Neutral Citation: [2016] IEHC 598

THE HIGH COURT

Record No. 2015 No. 204 MCA

IN THE MATTER OF THE ORGANISATION OF WORKING TIME ACT 1997

AND IN THE MATTER OF THE ORGANISATION OF WORKING TIME ACT (DETERMINATION OF PAY FOR HOLIDAYS) REGULATIONS 1997

AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 28(6) OF THE 1997 ACT

BETWEEN

ANDRIUS BABIANSKAS

APPELLANT

AND

FIRST GLASS LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Hunt delivered on the 3rd day of October, 2016

1. Mr. Babinskas ("*the appellant*") was employed by First Glass Limited ("*the respondent*") as a lorry driver for a number of years from 5th September, 2005. This employment relationship has generated disputes and claims in a variety of forums. The claim giving rise to this appeal was lodged with the Labour Court, in which the appellant asserted that he was underpaid in respect of annual leave, that he was similarly underpaid for public holidays, and that the respondent had failed to provide him with the requisite statutory notice of his starting and finishing times. These claims were made pursuant to ss. 20, 21 and 17 of the Organisation of Working Time Act 1997 ("*the Act*"). The respondent allowed the appellant's claim in respect of notice of starting and finishing times, but found that the claims in respect of payment for annual leave and public holidays were not well founded.

2. The appellant appealed the latter determinations by way of originating notice of motion dated 30th June, 2015. The appeal was heard on 7th July, 2016. The appeal was contested by the respondent, and the Labour Court was removed as a notice party by agreement of the remaining parties. In essence, the appeal was based on the contention that the Labour Court erred in law in determining that two of the appellant's claims were not well founded.

3. The rates of pay for the purposes of claims pursuant to the provisions of ss. 20 and 21 of the Act are defined and calculated by reference to the provisions of the Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997, ("*the Regulations*"). Regulation 2(2) provides that:-

> *"References in these Regulations to a sum paid to an employee in respect of time worked by him or her shall, where appropriate (and, in particular), in a case of the employer's insolvency, be construed as including references to a sum that is liable to be paid to the employee in respect of time worked by him or her and references to an employee's pay shall be construed accordingly".*

4. The issue arising on this appeal springs from two basic facts. Firstly, under his written contract of employment with the respondent dated 4th December, 2005, the appellant was liable to be paid the sum of €34,384 per annum by the respondent, which converts to a weekly wage of €668.75. He was also entitled to certain other payments in respect of subsistence which are not relevant to this appeal. Secondly, at all times material to this dispute, the appellant was, in fact, paid at the rate of €554.48 per week by the respondent. In rejecting the appellant's claims in respect of annual leave and public holiday pay, the Labour Court adverted to both salient facts and the relevant provisions of the Regulations. It correctly summarised the substance of the appellant's case as follows:-

> *"The rate specified in his contract of employment is the rate that is liable to be paid to him in respect of time worked, within the meaning of Regulation 2 and should, on that account, be deemed to be his normal weekly or daily rate for the purpose of calculating his holiday pay."*

5. It also noted that the clear purpose of the Regulations is to ensure that for either annual leave or public holidays an employee receives no less (or no more) than he or she would have received if he or she was working during the period in question. The Labour Court found against the appellant in respect of the holiday and annual leave claims by holding that the appropriate reference point for these claims was the lower amount actually received by the appellant rather than the higher rate specified in his contract of employment. It did so in the following terms:-

> *"The claimant's contract of employment, which was concluded in September 2005, provided for a different rate than that at which he was actually paid at all times material to this claim. While the claimant's actual rate differed from that specified in the contract, he appears to have accepted the adjustment over an extended period. If he did not, or if the adjustment of his rate of pay was unlawful, that is a matter to be determined in other proceedings."*

6. Both parties were represented at the hearing before the Labour Court, the appellant by his solicitor, the respondent by a director and an industrial relations consultant. The affidavit evidence lodged on this appeal agrees that the appellant gave oral evidence before the Labour Court in the course of the hearing of these claims but differs as to the extent of that evidence. The affidavit of the appellant's solicitor exhibited a contemporaneous attendance document compiled at the hearing and, on that basis, and insofar as it may be relevant, I am satisfied that the appellant was not questioned by the representatives of either party or the members of the Labour Court on what was subsequently found to be his apparent acceptance of the adjustment in his rate of pay over an extended period. This attendance suggests that the appellant's evidence was directed to the issue of starting and finishing times, which was ultimately determined in his favour by the Labour Court.

