

THE HIGH COURT**JUDICIAL REVIEW****[2012 No. 9135 JR]****BETWEEN****KERRY COUNTY COUNCIL****APPLICANT****AND****THE HEALTH AND SAFETY AUTHORITY****RESPONDENT****JUDGMENT of Kearns P. delivered the 11th day of April, 2013.**

In these proceedings the applicant seeks various reliefs by way of an application for judicial review to prevent the respondent from further investigating the applicant in respect of a fatal road accident which occurred on Saturday, 29th September, 2012 on the N72 roadway in Rathmore, County Kerry.

The applicant is a local authority within the meaning of the Local Government Acts 1925 – 2012 and, as such, is responsible for the maintenance and improvement of national, regional and local roads within the County of Kerry. The applicant commenced construction works on the N72 in Rathmore on 13th August, 2012 for the purposes of installing traffic calming measures. The said works were scheduled to last some 20 weeks. However, on the afternoon of Friday 28th September, 2012, a traffic management plan was put into operation for the weekend during which work would not be taking place. This involved re-opening the road to two-way traffic, albeit that the roadway remained dressed with cones and other insignia indicative that road works were taking place. In particular there were cones located to the front of a traffic island under construction in the middle of the roadway. It was into this traffic island and cones that the driver of a vehicle collided shortly before 10.00pm on the evening in question, causing him to lose control of the vehicle which left the roadway, overturned and caused the driver fatal injuries.

The respondent was notified by the applicant of the accident on 1st October, 2012 and an inspector from the respondent carried out an inspection at the site on the same date. On 2nd October, 2012 the applicant was notified by the respondent of its intention to carry out an investigation into the accident. The applicant's position is that the respondent has no authority to investigate the accident locus as it is not a "place of work" and, in circumstances where the respondent refuses to accept that contention, sought leave to bring an application by way of judicial review which was granted on 5th November, 2012 whereupon the respondent's investigation was stayed pending the outcome of the proceedings.

The core issue in these proceedings is thus a very net one, being one which has arisen in a number of cases, and it is whether the location of the accident was a place of work at the time of the accident. Both sides accept, of course, that if the location of the accident was not a place of work then the respondent does not have jurisdiction to investigate the accident.

SUBMISSIONS OF THE APPLICANT

On behalf of the applicant it was submitted that while undoubtedly the relevant section of roadway was a place of work for the duration of the works in progress, it ceased to be such when the workmen left the site on the Friday afternoon, because the works were shut down and the roadway was re-opened to the public. There were no employees of the applicant working at the accident locus at the time of the accident. The working hours traffic management arrangement, manually controlled by a flag man, had been deactivated. The barrier protecting the working area and cones defining the traffic route had been removed from the carriageway. A line of retro-reflective traffic cones had been installed on each side of the central island of the traffic calming gateway to guide traffic safely through the gateway. A similar line of traffic cones was also installed at the side island on the left-hand side of the road when leaving the village in the direction of Cork. The site was locked and two JCB vehicles had been deactivated.

It was submitted that The Safety, Health and Welfare at Work Act 2005 (hereinafter referred to as "the Act of 2005") has as its core purpose the protection of workers. It applies to and places duties on all employers, self-employed persons and employees in all places of work. Importantly, "accident" is defined in s. 2 of the Act of 2005 as meaning "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". This would suggest that the definition of "accident" does not ordinarily include an accident involving a third party motorist, such as in the present case, given that the third party motorist was driving on a public road at the time of the accident in question. The various obligations under the Act of 2005 focus on the duties of persons in control of places of work and are all designed to ensure the safety, health and welfare of persons at work at places of work.

It was further contended that the respondent is not the correct person to investigate or to take any other action arising out of a road traffic accident of the sort involved in the instant case. Even if the applicant had been at fault, which is denied, multiple appropriate remedies are available, including civil remedies in the form of a fatal claim for compensation under the Civil Liability Act 1961 (as amended) or a criminal prosecution under s. 13 of the Non-Fatal Offences Against the Person Act 1997. An Garda Síochána is, it was suggested, a more suitable agency for the investigation of the manner of driving, the driver's physical and mental state, and other matters which would not be within the respondent's remit. Furthermore, coroners have legal responsibility for the investigation of sudden and unexplained deaths including accidents also.

