferred on him or her by the Act. Section 82 of the Act provides that summary proceedings in relation to any offence under any of the relevant statutory provisions may be brought and prosecuted by the Authority.

SUBMISSIONS OF THE PARTIES

The respective submissions of the parties may be briefly summarised. The applicant contends that it is a basic principle of administrative law that an administrative body may only act within the powers lawfully conferred on it by statute. Section 34 of the 2005 Act, on which the respondent relies, does not permit an investigation into completed roadworks or into the circumstances of persons travelling on the public highway driving motor vehicles. In this regard reliance was placed on the recent judgment of the High Court (Hedigan J.) in *Cork County Council v. Health and Safety Authority and Vincent D'Arcy of the Health and Safety Authority – Inspector* [2008] IEHC 304.

It was argued that the jurisdiction of the respondent does not extend to road safety or the protection of road users. On the contrary, under and by virtue of the provisions of the Roads Act, 1993, statutory responsibility for the maintenance and construction of public roads rests upon the applicant as the Roads Authority. While roadworks in progress could be considered to be a place of work within the meaning of s. 2 of the Act, there can be no "place of work" within the section in circumstances where the site has been demobilised and opened up to the unimpeded flow of traffic.

It was further submitted that the respondent's jurisdiction does not extend to the protection of road users generally. The whole underlying purpose of the Act of 2005 was to promote the safety, health and welfare of persons at work.

It was also submitted that s. 34 of the 2005 Act does not apply in a retrospective manner. While s. 32 of the Act provides for the continuance of anything not completed under the 1989 Act, the respondent had not chosen to rely on that section but had instead relied exclusively upon s. 34 as the authority for its investigation. The fact of the matter was that the respondent had commenced an investigation as far back as November 2001 and its officers had visited the location of the road traffic accident in April 2002. In October 2005, the respondent had advised the father of Sinead McDaid to the effect that the Authority had decided not to investigate the road traffic accident. It would be an unfair procedure to permit them to do so now. The respondent arguably had commenced but not completed its investigation under the provisions of the 1989 Act which had now been repealed, but had not invoked s. 32 of the 2005 Act to ensure a valid continuance of that investigation. Finally, it was submitted that any interpretation of the Act of 2005 must be one of strict interpretation having regard to the fact that it was a penal statute.

In response, it was submitted on behalf of the respondent that the facts established that there were roadworks in progress at the time of the accident and that the scene of the accident still remained a "place of work" at the time of the accident. This proposition was supported by the fact that, on the day after the fatal accident, further surface dressing or sweeping was carried out by the applicant's servants or agents. Moreover, the fact that there were restrictive speed signs of 20mph in the area where there were loose chippings suggested that, at the time of the accident, the roadworks were still in progress and the site had not been demobilised. It was argued that two key elements of the roadworks still remained to be attended to, namely, the removal of loose chippings and the removal of signage. The site had therefore not been demobilised.

In those circumstances, it was contended on behalf of the respondent that the decision of the High Court in *Cork County Council v. Health and Safety Authority* did not preclude the respondent from carrying out the investigation in question.

In relation to the issue of retrospectivity, the respondent maintains that there was no investigation in being prior to December 2006. The applicant had not established by evidence that the respondent had concluded an investigation under the 1989 Act. In those circumstances it was submitted that, as a matter of law, s. 34(1) of the 2005 Act permitted the respondent to enforce the provisions of the 1989 Act. There was nothing in the transitional provisions of the 2005 Act, or in the provisions of the Interpretation Act 2005, that would displace the effect of s. 34(1)(d).

Furthermore, the statement of opposition had made clear that the respondent was not attempting to apply the penalties provision of the 2005 Act to the material incident and conceded that the penalties provided under the 1989 Act would apply in the event of any conviction being obtained. There had been no unwarranted investigative or prosecutorial delay on the part of the respondent.

DISCUSSION AND DECISION

It must be stressed at the outset that this was a most tragic and unfortunate accident and one can readily understand the distress experienced by the deceased's family in that regard. Their anxiety to have some body or person "brought to account" has by now been the subject matter of a lengthy campaign of representations to both politicians, the Garda Síochána and other parties. An indication of the degree to which the parents of the deceased have themselves become embroiled in this campaign was evident at the hearing where they arranged to have their own stenographer present in Court to make a record of the proceedings,

notwithstanding that they were advised that this was an unusual procedure and one which the Court itself regarded as an unnecessary expense from their point of view. I stress I have every sympathy for the parents of Sinead McDaid but it is an undeniable fact of this case that a huge impetus for every ongoing investigation into this accident has emanated from that quarter.