7. In this case, the three issues before the Labour Court arose by way of an appeal by a decision of a Rights Commissioner under s. 27 of the Act. In those circumstances, s. 28(1) of the Act provides that the Labour Court "*shall give the parties an opportunity to be heard by it and to present to it any evidence relevant to the appeal*". In that respect, it appears to have complied with its statutory obligations and it is regrettable that an opportunity was not taken by the representatives of the parties to comprehensively canvass

all three issues when evidence was given by the appellant.

8. The scope of an appeal to this Court against a determination of the Labour Court arises only on a point of law, by virtue of the provisions of s. 28(6) of the Act. The scope of this type of appeal was helpfully explained by Baker J. in *Health Service Executive v. Abdel Raouf Sallam* [2014] IEHC 298, by reference to the decision of the Supreme Court (per McCracken J.) in *National University of Ireland Cork v. Ahern* [2005] 2 I.R. 577. Baker J. concluded that this Court may, on such an appeal, consider whether the Labour Court wrongly took into account or ignored a fact or a piece of evidence, incorrectly applied a legal test in coming to its conclusions, or erred in law in its interpretation of the law. Baker J. also noted that whereas the High Court must show appropriate curial deference to the Labour Court, such deference only arises when that Court deploys its particular expertise on industrial relation issues. Such deference does not extend to instances where the notice party deals with questions of law.

9. The question to be decided on this appeal is as to whether the appellant has identified an error of law underpinning the determination issued by the Labour Court in this case. When a claim is made in relation to annual leave or public holidays by reference to Regulation 2, the first matter to be determined is the amount "*liable to be paid*" to the claimant, which is then deemed to be the appropriate rate for calculation of holiday pay. On the facts of this case, the Labour Court had to determine whether the amount liable to be paid was that specified in the contract, or that actually paid to the appellant over a protracted period after the date of the written contract. In my view, having correctly identified that Regulation 2 was the relevant applicable provision in the case, it did not proceed to provide a clear analysis of the legal basis upon which it considered that the amount liable to be paid was the amount actually paid rather than the higher amount specified in the written contract between the parties.

10. The starting point is that the appellant was initially liable to be paid the amount stipulated in the written contract, and only became liable to be paid a lesser amount if there was some enforceable variation of that contract, whether by waiver, estoppel or by subsequent or collateral agreement. The Labour Court simply referred to his apparent acceptance of the lower sum over a long period of time. The protracted acceptance of the lower sum is an undoubted fact, but in my view it was insufficient on its own to permit the Labour Court to decide that the appellant was liable to be paid the lower amount on the basis of a simple extrapolation that the level of liability was fixed solely by the fact that a lower sum was subsequently accepted him.

11. Concerns about the approach of the Labour Court to this issue are heightened by the subsequent reference to the fact that any unlawful adjustment of the appellant's rate of pay was capable of being determined in other proceedings. The obligation of the Labour Court to ascertain the sum that the appellant was liable to be paid for the purposes of Regulation 2 implied that it had to carry out an inquiry and an analysis of the meaning and application of that provision in the context of the facts before it. In the light of the language used in Regulation 2, the Labour Court had to analyse whether the sum "liable" to be paid was that specified by the contract, which was the starting point of that inquiry, and whether any such liability was validly altered by events subsequent to the contract. The assumption that the relevant sum was the actual amount paid, coupled with a reference to the issue of potential unlawful deductions being determined elsewhere, did not in my view amount to a full consideration of the meaning and application of the term "*liable*" in the context of the instant case. There is certainly a serious issue as to whether the term "sums liable to be paid" is necessarily synonymous with payments actually made.

12. In the circumstances, the Labour Court erred in law by assuming or inferring that the apparent acceptance by the appellant of a lesser sum than that to which he was initially contractually entitled automatically meant that this was the sum "*liable to be paid*" to him for the purposes of Regulation 2. In my view, the proper and full resolution of this issue required more extensive factual and legal analysis by the Labour Court. It is not that the final result must necessarily be different. The appellant is entitled to a full determination of the issue arising under Regulation 2(2) before an adverse conclusion can be reached. In fairness to the Labour Court, it must be observed that there was a lack of clarity in the manner in which these claims were presented and argued before it.

13. The matter will be remitted to the Labour Court for further consideration.