SUBMISSIONS OF THE RESPONDENT

On behalf of the respondent, it was submitted that in the case of the works in question at Rathmore, County Kerry, the same had been in progress for some three weeks prior to the fatal accident and were planned to continue for some 17 weeks after that date. The applicant was due to continue works from Monday, 1st October, 2012 after the weekend of the fatal collision. Accordingly, there was no question in the instant case of the works having been completed, a situation which had proved decisive in *Donegal County*

Council v. Health and Safety Authority [2010] I.E.H.C. 286. On the contrary, it had been confirmed to servants or agents of the respondent by the applicant's servants or agents that works which had been suspended temporarily for the weekend were due to resume the following Monday morning. The inspector appointed by the respondent on inspection of the locus following the fatal accident observed the presence of:

- ? unfinished road works,
- ? a site compound on the side of the road adjacent to the accident,
- ? road work barriers and traffic cones,
- ? a construction plant and
- ? unfinished, partly constructed traffic islands.

It appears to be the applicant's case that unless workers are present on site carrying out work activity at the exact time of an accident, the *locus* of the accident is not a "place of work" within the meaning of the Act of 2005 and the respondent has no statutory role in respect of same. The respondent contends, however, that the *locus* of the accident remains a place of work for so long as works are continuing. For the purpose of the Construction Regulations, including the provisions of the Safety, Health and Welfare at Work (Construction) Regulations, 2006 (S.I. No. 504 of 2006) (as amended) (hereinafter referred to as "the Construction Regulations") (as amended) the *locus* of the works remains a construction site until such time as the construction work in train is completed. Notices in prescribed form (AF 1 and AF 2) under Regulations 10 and 22 of the 2006 Construction Regulations (as amended) had been duly given to the respondent by the applicant.

While the general functions of the respondent, as set out at s. 34 of the Act of 2005, include, *inter alia*, the prevention of accidents, dangerous occurrences and personal injury at work, the respondent also engages in activities designed to promote safety and welfare and heighten awareness of risk and prevention measures, including directing information and awareness campaigns, publishing and revising industry guidelines and issuing codes of practice. The Act of 2005 protects not only workers, but also members of the public arising from or in connection with workplace activity in clear and unambiguous terms. This is evident from the provisions of s. 12 of the Act of 2005 which provides an express term of duties on employers to ensure the safety health and welfare of individuals at the place of work "not being his or her employees".

The legislature has conferred upon the respondent all such powers as are necessary or expedient for the performance of its functions under s.34 of the Act of 2005 which permit the respondent to perform any of its functions through any member of its staff. In the case of inspections, investigations or inquiries, these functions are carried out in accordance with the powers given to inspectors under s. 64 of the Act of 2005. That section provides an express term that the powers conferred under s. 64 are for the purposes of the "relevant statutory provisions" which include the 2006 Construction Regulations (as amended) introduced pursuant to s. 58 of the Act of 2005. Those Regulations define a construction site as "any site at which construction work in relation to a project is carried out". The locus of this particular accident was a construction site. The 2006 Construction Regulations (as amended) also include obligations to prepare a Preliminary Safety and Health Plan and a Construction Stage Safety and Health Plan and to make such plans available for inspection by inspectors lawfully appointed by the respondent in exercise of powers under s. 64 of the Act of 2005. Such documentation has been disclosed in the context of these present proceedings. Indeed, it seems clear from the face of the documents that no issue was being taken in relation to the application of the 2006 Construction Regulations (as amended) to the site in question.

A contractor responsible for a construction site is obliged under the 2006 Construction Regulations (as amended) to ensure that the surroundings of the site and the perimeter are sign posted and laid out in such a way as to be clearly visible and identifiable and that appropriate precautions are taken to protect persons present at or in the vicinity of the site from risks which may arise from such site (Regulation 30).