Essentially, however, this case is a very simple one in terms of the issues raised. That issue is simply this: at the time of the fatal accident involving Sinead McDaid at 8.10 p.m. on the 12th June, 2001, was the section of roadway to which tarmacadam and loose chippings had been applied, a "place of work" within the meaning of the Act of 2005? If it was, it seems to me the respondent can legitimately pursue an investigation and, notwithstanding the objections of the applicant, consider a possible prosecution. However, if the stretch of roadway was not a "place of work" at the relevant time, it equally seems clear to me that the respondent lacks jurisdiction to either investigate or prosecute arising out of the material incident.

Consideration of this issue is facilitated by a consideration of very similar issues recently determined in the High Court by Hedigan J. in the case of *Cork County Council v. The Health and Safety Authority and Vincent D'Arcy of the Health and Safety Authority – Inspector* [2008] IEHC 304.

This was a case where the respondent had written to Cork County Council raising concerns regarding the use of Dense Bitumen Macadam ("DBM") surface on roads outside the 50km or 60km speed limit zones. The HSE stated, *inter alia*, that allowing a situation to continue where roads had not yet received their final intended surface without appropriate control measures in place was unacceptable and that roads which had not had their final surface applied constituted an "incomplete project" within the scope of the Safety, Health and Work (Construction) Regulations, 2001. These concerns culminated in the issuing by the respondent of an Improvement Notice served on Cork County Council pursuant to s. 66(1) of the Act of 2005. Cork County Council, pursuant to s. 66 of the Act, appealed such notice to the District Court which in turn led to a Consultative Case Stated being transmitted to the High Court for guidance on a considerable number of legal issues, including the issue as to whether a road on which works have ceased for a significant period between phases of surfacing works and were open to traffic during that period a "place of work" within the meaning of the Act of 2005.

Having noted that the Act of 2005 was in the nature of a penal statute and must as a result be strictly construed, Hedigan J. accepted that the overall purpose of the Act of 2005 related to the health and safety and protection of workers at work as expressed in the Directives transposed into domestic law by the Act of 2005. At para. 22 of his judgment he stated:-

"22. The functions of the respondents are set out in s. 34 and are clearly aimed at this very specific protective role. No role is given to the respondents either in the legislation or the regulations made thereunder in relation to road safety or the protection of road users. Yet it is to just that that the respondents directed their attention when they addressed themselves to the situation existing here. They addressed themselves to safety issues arising while DBM surfaces were in use between phases of work i.e. after the site of road works that had existed had been demobilised and the road opened to traffic but before a final surface was laid. During that period of time no road workers would be on site. In fact no site would exist. The respondents are characterising a road as a "place of work" when, according to the appellant, on any sensible view, it is not one.

23. Moreover, the appellant argues that the court should consider that the dominant purpose of the respondents action herein was the safety of road users. While this may of itself be laudable it is outside the scope of the Act of 2005. In this regard I have been referred to the cases of Cassidy v. The Minister for Industry and Commerce [1978] I.R. 297, in re: Crowley [1964] I.R. 106 and Kennedy v. Law Society of Ireland (No. 3) [2002] 2 I.R. 458. In these cases the Supreme Court has held that the dominant purpose of the exercise of an administrative power must be warranted by the scope of that power.

24. It seems to me that this argument must be correct. It is clear that the dominant purpose for which the respondents have issued the improvement notice is the protection of road users from a DBM surface which it considers to be unsafe, because it does not have sufficient skid resistance. The concentration on traffic control and monitoring on the site of possible future works whilst indeed a laudable concern is, it seems to me, essentially governed by the purpose of ensuring a certain final road dressing is laid. This dominant purpose has nothing to do with the safety and welfare of workers at work and is not in my judgment, a purpose within the scope of the Act."

Hedigan J. noted, however, that where there are in fact road works in existence or in progress, the *locus in quo* constitutes a work place within the meaning of s. 2 of the Act and that the Act, at such time and place, would therefore be applicable. However, he also stated:-

"Conversely, it is not applicable when there are no road works in train and the site has been demobilised and opened up to the unimpeded flow of traffic. This may be so even where it is intended that at some future time there may be a final surface dressing."

He then proceeded to answer some of the particular questions addressed to the Court by the Learned District Judge, including whether s. 66 of the Safety, Health and Welfare at Work Act, 2005 applies to a local authority in respect of road works carried on by it or on its behalf. He replied affirmatively to this question *"but only where there are road works in being or imminent and only in respect of the safety of workers on site and road users present or likely to be present at the locus in quo"*. The Learned Trial Judge answered "No" to the question as to whether a road on which works have ceased for a significant period of time between phases of surfacing works and has been open to traffic during that period "a place of work" within the meaning of the 2005 Act.

I find myself entirely in agreement with the reasoning of Hedigan J. in this judgment. The primary and dominant purpose of the Act of 2005 appears clearly from its long title. It is a legal measure which is all about worker safety and it expressly so states.

While it might confer an incidental jurisdiction on the respondent in the case of a person who is not a worker but who is nonetheless injured while on a site which is a "place of work" at the time of the relevant accident, it does not seem to me to be a permissible purpose of the legislation to extend the parameters beyond those which are clearly provided by the legislation, particularly bearing in mind that this is a penal statute.

In considering the material placed before the Court in the form of the affidavit evidence and the agreed facts (and in this context, the Court cannot treat certain speculation appearing in newspaper reports as falling into either category), I am satisfied that the stretch of roadway where this tragic accident occurred ceased to be a place of work within the meaning of s. 2 of the Act of 2005 when the workmen completed the works at 11.00 a.m. on the day of the accident. It is worth noting that the works in question were "final" road works. The workmen had not been laying a temporary road surface, which was the issue which agitated the interest of the

respondent in the case of *Cork County Council*. A macadam surface had been applied to this stretch of roadway and had been covered with appropriate chippings. Certain road signage had been left in place in accordance with normal practice until it was considered safe to open the roadway to traffic in both directions at 3.00 p.m. that afternoon.

I attach no particular significance to the admitted fact that on the following day workmen returned to sweep the road clear of what might have been an excessive residue of loose chippings and to rearrange some of the road signage. This was an understandable reaction to the events of the previous evening and does not, in my view, mean that there had been an unbroken process of road works going on for a period in excess of twenty four hours from 8.00 a.m. the previous morning.

There must be many instances where it might be stated that workmen have left road works in a state which might be regarded as less than fully safe or satisfactory. I am in no position on the facts of the present case to make or arrive at any such conclusion. However, if in every such case road works were to be considered as still being in progress, an extremely wide jurisdiction would thereby be conferred on the respondent body in the absence of any express statutory provision to that effect.

It seems to me that a very close degree of proximity must be established to justify any finding that would confer jurisdiction on the respondents when workers have actually left a worksite and have completed their functions there.

On the various other points which were argued in the case, I find myself in complete agreement with the submissions advanced on behalf of the respondent. I do not believe that where they legitimately pursue their inquiries under the Act of 2005 that they can be accused of adopting unfair procedures, nor do I feel that there has been any delay in this case of such magnitude as would preclude them from conducting an investigation or bringing a prosecution if they had the jurisdiction to do so. In fairness, counsel on behalf of the applicants did not press these points to any great degree during the hearing.

I am equally satisfied that no difficulty would have stood in the way of the respondent on the issue of non-retrospectivity as it was formulated on behalf of the applicant. Counsel for the respondent made it clear that the Health Authority fully accepted that in the context of any possible prosecution, only those penalties which were available under the 1989 Act could be deployed. I see nothing in the Act of 2005 which precludes an investigation into an event which preceded the enactment of the Act of 2005, particularly in circumstances where provision for investigation existed under the 1989 Act. Nor do I regard the initial or preliminary investigation undertaken in 2001-2 as in any way invalidating the decision made in November, 2006 to conduct a more thorough investigation into this matter.

But for the reasons stated I will make the Order of Prohibition sought in this case and will discuss with the parties whether any additional Declarations or other Orders are required or necessary.