It was further submitted that the respondent's powers do not fall to be interpreted in a vacuum without regard to the factual context in which the powers are likely to be engaged. To interpret the Act of 2005 in the limited manner promoted by the applicant would have the effect of reducing the effectiveness of the respondent in its role of protecting public safety and would not be in keeping with the spirit and purpose of the Act. A significant part of the powers and functions of the respondent is preventative in nature.

The two principal Irish decisions interpreting the Act of 2005 were both consistent with the interpretation contended for by the respondent. In *Cork County Council v. Health and Safety Authority* [2008] I.E.H.C. 304, the road works in question had been completely demobilised at the point at which the fatal accident occurred and it was on this basis that Hedigan J. concluded the locus could not be regarded as a workplace within the meaning of the Act of 2005.

Similarly in *Donegal County Council v. Health and Safety Authority* [2010] I.E.H.C. 286 the decisive consideration in deciding that case was the fact that the roadworks in question had been demobilised and were final in that the project in which the workers had been engaged had been completed at the point in time at which the fatal accident occurred.

DECISION

The Safety, Health and Welfare at Work Act 2005 has as its main purpose, and as already noted, the aim of securing the safety, health and welfare of persons at work. It was enacted 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. As such, the legislation is predominantly concerned with the safety of persons at work and the prevention of accidents, dangerous occurrences and personal injury at work.

Thus s. 34 of the Act of 2005 provides:-

"(1) The general functions of the Authority as per the Act are –

(a) to promote, encourage and foster the prevention of accidents, dangerous occurrences and personal injury at work in accordance with the relevant statutory provisions,

(b) to promote, encourage, foster and provide education and training in the safety, health and welfare of persons at work,

- (c) to encourage and foster measures promoting the safety, health and welfare of persons at work,
- (d) subject to subsection (2) and section 33, to make adequate arrangements for the enforcement of the relevant statutory provisions,
- (e) to monitor, evaluate and make recommendations to the Minister regarding implementation of and compliance with –

- (i) the relevant statutory provisions, and

- (ii) best practice relating to safety, health and welfare at work, and the review and maintenance of relevant records by employers,

- (f) to promote, encourage and foster co-operation with and between persons or bodies of persons that represent employees and employers and any other persons or bodies of persons, as appropriate, as regards the prevention of risks to safety, health and welfare at work in accordance with the relevant statutory provisions,

- (g) to make any arrangements that it considers appropriate for providing information and advice on matters relating to safety, health and welfare at work,

- (h) to make any arrangements that it considers appropriate to conduct, commission, promote, support and evaluate research, surveys and studies on matters relating to the functions of the Authority and for this purpose –

- (i) to foster and promote contacts and the exchange of information with other persons or bodies of persons involved in safety, health and welfare at work in and outside the State, and

- (ii) as it considers appropriate, to publish in the form and manner that the authority thinks fit, results arising out of such research, studies and surveys ...”

While the Act of 2005 does not define “safety”, “health” or “welfare”, it does define “accident” as follows in section 2:-

“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” is defined in the same section as:-

“... 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 ...”

In *Cork County Council v. Health and Safety Authority* [2008] I.E.H.C. 304, the respondent had written to the applicant raising concerns about the use of dense bitumen macadam (DBM) surface on roads outside certain speed zones. The respondent claimed 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 Welfare at Work (Construction) Regulations, 2001. The respondent issued an improvement notice under s. 66 of the Act of 2005. This notice was appealed to the District Court which in turn stated a case to the High Court. The respondent’s concern related to the lapse of time between the laying of a DBM surface and the subsequent laying of the permanent surface, during which time the road was opened to traffic. An issue arising in the case was whether the road on which the works had ceased between phases of surfacing works and which was opened to traffic during the period in question was a “place of work” for the purposes of the Act of 2005.

The High Court (Hedigan J.) found that the appellant’s arguments were correct, holding that the dominant purpose for which the respondent issued the improvement notice was the protection of road users from a DBM surface which it considered to be unsafe. The dominant purpose of the respondent’s concerns had “nothing to do with the safety and welfare of workers at work and is not ... a purpose within the scope of the Act”.

However, the roadworks in that case had been completely demobilised (rather than temporarily suspended) at the point at which the fatal accident occurred, and it was on this basis that Hedigan J. concluded that the *locus* could not be regarded as a workplace within the meaning of the Act of 2005. In response, therefore, to the question posed as to whether s. 66 of the Act of 2005 applied to a local authority in respect of roadworks carried on by it or on its behalf, Hedigan J. held:-

“The answer to this question is yes but only where there are roadworks 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 scope of the definition of “place of work” was recently considered by this Court in *Donegal County Council v. Health and Safety Authority* [2010] I.E.H.C. 286. The case concerned an accident whereby a driver was killed when a car left a roadway which was newly tarred and covered in loose chippings. The respondent sought to investigate the roadway and the accident. The Council accepted that the section of the roadway which had been covered in loose chippings was a place of work for the duration of the works in progress. However, it contended that it ceased to be such when the workmen left the site at 11.00am notwithstanding that the free-flow of traffic in both directions did not resume until 3.00pm. The Council contended that the scene was not a place of work at the time of the accident at 8.10pm. In agreeing with the decision of Hedigan J. in the *Cork County Council* case, I expressly stated that the primary and dominant purpose of the Act of 2005 is to secure worker safety and indeed the long title of the Act so states. However, I concluded that the stretch of roadway where the accident occurred ceased to be a place of work within the meaning of the Act of 2005 when the workmen completed the works on the morning of the accident.

A completely different situation exists in the present case in which by no stretch of the imagination could it be suggested that the works had been completed. Far from it. All the documentation in this case makes clear that the roadworks were intended to last over a period of some 20 weeks and had merely been suspended for the weekend when the accident occurred. There was no question in the present case of the workers having left the work site or having completed their functions there, two considerations to which I expressly adverted in the *Donegal County Council* case.

I am quite satisfied in this case that the stretch of roadway where this fatal accident occurred was, at the relevant time, very much still a place of work in the same way as a building construction site retains that character over the course of a weekend when work is temporarily suspended.

The 2006 Construction Regulations (as amended) referred to above define a "construction site" as "any site at which construction work in relation to a project is carried out". The *locus* of the fatal accident in this case was clearly such a site. The 2006 Construction Regulations (as amended) define a "project" as "an activity which includes or is intended to include construction work" and I am satisfied a project was being undertaken by the applicant at the *locus* of this particular accident. The application of the 2006 Construction Regulations (as amended) can hardly be in doubt in this case having regard to the fact that the applicant prepared a Preliminary Safety and Health Plan in accordance with regulation 12 of the 2006 Construction Regulations (as amended) and further prepared a Construction Stage Safety and Health Plan in accordance with regulation 16 of the 2006 Construction Regulations (as amended). In these circumstances, it is not clear to me on what basis the applicant contends that the respondent has no powers of inspection or inquiry on foot of the 2006 Construction Regulations (as amended), nor do I understand the refusal of the applicant to furnish copies of the statutory documents when requested to do so by the respondent's servant or agent in early October 2012, given that such a refusal is not consistent with an apparent acceptance that the 2006 Construction Regulations (as amended) applied to the site in question.

I am satisfied that the investigation of this fatal accident, occurring as it did at a place which is the site of ongoing construction works, temporarily suspended, is within the power of the respondent having regard to the terms of the Act of 2005 (in particular, s. 34 thereof) and the 2006 Construction Regulations (as amended).

I might have reached a different conclusion if the works had been suspended for a period of weeks or months during which time the roadway might be characterised as having returned to its normal status, but that is very different from the present case where work was merely suspended for the weekend and where construction work was incomplete and indeed where plant and machinery remained at the *locus* in advance of the recommencement of work on the Monday following the accident.

For these various reasons, I am satisfied that I should refuse the relief sought in this case.